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FIRST AMENDMENT

Supreme Court Upholds Immigration Statute Over First Amendment Overbreadth Doctrine Challenge

In ***United States v. Hansen***, 599 U.S. 762 (2023), the Supreme Court, in a 7-2 opinion, held that 8 U.S.C. § 1324(a)(1)(A)(iv) (the "immigration statute"), which sets forth criminal penalties for any person who "encourages or induces" a non-citizen to "come to, enter, or reside in the United States knowing or in reckless disregard of the fact that such [activity] is or will be in violation of the law," is not unconstitutionally overbroad.

Helaman Hansen (Hansen) falsely promised non-citizens a path to U.S. citizenship through an "adult adoption" program in exchange for a fee. Despite no such path to citizenship existing, Hansen lured approximately 450 non-citizens into his scheme, and obtained nearly $2 million in fees from them. The government charged Hansen with, *inter alia*, violations of the immigration statute. Following a jury conviction, Hansen moved to dismiss the immigration-statute charges on First Amendment overbreadth grounds. The district court rejected this argument and he was convicted. On appeal, the Ninth Circuit vacated his immigration-statute convictions, holding that the immigration statute was an unconstitutionally overbroad restriction of speech. The Ninth Circuit denied the government's petition for a rehearing *en banc*.

The Supreme Court granted *certiorari*. The Court first noted that the overbreadth doctrine requires a statute to be held facially unconstitutional if it "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." In that case, society's interest in free speech outweighs its interest in the statute's lawful application. The Court defined the issue on appeal as whether Congress, in promulgating the immigration statute, used "encourages or induces" as terms of art narrowly referring to common-law liability for criminal solicitation and facilitation, or instead as those terms are more broadly used in everyday conversation. The Court concluded that Congress intended the former. The Court noted the terms "encourage" and "induce" are among the most common verbs used to describe criminal solicitation and facilitation, dating back hundreds of years. The use of these verbs to describe these crimes is also pervasive and longstanding in federal and state criminal codes. The Court rejected Hansen's argument that the immigration statute uses the terms "encourage" and "induce" in their ordinary sense, recognizing that these terms have well-established legal meanings. The Court further noted that the statutory history of the immigration statute supports the common-law, specialized meaning of the terms. The Court also rejected Hansen's argument that the immigration statute is missing the necessary *mens rea* for solicitation and facilitation, concluding that since the statute draws on common-law principles, it incorporates the *mens rea* found in common-law crimes. Finally, the Court concluded that, to the extent the immigration statute reaches any speech, it does not criminalize any speech beyond that integral to criminal conduct. The Court reversed the judgment of the Ninth Circuit and remanded.

Justice Thomas concurred, noting that the facial-overbreadth doctrine "'lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges' and distorts the judicial role."

Justice Jackson, joined by Justice Sotomayor, dissented, noting that the majority's interpretation of the immigration statute "diverges from the text and history of the provision, and simultaneously subverts the speech-protective goals of the constitutional doctrine plainly implicated here[.]"

Note: On remand, the Ninth Circuit in *United States v. Hansen*, 97 F.4th 677 (2024), vacated Hansen's immigration-statute convictions and remanded, holding that the immigration statute had the specific intent *mens rea* element, and the district court's jury instruction omission of the element was not harmless error.

This bulletin is for informational purposes. It is not a directive.

FOURTH AMENDMENT

First Circuit *En Banc* Disagrees on Whether Eight-Month Pole-Camera Surveillance Constituted Search

In ***United States v. Moore-Bush***, 36 F.4th 320 (1st Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 2494 (2023), the First Circuit, on rehearing *en banc*, unanimously reversed the district court's suppression of video pole-camera surveillance of the front curtilage of the defendant's residence. This *en banc* decision follows a First Circuit panel opinion in *United States v. Moore-Bush*, 963 F.3d 29 (1st Cir. 2020) (vacated), which held that the government does not need a search warrant to obtain pole-camera-surveillance evidence.

