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QUALIFIED IMMUNITY

White v. Pauly, --- U.S. --- (2016), Decided January 9, 2017

FACTS: Daniel Pauly was involved in a road rage incident on a rainy evening, on a highway near Santa Fe (NM). Callers had reported to 911 that the driver was drunk and "swerving all crazy." The callers, two women, followed him, with their lights on bright, Feeling threatened, Pauly pulled over on an off-ramp and confronted them. After a "brief, non-violent encounter," he went a short distance away to a "secluded house" he shared with his brother, Samuel.

Between 9 and 10 p.m., Officer Truesdale was dispatched to the calls. He interviewed the two women, who provided the license number of the truck. He was joined by Officers White and Mariscal, who agreed they lacked enough probable cause to arrest. However, they decided to speak to him to determine what had happened and whether he was, in fact, intoxicated. Officer White stayed at the ramp in case Pauly returned, and Officers Truesdale and Mariscal proceeded to the house, a half-mile away. They did not respond in emergency mode, with lights and siren. At the address, they found two houses, one with no lights on and the other behind it, up on a hill, with lights. They parked near the first house and did not see the truck in question.

They approached the lighted house in a covert manner, using their flashlights only intermittently. Truesdale had his light on when they got near the house. There, they found the truck and saw two men inside. They radioed White to join them.

At about 11, the two brothers became aware of the officers and yelled out to ask who they were and what they wanted. The officers laughed and said "Hey, (expletive0, we got you surrounded. Come out or we're coming in." Truesdale then shouted for them to open the door and identified the pair as "state police." Mariscal also yelled at them to open the door. Later, it was claimed that neither brother heard them identify themselves as police. They armed themselves, Samuel had a handgun and Daniel a shotgun, and yelled back that they had guns. "The officers saw someone run to the back of the house, so Officer Truesdale positioned himself behind the house and shouted" again for them to open the door and come outside.

Officer White had arrived and was walking up to the first house when he heard the shouting from the second house. He arrived just as one of the two said they had guns. As such, he drew his pistol and took cover some 50 feet away from the front of the house – Officer Mariscal was in cover behind a pickup. Within just a few seconds, Daniel stepped partially out the back door, and fired two shotgun blasts, "while screaming loudly." Samuel pointed his handgun out the front window, toward Officer White. Officer Mariscal fired, missing, and a few seconds later – White shot and killed Samuel.

Daniel Pauly, on behalf of his brother's estate, filed suit against White, and the other officers, under 43 U.S.C. §1983, claiming wrongful death as a result of a violation of Pauly's Fourth Amendment rights. . The officers requested summary judgement, under qualified immunity, and were denied. They appealed to the Tenth Circuit Court of Appeals, which denied rehearing. The officers petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: Is it clearly established law that a late-arriving officer at an ongoing situation must second-guess the actions of officers that had arrived before?

HOLDING: No

DISCUSSION: As required at this stage of the proceeding, the Court looked only at "the facts that were

knowable to the defendant officers."[1] The logic of the trial court was that, "a reasonable person in the officers' position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White." Officer White's defense was set apart from the initial two officers because he "did not participate in the events leading up to the armed confrontation," and as such was not privy to what had gone before. The trial court believed that the rule that "a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm" had been clearly established at the time." The trial court believed this rule existed based upon "general statements" from prior case law that "where feasible, some warning has been given" prior to a use of deadly force.[2] Further, the Court noted that White was, at the time, in a protected position, behind a stone wall, which further required a warning.

The Court noted that qualified immunity attaches when an officer "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[3] Although this does require a case directly on point, it must be enough to fairly guide the officer's conduct in the future. In the past five years, the court noted, it had issued a number of qualified immunity rulings that reversed lower federal courts, finding it "necessary both because qualified immunity is important to 'society as a whole,' and because as ' an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'"[4]

The Court agreed that in this case, the "longstanding principle" that it could not define to a "high level of generality" such clearly established law.[5] To apply it, the clearly established law in question "must be 'particularized' to the facts of the case."[6]

As the trial court, and the Tenth Circuit, had "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment," but only looked to far more generalized circumstances. In Brousseau v. Haugen, the Court agreed, it had previously held that "Garner and Graham do not by themselves create clearly established law outside 'an obvious case.'"[7]

The Court noted that the trial court and the Tenth Circuit, had both acknowledged that White's late arrival presented "a unique set of facts and circumstances." The Court agreed that "federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed." Nothing that has been settled 'requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here." (Note, this decision only applies to the issue of whether Officer White is entitled to qualified immunity, and does not address claims by Officers Truesdale and Mariscal, who did not fire their weapons.)