Nia Moore-Bush (Moore-Bush) was charged with narcotics and money-laundering violations based, in part, on pole-camera-surveillance footage recorded over eight months. Moore-Bush moved to suppress this evidence, arguing the government violated the Fourth Amendment when it obtained the evidence without a warrant. The district court granted the motion, concluding prior circuit precedent was not controlling after the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which, in the court's view, permitted a re-evaluation of whether the government needs a warrant to obtain pole-camera evidence. The district court held that continuous video recording for eight months, focusing on the driveway and front of the house; the ability to zoom close enough to read license-plate numbers; and the creation of a digitally searchable log made the use of the pole camera a search.

On appeal, a First Circuit panel reversed the district court's suppression order, reasoning that the Supreme Court in *Carpenter* explicitly noted its decision was a narrow one, which did not call into question conventional surveillance techniques such as security cameras. Thus, *Carpenter*, by its explicit terms, could not be used to overrule prior circuit precedent. Nor did the *Carpenter* decision call into question the principles set forth in prior Supreme Court decisions, including *Katz v. United States*, 389 U.S. 347 (1967), *Smith v. Maryland*, 442 U.S. 735 (1979), *California v. Ciraolo*, 476 U.S. 207 (1986), and *Kyllo v. United States*, 533 U.S. 27 (2001).

In addition, the First Circuit reaffirmed the Fourth Amendment doctrine that there is no reasonable expectation of privacy in what one knowingly exposes to public view. The appellate court declined to extend the logic of *Carpenter* to other technologies and Fourth Amendment doctrines. The First Circuit added that information obtained by a public view of a particular location is different from cell site location information (CSLI), which provides an all-encompassing record of a cellphone holder's whereabouts, beyond public thoroughfares and into private residences, doctors' offices, political headquarters, and other revealing locales.

Upon granting rehearing *en banc*, the First Circuit panel opinion was withdrawn and its June 16, 2020 judgment vacated. *United States v. Moore-Bush*, 982 F.3d 50 (2020).

On the rehearing, the *en banc* First Circuit panel unanimously reversed the district court's suppression of the video pole-camera evidence. The *en banc* panel of six judges, however, did not agree on the underlying legal basis for its reversal.

In the first concurring opinion, three judges agreed that the pole-camera surveillance constituted a search but that the good-faith exception to the Fourth Amendment's warrant requirement applied in this case. Relying in part on *Carpenter*, the first concurrence judges held that "aggregate surveillance," like eight months of continuous video surveillance, constituted a search in this case. However, law enforcement relied in good faith on the First Circuit's prior opinion in *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009), which allowed the use of surveillance obtained without a warrant.

In the second concurrence, three judges believed that the use of pole-camera surveillance in this case did not constitute a search as the defendants did not have a reasonable expectation of privacy in their residence's front curtilage. Citing opinions from the Sixth and Tenth Circuits, the second concurrence reasoned that the *Carpenter* opinion did not change the constitutionality of pole-camera surveillance.

Sixth Circuit Holds No Abuse of Discretion in Reauthorizing Wiretap When Government's Goals are Unmet

In ***United States v. Mosley***, 53 F.4th 947 (6th Cir. 2022), the Sixth Circuit held, *inter alia*, that the district court did not abuse its discretion in reauthorizing a wiretap when the government had largely achieved its goal of obtaining "evidence to fully prosecute all the members of" the defendant's organization.

Troy Bush (Bush) was a member of an interstate trafficking organization. He maintained a stash house, tended a marijuana grow, and distributed drugs. Bush entered a plea agreement after the district court denied his motion to suppress evidence derived from the twice-reauthorized wiretap of a phone. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, regulates the government's use of wiretaps. The district court found that the second authorization of the wiretap

was "necessary" under 18 U.S.C. § 2518(1)(c). The test for necessity requires that: (1) the wiretap is not the investigation's "initial step," (2) traditional techniques for gathering evidence would not suffice, and (3) if investigators rely on prior experiences in explaining the inadequacy of traditional techniques, those experiences relate "to the particular facts of the investigation at hand." In addition, for a reauthorization, after an initial wiretap authorization has expired, there is a fourth requirement that the government lay out the evidence obtained from the initial authorization and explain why the first authorization did not produce all needed evidence.

On appeal, Bush argued the district court abused its discretion in reauthorizing the wiretap a second time because the government failed to meet its burden to demonstrate the necessity of the reauthorization. Further, he argued that the government had "already acquired sufficient admissible evidence" to achieve its objective and 18 U.S.C. § 2518(5) requires that the wiretap terminate "upon attainment of the authorized objective[.]" The Sixth Circuit affirmed the district court's reauthorization of the wiretap, reasoning that the reauthorizing judge acted within his discretion in finding that the government met its burden to show necessity and the extension requirements based on the application submitted by the government which drew upon specific factual elements of the investigation at hand in determining that traditional methods would not meet the investigation's unfulfilled goals. The appellate court also held that application of § 2518(5) produces the same result as the necessity test because the government's goals had not been fully met. The Sixth Circuit noted that the government's wiretap application explained that its objective was to obtain evidence to fully prosecute all members of the trafficking organization. The appellate court reasoned that the district court's wiretap authorization aligned with the government's objective and accordingly with § 2518(5) by authorizing intercepts to continue "after the first interception" and "until all communications are intercepted" that "reveal fully the manner" of the conspiracy. Finally, Bush asked the Sixth Circuit to require heightened scrutiny when the government seeks reauthorization of an existing wiretap. Bush, however, did not provide legal authority nor did he identify a textual basis for the heightened scrutiny. Thus, the Sixth Circuit declined to do so, indicating that application of § 2518(5) does not require heightened scrutiny.

Second Circuit Affirms Denial of Suppression, Defendant Failed to Establish Expectation of Privacy

In ***United States v. Lewis***, 62 F.4th 733 (2d Cir. 2023), the Second Circuit held, *inter alia*, that the defendant lacked standing to challenge the validity of a search-warrant execution because he did not establish a reasonable expectation of privacy in a shared porch of a multi-unit apartment complex.

Vashun Lewis (Lewis) resided in a second-floor apartment of a multi-unit building with a common entrance and a shared stairwell and porch area. In May 2017, the New Haven (Connecticut) Police Department obtained a search warrant for Lewis' apartment and the basement of the building to search for illegal cigarettes, heroin, marijuana, and a firearm. Probable cause was based on a confidential informant's statement that s/he had recently seen these items in Lewis' apartment and in the basement of the building. Police executed the warrant and seized cartons of cigarettes, marijuana, drug paraphernalia, and a 9mm handgun. The handgun was found inside a sock in a laundry basket located on a shared back porch on the ground floor of the building. The porch was accessible via a common stairwell leading up to the second- and third-floor apartments. Lewis was charged for possession of a firearm in furtherance of marijuana trafficking and possession of a firearm by a convicted felon.

Lewis moved to suppress the handgun, arguing that its seizure from the ground-floor porch was beyond the scope of the warrant, which only authorized a search of the second-floor apartment and basement. Consistent with long-standing precedent, Lewis was only entitled to suppression if he could establish he had "standing" to challenge the warrant's execution, meaning that he must show his own personal Fourth Amendment rights were infringed by the porch search. At a hearing on the motion, Lewis did not offer any evidence supporting a legitimate expectation of privacy in the commonly accessible porch area. Ultimately, Lewis was convicted by a jury on two firearms charges.

On appeal, Lewis challenged the district court's denial of his motion to suppress the firearm and marijuana found during the search of the back porch. The Second Circuit held that Lewis failed to meet his burden of establishing a reasonable expectation of privacy over the porch. The appellate court emphasized Lewis' failure at the hearing to "offer evidence of the particular uses he made of the porch, point to its proximity to his living area, argue that it was inaccessible to visitors of the triplex, or testify regarding any steps he took to maintain his privacy while using it."

Notwithstanding its holding, the appellate court emphatically rejected a categorical rule that shared spaces cannot be constitutionally protected by the Fourth Amendment. It reasoned that such a rule "would have the effect of extending greater constitutional rights to those with the means to reside in single-family dwellings or those who live outside of densely populated urban areas." Instead, the Second Circuit stated that a fact-specific analysis was required on a case-by-case basis to

determine whether a person has a reasonable expectation of privacy in a place. It emphasized "the fact that a particular area or thing is not completely walled off from the outside world has never been wholly determinative of Fourth Amendment protection," and cited a collection of cases where the court has recognized Fourth Amendment privacy protections in shared spaces (*e.g.*, housemates, social guests, and co-workers).