The court vacated the judgement of the Tenth Circuit Court of Appeals, and remanded the case for further proceedings.

42 U.S.C. §1983 – UNLAWFUL DETENTION

Manuel v. City of Joliet, --- U.S. --- (2017), Decided March 21, 2017

FACTS: On March 18, 2011, Manuel was a passenger in his brother's vehicle when it was stopped for a minor traffic offense in Joliet, Illinois. The officer smelled marijuana in the vehicle and pulled Manuel from the car. He allegedly pushed Manuel to the ground, handcuffed him, punched and kicked him. A bottle of pills was pulled from his pocket and field tested, but the test came back negative for illegal substances. (The pill bottle indicated it was for vitamins.) However, the arresting officer claimed, in his

[1] Kingsley v. Hendrickson, 576 U.S. --- (2015).
[2] Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989).
[3] Mullenix v. Luna, 577 U.S. --- (2015).
[4] Pearson v. Callahan, 555 U.S. 223 (2009).
[5] Ashcraft v. al-Kidd, 563 U.S. 731 (2011).
[6] Anderson v. Creighton, 483 U.S. 635 (1987).
[7] 543 U.S. 194 (2004).

report, that his “training and experience” indicated that the pills were Ecstasy. The pills were tested a second time, and still indicated negative for illegal substances. The fabrication was continued before the judge and the grand jury, which returned an indictment. Later official testing, however, confirmed the pills contained nothing illegal, but it took until May for the charges to be dismissed and for Manuel to be released. He spent 48 days in custody, missing work, and was forced to drop college classes for which he’d already paid.

Manuel filed suit against the City of Joliet and named officers, alleged malicious prosecution and other claims. Most of his claims were time barred, as they fell outside the two year statute of limitations. The malicious prosecution case, which escaped being time-barred as it did not accrue until the case was dismissed, was barred under Illinois case law, Newsome v. McCabe.[8] Manuel appealed the dismissal, arguing that the Illinois case law did not apply in his situation, as the police mispresented evidence in his case, citing Johnson v. Saville.[9] The lower court agreed that “once detention by reason of arrest turns into detention by reason of arraignment … the Fourth Amendment falls out of the picture and the detainee’s claim that the detention is improper becomes a claim of malicious prosecution violative of due process.” Since Illinois had a remedy for malicious prosecution under Newsome, the District Court dismissed Manuel’s federal claim. The Seventh Circuit affirmed the dismissal of his claim for unlawful detention noting that “[o]nce a person is detained pursuant to legal process,” “the Fourth Amendment falls out of the picture and the detainee’s claim that the detention is improper becomes [one of] due process.”[10] And again: “When, after the arrest[,] a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention.” In essence, the appellate court ruled that he had based his claim on the wrong part of the U.S. Constitution.

Manuel sought certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the Fourth Amendment or the Fourteenth Amendment control in a claim of unlawful pretrial detention?

HOLDING: The Fourth Amendment

DISCUSSION: The Court noted it had held in Gerstein v. Pugh[11] that a “claim challenging pretrial detention fell within the scope of the Fourth Amendment.” In Gerstein, however, the claimant had been held based solely on a prosecutorial decision, not that of a judge or grand jury. In a later case, Albright v. Oliver,[12] the plaintiff did not raise a Fourth Amendment claim, relying instead on the Fourteenth Amendment, but the Court noted that “[t]he Framers” … “considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.”

As such, the Court agreed, “pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause.”