SIXTH AMENDMENT

Supreme Court Holds Confrontation Clause not Violated by Admission of Non-Testifying Codefendant's Confession

In ***Samia v. United States***, 599 U.S. 635 (2023), the Supreme Court, in a 6-3 opinion, held that the Confrontation Clause of the Sixth Amendment was not violated by the admission of a non-testifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction.

Adam Samia (Samia), Carl David Stillwell (Stillwell), and another individual were tried jointly and convicted on charges related to the murder-for-hire of a real estate broker. Among the evidence used to convict the defendants was Stillwell's redacted confession. On appeal to the Second Circuit, Samia challenged the admission of that evidence, arguing that the redactions were insufficient because jurors could have immediately inferred that the "other person" described in the confession was Samia himself. As such, Samia argued, his inability to cross-examine Stillwell violated his Sixth Amendment right to confront witnesses against him. The Second Circuit disagreed with Samia and affirmed the district court's prior evidentiary ruling on that issue.

The Supreme Court granted *certiorari* to determine whether the admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's rights under the Confrontation Clause. After reviewing the historical practice of allowing a non-testifying codefendant's confession to be admitted in a joint trial as long as the jury was properly instructed not to consider it against the non-confessing defendant, the Court considered *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny. In *Bruton*, the Court held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a non-testifying codefendant is introduced at their joint trial, even with a proper instruction. In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court did not extend the *Bruton* rule to confessions that do not name the defendant. In *Gray v. Maryland*, 523 U.S. 185 (1998), however, the Court qualified that some obviously redacted confessions might still be directly accusatory, and thus fall within the *Bruton* rule, even if not specifically using the defendant's name.

In this case, the Court reasoned that Stillwell's confession was redacted to avoid naming Samia, satisfying the *Bruton* rule, but was not obviously redacted as was the confession in *Gray* noting the "neutral references to some 'other person' were not akin to an obvious blank or the word 'deleted.'" The Supreme Court affirmed the judgment of the Second Circuit, holding that the admission of the non-testifying codefendant's confession did not violate the Sixth Amendment's Confrontation Clause because the confession as modified did not directly inculpate the defendant but used the descriptor "other person" and the jury was instructed to consider the confession only as to the codefendant.

The dissent, however, argued that the non-testifying codefendant's confession inculpated the defendant in the same way that the Court recognized it would in other cases. Justice Kagan criticized the majority for "permit[ting] an end-run around [the Court's] precedent and undermin[ing] a vital constitutional protection for the accused."

TAX EVASION – 26 U.S.C. § 7201

Fifth Circuit Upholds Evasion of Payment Conviction for Willful Submission of False Form 433-A

In ***United States v. Crandell***, 72 F.4th 110 (5th Cir. 2023), the Fifth Circuit held, *inter alia*, in a matter of first impression, that the defendant's intentional filing of a false Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*, violated the federal tax evasion statute (26 U.S.C. § 7201).

Kevin Crandell (Crandell), a medical doctor, was contracted as a physician at two hospitals earning between $30,000-$40,000 per month. As a contractor, the hospitals did not withhold any wages for tax purposes leaving Crandell solely responsible for satisfying his federal tax obligations. From 2006-2012, Crandell did not pay any income taxes or file any timely tax returns. Later, he engaged a tax service to assist him in filing returns. As a result, he incurred a tax liability (including taxes, interest, and penalties) of $943,493, which he did not pay off. In order to propose a payment plan, Crandell submitted a false Form 433-A to the IRS, which underreported Crandell's income and omitted significant assets. Crandell was charged with tax evasion for submitting the fraudulent Form 433-A. A jury convicted him, and he was sentenced to 33 months' imprisonment and ordered to pay restitution of $972,793.86.