Further:

> That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge’s probable-cause determination is predicated solely on a police officer’s false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment’s probable-cause requirement. And for that reason, it cannot extinguish the detainee’s Fourth Amendment claim— or somehow, as the Seventh Circuit has held, convert that claim into one founded on the

[8] 256 F.3d 747 (7th Cir. 2001).
[9] 575 F.3d 656 (7th Cir. 2009).
[10] Llovet v. Chicago, 761 F. 3d 759 (7th Cir. 2014).
[11] 420 U. S. 103 (1975),
[12] 510 U.S. 266 (1994).

> Due Process Clause. If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.

In this case, based solely on the false information that the pills were illegal substances, the judge's holding "lacked any proper basis."

> Or put just a bit differently: Legal process did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime.

However, the Court agreed, this addresses only the first issue in a §1983 case, to identify the specific constitutional right allegedly violated. The Court went on to discuss the only issue in the case, the proper date for his claim of unlawful detention, which was critical due to the statute of limitations for such claims.[13] Manuel argued that the Fourth Amendment claim accrued when his criminal charges were dismissed, on May 4, 2011, as he made an analogy to the tort of malicious prosecution, which did not accrue until the matter reached a favorable termination. The City, of course, argued it accrued on March 18, when he was arrested, which would have placed it outside the two-year window from when Manuel filed the case, making the analogy to a false arrest claim. The Court concluded, however, it did not need to address that claim, and instead, that it was better to remand the matter back to the Seventh Circuit for review, which never reached the issue, having ruled against Manuel on the Fourth Amendment premise.

The Court reversed the Seventh Circuit's ruling and remanded the case for further proceedings.

CAPITAL PUNISHMENT

Moore v. Texas, --- U.S. --- (2017), Decided March 28, 2017

FACTS: In April, 1980, Bobby James Moore fatally shot a store clerk in Texas during a "botched robbery." He was convicted of capital murder and sentenced to death. He challenged his sentence on the basis of his intellectual disability. Following a number of appeals, a state court, ruling on his habeas petition, granted a hearing. Ultimately, that court agreed that he was so qualified and that as such, recommended that he be granted relief under Atkins v. Virginia[14] and Hall v. Florida.[15] However, the Texas Court of Criminal Appeals (CCA), the court of last resort, declined to adopt the recommendation and upheld his sentence, ruling that the habeas court had "erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the CCA in Ex parte Briseno."[16]

The Briseno requirements are as follows:

- "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- "Has the person formulated plans and carried them through or is his conduct impulsive?
- "Does his conduct show leadership or does it show that he is led around by others?
- "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- "Can the person hide facts or lie effectively in his own or others' interests?
- "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?"

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[13] In Illinois, the statute of limitations is two years. In Kentucky, however, it will be one year. The statute of limitations in such cases follows the state's statute of limitation for a personal injury case.
[14] 536 U. S. 304 (2002),
[15] 572 U. S. ___ (2014).
[16] 135 S. W. 3d 1 (2004).

The CCA concluded that Moore had "failed to prove significantly sub average intellectual functioning" and that he also failed to prove that he had "significant and related limitations in adaptive functioning," finding that he was able to adapt his behavior to his environment and had been successful in living on the streets (having been thrown out of his home as a juvenile," played pool and mowed lawns for money, committed a sophisticated crime and fled, testified and represented himself.

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

ISSUE: Must a ruling on intellectual disability on a death penalty case use current medical standards?

HOLDING: Yes

DISCUSSION: The Court noted that the Eighth Amendment prohibits "cruel and unusual punishment." "In Atkins v. Virginia, [the Court] held that the Constitution "restrict[s] . . . the State's power to take the life of" any intellectually disabled individual.[17] To execute such an individual "serves no penological purpose." In Hall v. Florida, the Court had held that a "State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70"[18] and must be informed by the diagnostic framework of the medical community, which would include the current version of the DSM-5 and the AAIDD-11.
Further, as a result of Hall, the Court instructed that "State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70." Moore, who scored 74, when adjusted for the statistical deviation of error, put him between 69-79. Since the lower end put him below 70, the CCA was required to consider Moore's adaptive functioning as well. The CCA elected to overemphasize Moore's "perceived adaptive strengths" and not his deficits. Improvements in a controlled setting, his "improved behavior in prison," were, it noted, an unreliable indicator. The CCA also considered his behavior as a child to be more likely caused by personality or emotional problems, but "As mental-health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism." The existence of a personality disorder or mental-health issue does not rule against the individual also having an intellectual disability as well.
The Court noted that Texas was not consistent in its assessment of intellectual disability in other contexts. Instead, it applies the current medical standards, using for example, the "latest edition of the DSM," to assess intellectual disability in such areas as the school system and juvenile court. Yet, it noted, Texas "clings to superseded standards when an individual's life is at stake."
The Court vacated the decision of the Texas Court of Criminal Appeals and remanded the case for further proceeding.