On appeal, Crandell argued that the submission of a fraudulent Form 433-A to solicit a payment plan was *per se* insufficient to establish a violation of 26 U.S.C. § 7201 because solicitation of a payment plan does not change

the amount owed and therefore does not evade or defeat any tax imposed but merely changes the timetable for repayment. The Fifth Circuit disagreed, citing the text of § 7201 which proscribes evading "any tax imposed by this title *or the payment thereof*." (emphasis added). The appellate court reasoned that although understating one's financial status on a Form 433-A does not change one's tax liability, it does reduce *the payments* due on that tax debt. The Fifth Circuit noted that, using Crandell's logic, a taxpayer could theoretically string the IRS along for his entire lifetime by racking up huge debts and then arranging very slow repayment schedules using Forms 433-A that underreport income and assets. Ultimately, the appellate court concluded that Crandell's intentional filing of a false Form 433-A violated the tax-evasion statute. Accordingly, the Fifth Circuit upheld Crandell's conviction.

MAIL, WIRE, AND HONEST SERVICES FRAUD – 18 U.S.C. §§ 1341, 1343, 1346

First Circuit Vacates Honest Services and Property Mail and Wire Fraud Convictions in "Varsity Blues" Scandal Case

In ***United States v Abdelaziz***, 68 F.4th 1 (1st Cir. 2023), the First Circuit, *inter alia*, overturned defendants' convictions for substantive mail and wire fraud based on honest-services and property-fraud theories.

Gamal Abdelaziz (Abdelaziz) and John Wilson (Wilson) (collectively defendants) are two of the dozens of wealthy individuals who hired Rick Singer, a college-admissions consultant, to secure their children's admissions into elite universities. Both defendants made payments to Singer's tax-exempt organization, a portion of which would be forwarded to university accounts controlled by coaches or other school administrators, in exchange for university employees' securing their children's admissions as athletic recruits. Their defense at trial (and on appeal) is that they believed Singer's services and the "side-door" admissions to be legitimate and that they acted in good faith. Ultimately, a jury convicted defendants of, *inter alia*, conspiracy to commit federal programs bribery and conspiracy to commit mail and wire fraud based on honest-services and property-fraud theories (18 U.S.C. §§ 1341, 1343, 1346, 1349). Wilson also was convicted of federal programs bribery and filing a false tax return (26 U.S.C. § 7206(1)).

On appeal, the First Circuit vacated defendants' mail- and wire-fraud convictions, holding the honest-services-fraud theory failed as a matter of law, and the government's property-fraud theory was insufficiently developed to support the jury instructions. The appellate court's rationale was that the mail and wire fraud honest services theory cannot be met where a bribe is paid to the party purportedly being deprived of honest services. The First Circuit credited defendants' argument that they intended their payments to go to the universities, the parties whose interests were purportedly betrayed by their agents (the coaches and other school administrators). As such, the appellate court concluded, they could not constitute bribes under the honest-services doctrine described in *Skilling v. United States*, 561 U.S. 358 (2010). The First Circuit explained that the statute governing honest-services fraud only codified the honest-services doctrine under prior jurisprudence, the core of which involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.

The First Circuit also found the mail- and wire-fraud convictions based on the property-fraud theory were infirm, concluding that the trial court erred in instructing the jury that admissions slots are property as a matter of law. The appellate court rejected the government's claim that admissions slots are always property for purposes of the mail-and wire-fraud statutes. The appellate court also rejected defendants' argument that admissions slots can never qualify as property. Instead, the First Circuit explained that the government had not sufficiently developed its factual and legal arguments to prove the property-based mail and wire fraud charges. Thus, the First Circuit held the trial court's instructions that admissions slots invariably constituted "property" were improper.

Accordingly, the First Circuit vacated defendants' convictions for mail and wire fraud based on the honest-services and property-fraud theories but affirmed Wilson's conviction for filing a false tax return.

RESTITUTION

Fourth Circuit Holds Restitution Required Despite Stolen Property Being Derived from Criminal Proceeds

In ***United States v. Taylor***, 62 F.4th 146 (4th Cir.), *cert. denied*, 144 S. Ct. 297 (2023), the Fourth Circuit held that the defendant was required to make restitution for cash and property he stole, even though some of the cash and property were criminal proceeds.