42 U.S.C. §1983 – FORCE

County of Los Angeles v. Mendez, --- U.S. --- (2017), Decided May 30, 2017

FACTS: In October, 2010, Los Angeles, CA, deputy sheriffs were searching for O'Dell, a missing parolee who was believed to be armed and dangerous. Deputies Conley and Pederson were assigned to assist in the search with a task force. A Ci informed the task force that O'Dell had been seen at a home in Lancaster owned by Hughes. They mapped out a plan to apprehend him. The plan involved officers approaching the front door, while the deputies searched the rear and covered the back door. They learned the Mendez lived in the backyard of the Hughes home with a pregnant female, Garcia.[19] Deputy Pederson was aware of this, but Deputy Conley later testified that he was not.

When the plan was executed, officers at the front spoke to Hughes about O'Dell. One of the officers thought he heard sounds of running and they prepared to enter by force, but Hughes let them in, explaining O'Dell

[17] Supra.
[18] Supra.
[19] She ultimately married Mendez.

was not there. O'Dell was not found in a subsequent search. Deputies Conley and Pederson, meanwhile, searched the back yard, which was cluttered with debris, old vehicles and several sheds. Mendez and Garcia lived in a shack made of wood and plywood, which had a doorway covered with a blanket. An extension cord ran an air conditioner in the shack. Clothing and possessions, as well as a BB rifle were visible. The latter looked like a "small caliber rifle." They were inside the shack napping when Deputy Conley pulled aside the blanket. Mendez thought it was Hughes entering and picked up the BB gun to move it. As a result, he appeared to be pointing it at the deputy. Deputy Conley yelled "gun" and both opened fire, 15 rounds were expended. Both Mendez and Garcia were shot multiple time and severely injured, Mendez ultimately lost a leg.

Both Mendezes filed suit under 42 U.S.C. §1983, under the Fourth Amendment. They made a warrantless entry claim, a failure to knock and announce and an excessive force claim. At a bench trial, the Court found Deputy Conley liable on the entry and both on the knock and announce, but found the BB gun to be a superseding cause to any real damages. The trial court then reviewed the excessive force claim under the Ninth Circuit's "provocation" rule, in which it did not end its analysis when it held that the force was reasonable if the deputies were in fear for their lives. Under the Ninth Circuit's provocation rule, a second analysis was required, holding that "an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation."[20] Finding that occurred in this case, the trial court ruled in favor of the Mendezes on the excessive force claim, and ultimately, gave substantial damages.

The Ninth Circuit agreed that the officers were entitled to qualified immunity on the knock-and-announce claim, but ruled that the entry without a warrant violated clearly established law. It affirmed the application of the provocation rule on the excessive force claim. (In an alternative rationale, it also noted that even without the rule, it was "reasonably foreseeable" they might encounter an armed homeowner when they entered.)

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

ISSUE: Does an action brought under 42 U.S.C. § 1983, in an incident giving rise to a reasonable use of force, allow for a secondary analysis of a provocative action that preceded the use of force and make that use of force unreasonable?

HOLDING: No

DISCUSSION: The Court reviewed the Ninth Circuit's creation of the "provocation rule." The Rules requires that consideration be given as to "whether the law enforcement officer violated the Fourth Amendment in some way in the course of events leading up to the seizure." If so found, the rule may make a reasonable defense use of force unreasonable.

The Court noted:

> The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.

The Court noted that "case law sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment" in the scheme of Graham v. Connor.[21] Such an evaluation looked as the totality of the circumstances and is an objective one that gives "careful attention to the facts and circumstances of each particular case." Once it is determine that a seizure is reasonable, there is no claim.