Marcus Taylor (Taylor) was a detective in Baltimore's Gun Trace Task Force. Taylor and his colleagues stole cash, drugs, and other items while on the job. Taylor was subsequently convicted of robbery and racketeering offenses and sentenced to 18 years' imprisonment. As part of his sentence, under the Mandatory Victims Restitution Act (MVRA), the district court ordered Taylor to make restitution to two people from whom he stole cash and

property. Both of these individuals testified against Taylor, and one admitted that a portion of the cash Taylor stole was derived from illegal-drug sales. Taylor appealed the restitution order, claiming that the two individuals were not "victims" under 18 U.S.C. § 3663A(a)(2) because "the proceeds of illegal activity are not the property of the person who obtained the funds through that activity" and that the government failed to prove that that the cash and property Taylor stole were "untainted."

The Fourth Circuit rejected this argument for several reasons. First, the appellate court determined Taylor's position that one cannot experience "pecuniary harm" when what was taken from that person was derived from illegal activity was meritless, observing an absence in authority holding a person's prior conduct has any bearing upon whether they suffered a loss. Next, the Fourth Circuit cited the Restatement (First) of Restitution from 1937, which stated "A steals B's chattels. C steals them from A. A is entitled to restitution from C ... since A's wrong to B is not connected with C's wrong to A," and concluded this scenario was identical to Taylor's and that the individuals he stole from constituted victims. Furthermore, the appellate court determined that Congress did not put language in the MVRA requiring courts to investigate how victims obtained their property. Finally, the Fourth Circuit concluded that Taylor's arguments were appeal to policy and did not overcome the MVRA's plain statutory text. Accordingly, the Fourth Circuit held that Taylor was required to make the restitution payments.

RESTITUTION AND SENTENCING

Tenth Circuit Reverses Freestanding Restitution as Not Statutorily Authorized and Holds Discretionary Conditions of Supervised Release Must be Announced in Court

In ***United States v. Geddes***, 71 F.4th 1206 (10th Cir. 2023), the Tenth Circuit held, *inter alia*, that the district court clearly erred by imposing restitution beginning during incarceration, and that it was an abuse of discretion to impose discretionary conditions of supervised release in a written judgment not orally announced at sentencing. The Tenth Circuit also held failure to announce mandatory conditions at sentencing was not an abuse of discretion.

Derald Wilford Geddes (Geddes), an Ogden, Utah dentist, appeared *pro se* at trial with standby counsel. A jury convicted Geddes of one count of obstruction (26 U.S.C. § 7212(a)), one count of tax evasion (26 U.S.C. § 7201), and three counts of filing false returns (26 U.S.C. § 7206(1)). The district court sentenced Geddes to five years' imprisonment, three years' supervised release, and ordered him to pay $1.8 million in restitution.

During sentencing, the district court confirmed that Geddes and his standby counsel had an opportunity to review the presentence report (PSR) but did not orally adopt the PSR in the sentence. The district court ordered restitution to begin during Geddes' incarceration and explained nine special conditions of release but did not refer to any of the standard conditions of release. The district court included the nine special conditions orally announced in the written judgment as well as 16 additional conditions. Two of the 16 additional conditions were actually mandatory conditions under the Sentencing Guidelines and 18 U.S.C. § 3583(d), *Inclusion of a term of supervised release after imprisonment*. The remaining 14 were classified as standard conditions.

On appeal, Geddes argued that restitution was impermissibly ordered to begin during his imprisonment. The Tenth Circuit held restitution must be authorized by statute, and, under 18 U.S.C. § 3583(d), restitution can only be a condition of supervised release. The Tenth Circuit reviewed the issue for clear error because there was no objection during sentencing and found there was clear error because the district court's sentence conflicted with statutory requirements, affected Geddes' substantial rights, and undermined fairness, integrity, or reputation of the proceedings. The Tenth Circuit reversed and remanded for correction of the restitution order.

Geddes also argued that the 16 conditions of supervised release not pronounced orally at sentencing improperly appeared in the written judgement. The Tenth Circuit held where there is a conflict between the oral and written judgment, the oral judgement controls; however, the written judgement can be used to clarify a mere ambiguity in the oral judgment. The Tenth Circuit determined that discretionary standards of release must be orally announced in order to give notice to a defendant and an opportunity to object. Under an abuse of discretion standard, the Tenth Circuit concluded the district court's failure to announce, or at least incorporate the 14 additional discretionary conditions from the PSR, created a conflict between the written and oral judgments. For the mandatory conditions, the statute put Geddes on notice of the conditions, and the failure to announce them was merely an ambiguity clarified in the written judgment. Accordingly, the Tenth Circuit reversed the imposition of the discretionary conditions and remanded for correction of the written judgment. The Tenth Circuit affirmed the mandatory conditions of release.

POST-CONVICTION REMEDIES

Supreme Court Holds AEDPA Does Not Provide Retroactive Relief After Innocent Defendant Previously Challenged Conviction

In ***Jones v. Hendrix***, 599 U.S. 465 (2023), the Supreme Court, in a 6-3 opinion, held, *inter alia*, that the defendant could not bring a habeas petition, despite being rendered legally innocent by subsequent developments in statutory interpretation, because the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) restricted his ability to bring a second or successive motion to vacate his sentence.

Marcus DeAngelo Jones (Jones) was convicted in 2000 of being a felon in possession of a firearm and was sentenced to over 27 years in prison. Jones subsequently filed and lost his motion to vacate his sentence under 28 U.S.C. § 2255. Nearly two decades later, the Supreme Court held in *Rehaif v. United States*, 588 U.S. 225 (2019), the government had to prove that the defendant knew he was an unlawful possessor of a firearm—*i.e.*, an element not proven at Jones' trial. The *Rehaif* decision resulted in Jones being legally innocent based on the felon-in-possession statute, but Jones had previously filed and lost his motion to vacate his sentence and was therefore barred under AEDPA from bringing another one. Jones filed a petition for writ of habeas corpus under 28 U.S.C. § 2241, arguing that the AEDPA's "saving clause" allowed him to file another habeas petition because a new rule of constitutional law, which was previously unavailable, was made retroactive by the Supreme Court. The Eighth Circuit affirmed the district court's dismissal of Jones' petition for lack of subject-matter jurisdiction, and the Supreme Court granted *certiorari*.

The Supreme Court held that a federal prisoner cannot raise a claim of legal innocence if he has already challenged his conviction, even if that claim was unavailable at the time he filed his first challenge. Namely, 28 U.S.C. § 2255 replaced the habeas remedy with a motion to vacate sentence, and the statute has a "saving clause" that preserved petitions for a writ of habeas corpus when the "remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention."

In 1996, Congress passed the AEDPA, which restricted prisoners' ability to bring "second or successive" motions to vacate under § 2255, except in two circumstances: (1) when newly discovered evidence would be sufficient to establish that no reasonable factfinder would have found the person guilty; and (2) when a new rule of constitutional law, which was previously unavailable, was made retroactive by the Supreme Court. Here, the Supreme Court held that because the AEPDA only lists two exceptions to the bar on successive motions -- for newly discovered evidence and previously unavailable constitutional claims -- Congress intended the bar to apply to previously unavailable statutory claims, like the one Jones claimed. Specifically, the Court reasoned that the inability of a prisoner with a statutory claim to satisfy one of § 2255's two exceptions means that the prisoner cannot bring a claim in a habeas petition under the saving clause at all.

Justice Jackson dissented, noting that the saving clause expresses a congressional intent to maintain equivalence between what a prisoner can claim before and after the statute was enacted, but the majority's reasoning shrinks the universe of previously available claims, which is the opposite of what Congress set out to do when it set up 18 U.S.C. § 2255.

Justices Sotomayor and Kagan filed a separate dissent, stating that "a prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred ... from raising that claim, merely because he previously sought postconviction relief." Specifically, the Justices noted that by Jones "challenging his conviction once before, he forfeited his freedom."

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