[20] Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002).
[21] 490 U.S. 386 (1989).

The provocation rule, however, “provides a novel and unsupported path to liability in cases in which the use of force was reasonable.” It requires the court to look back and time to find a different violation that somehow might tie to the use of force that happened later. The Court however, noted that an “excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through t a use of force that was not justified under the relevant circumstances.”

The Court affirmed:

> If there is no excessive force claim under Graham, there is no excessive force claim at all.

The Court looked at the alternative argument is well, noting that the Court focused “solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals” gave qualified immunity on that claim. Instead it “required only a murky causal link between the warrantless entry and the injuries attributed to it.”

The Court vacated the ruling of the Ninth Circuit Court of Appeals and remanded the case.

FIRST AMENDMENT

Packingham v. North Carolina, --- U.S. --- (2017), Decided June 19, 2017

FACTS: In 2008, North Carolina, as did many states, enacted a law that prohibited registered sex offenders access common commercial social media websites, including Facebook and Twitter. (The statute did provide some exceptions to the prohibition.) It was noted that the prohibition applied to approximately 20,000 people and that over 1,000 had been prosecuted for violating it.

In 2002, Packingham had been convicted of an offense that required that he registered as a sex offender. In 2010, he was caught posting on Facebook.

Packingham was indicted, convicted and given a suspended sentence. He was never accused of any attempt to contact a minor or commit any other illicit act via social media. He appealed to the North Carolina Court of Appeals which struck down the statute on First Amendment grounds, finding it not sufficiently narrowly tailed to serve the state’s primary interest, protecting minors from sexual abuse. The North Carolina Supreme Court however, reversed that decision, finding that the law was constitutional.

Packingham sought certiorari from the U.S. Supreme Court, which granted review.

ISSUE: May a state enact a statute that prohibits sex offender registrants from using common social media sites?

HOLDING: No

DISCUSSION: The Court began:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. “ In the past, such protections were tied to physical space, such as a sidewalk. Now, however, cyberspace had become the new space in which the First Amendment must be considered. Social media, such as Facebook, has become the communication method of choice for the majority of American adults.

The Court acknowledged that it was impossible to know the vast potential of cyberspace, and this case presented the first opportunity to “address the relationship between the First Amendment and the modern Internet. Against this background, the Court looked to the North Carolina statute.

The Court began by noting that the “broad wording” of the statute at bar covered not only social media but many other websites as well. However, even limiting its applicability to sites such as Facebook, it

expressed concern. The Court agreed that states were free to enact specific law to protect victims from crime, such as contacting minors via the Internet for illicit acts. (As a sidenote, the Court noted that the "troubling fact that the law imposes severe restricts on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system.) The Court agreed that the statute "enacts a prohibition unprecedented in the scope of First Amendment speech it burdens." By barring sex offenders from such sites, the state "with one broad stroke bars access to what for many are the principal sources of" knowledge. Such sites "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."

The Court declared: "In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."

The Court found it "unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences." Such access is almost essential for being successful in life. The Court agreed that North Carolina had not "met its burden to show that this sweeping law is necessary or legitimate to serve [the] purpose" of protecting vulnerable victims. The Court agreed that "the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."

The Court ruled that the North Carolina Statute was invalid and reversed the decision of its highest court.

NOTE: *The equivalent statute in Kentucky is KRS 17.546. It also, in part, prohibits a registered sex offender from using social networking sites that allows communication with minors, which of course, Facebook and similar social media sites do.*

FORFEITURE

<u>U.S. v. Honeycutt</u>, 581 U.S. --- (2017), Decided June 19, 2017

FACTS: Terry Honeycutt was an employee in a hardware store owned by his brother, Tony. He became suspicious of individuals purchasing large quantities of an iodine-based water-purification product (Polar Pure) and contacted Chattanooga PD. The police confirmed that the product could be used to manufacture methamphetamine, and suggested he not sell it if he was concerned.

The store, however, continued to do so, selling quantities far in excess of normal usage to customers. Over three years, the store had a gross profit of approximately $400,000 tied to the sale of the product. As a result, the DEA opened an investigation which eventually resulted in a search warrant executed on the store, in November, 2010.

Both were charged with federal crimes. Tony took a plea and agreed to forfeit $200,000, approximately $70,000 left of the amount claimed in forfeiture by the Government. Terry was convicted at trial and the Government sought forfeiture of the remainder against him.

The District Court denied the forfeiture, but the Sixth Circuit agreed that he was jointly and severally liable for the entire amount, although recovery could only be had for the amount demanded by the Government. Terry appealed.

ISSUE: May the government apply joint and several liability in a drug conviction under 21 U.S.C. §853 when the defendant obtained no direct benefit?

HOLDING: No

DISCUSSION: The Court noted that the criminal forfeiture statutes gave the Government the power to confiscate property from convicted subjects who had derived it, or used it, to facilitate criminal activity. The statute in question, 21 U.S.C. §853, related specific to serious drug crimes.

The Court explored whether joint and several liability, making multiple parties liable for the whole amount, in toto, although of course, the amount recovered could only be for the total amount demanded, was appropriate in this case.

The Court agreed that the statute in question only applied to tainted property and that Terry, as a mere employee drawing a salary, was not in possession of any tainted property and as such, restitution was no appropriate. The court noted that forfeiture was an *in rem* (property) rather than an *in personam* (personal) cause of action, as well. Further, although the Government could substitute a seizure of untainted property in reach for tainted property out of reach, it could only do so if there was underlying tainted property. In this case, the court agreed, there was no tainted property in Terry's possession.

The Court reversed the Sixth Circuit's decision and remanded the case.

BRADY

Turner v. U.S., --- U.S. --- (2017), Decided June 22, 2017

FACTS: In 1985, a number of men were indicted for the kidnapping, sexual assault, robbery and murder of Fuller in Washington D.C. She had been attacked in an alley by a large group of individuals, including the named defendants. Two individuals from the group confessed to participating and testified against the others. By all accounts, including those of uninvolved witnesses, the attack took place as a group.

None of the defendants testified nor did any attempt to rebut the testimony of the prosecution witnesses. Instead, their defense was a "not me, maybe them" argument, with each claiming to have not been part of the group. The seven defendants in this case were convicted. They appealed, and their convictions were upheld.

In 2010, they began the process of pursuing postconviction proceedings. It had been discovered that after their original trial, certain evidence had been available to the prosecution that had not been provided to the defense. The seven claimed that the evidence was "both favorable and material," which put the evidence under the purview of Brady v. Maryland.[22] The D.C. Supreme Court rejected that, finding none of the undisclosed evidence was material. (The Court reviewed in detail each of the 7 items at issue in the decision.)

The seven requested certiorari to the U.S. Supreme Court, which granted review.

ISSUE: Does all suppressed evidence implicate Brady?

HOLDING: No

DISCUSSION: The Government did not disagree that the withheld evidence was favorable to the seven men, being either exculpatory or impeaching. It also conceded the evidence had been suppressed through the process. However, it argued that after this case, it had adopted a more generous policy of discovery. The Government also argued that the evidence that was not shared was not actually material – under Brady's definition that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[23] Under Kyles v. Whitley, further, a "'reasonable probability' of a different result" is one in which the evidence that was suppressed "undermines confidence in the outcome of the trial."[24]

The Court noted the issue "is legally simple but factually complex." To resolve it, the court would be required to evaluate the trial record with respect to the withheld evidence, in the "context of the entire

[22] 373 U.S. 83 (1963).
[23] Cone v. Bell, 556 U.S. 449 (2009).
[24] 514 U.S. 419 (1995).

record." In doing so in this case, the Court agreed that "there was no such reasonable probability" in this case. It concluded that the withheld evidence was "too little, too weak or too distance from the main evidentiary points to meet Brady's standards." Some was simply so far-fetched to be believed, requiring a jury to have accepted that two individuals had confessed to a vicious attack in which they did not participate. Also, much of the suppressed evidence was cumulative of impeachment evidence already in the possession of the defense, and which was used at trial.

The Court affirmed the convictions.

Full Text of Decision: https://www.supremecourt.gov/opinions/16pdf/15-1503_4357.pdf