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Core Rights Of Accused At Issue In High Court's New Term

By **Harry Sandick and Jacob Newman** (October 6, 2019, 8:02 PM EDT)

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In addition to deciding cases that involve major political and social issues such as immigration policy, marriage equality and gerrymandering, the U.S. Supreme Court also sits as the ultimate arbiter of constitutional criminal procedure and substantive federal criminal law. In this article, we look at a few of the cases in the upcoming Supreme Court term — October term 2019 — that we expect will impact the core rights of the accused in our criminal justice system.

Is a unanimous jury required for a criminal conviction? Is the insanity defense required under the U.S. Constitution? How will the death penalty be applied? Between now and June 2020, these questions will be answered, and the answers will bind the courts in all 50 states.

Ramos v. Louisiana: Must a jury be unanimous to convict a criminal defendant?

Last term in Timbs v. Indiana,[1] the Supreme Court incorporated one of the last unincorporated provisions of the Bill of Rights in holding that, under the due process clause of the Fourteenth Amendment, the excessive fines clause of the Eighth Amendment applies against the states. This term, the Supreme Court has taken on another incorporation question: Does the Fourteenth Amendment "fully incorporate[] the Sixth Amendment guarantee of a unanimous jury verdict to convict"?

The requirement of a unanimous verdict has long been part of the Sixth Amendment's jury trial guarantee in federal court, but it has not been incorporated through the Fourteenth Amendment to apply to criminal trials in state court. As hard as it might be for most non-lawyers and even some lawyers to imagine, the Constitution does not currently require state court criminal trials to end with a unanimous verdict.

To be sure, the famous Sidney Lumet-directed movie, "Twelve Angry Men," would have been much shorter and quite different if Henry Fonda's character had been on the losing end of an 11-1 vote that resulted in a swift conviction. In Ramos, the defense counsel's brief to the Supreme Court even cites this "cultural touchstone" in support of its argument for full incorporation of the Sixth Amendment.

Despite the absence of a constitutional rule requiring unanimity in state court trials, all states but one — Oregon — require a unanimous jury verdict at a criminal trial. In fact, after the conviction of the defendant

in this case, Louisiana changed its own law to require unanimous juries for convictions after Jan. 1, 2019, but that change did not impact the defendant's preexisting sentence.

In this appeal from a Louisiana conviction, the defendant — who was convicted of homicide for which he continues to assert his innocence, and sentenced to life in prison without possibility of parole, based on a 10-2 jury verdict — argues that historical practices at common law going back as far as 1367 require unanimity and that the Founding Fathers also believed that unanimity was required even in civil cases.

In order to rule for the defense, the court will need to limit or overrule Apodaca v. Oregon,[2] in which Justice Lewis Powell cast the deciding vote against the defendant based on his view that the unanimous jury verdict rule was not applicable to the states. Whether Apodaca retains precedential force today occupies a significant portion of the parties' briefing.

After Timbs — and in light of the fact that the court granted certiorari on an otherwise-settled question of constitutional interpretation — the court seems inclined to incorporate through the Fourteenth Amendment those rights of the accused that are recognized in virtually all of the states, and it seems likely that the court will reverse and hold that a unanimous verdict is required in all criminal cases. This case will be argued on Monday.

McKinney v. Arizona: Death Penalty Procedural Rules

Must a state supreme court apply current law when considering whether the death penalty is warranted? Framed this way, the answer seems obvious. Why should the Arizona Supreme Court's view of the law be frozen in 1996, at the time when defendant McKinney's conviction became final? Yet the Arizona Supreme Court and the U.S. Court of Appeals for the Seventh Circuit both have held that the law in effect at the time when a defendant's first conviction becomes final governs all resentencing and sentence correction proceedings.

The Florida and Washington Supreme Courts, as well as the U.S. Court of Appeals for the First Circuit, U.S. Court of Appeals for the Second Circuit and U.S. Court of Appeals for the Fourth Circuit have held the opposite: Unless the sentence correction is purely ministerial, those courts will apply the current law at the time of resentencing or sentence correction.

The case presents a second issue as well: Should the Arizona Supreme Court have remanded this case for resentencing in light of the U.S. Supreme Court's decision in Eddings v. Oklahoma?[3] Eddings held that a sentencer considering imposing a death sentence may not refuse to consider mitigating evidence.

Most courts have ruled that when the sentencer fails to follow Eddings, the proper approach is to remand to the trial court. Here, however, the appellate court opted to reweigh the evidence itself, now with the mitigating evidence considered. Such quasi-fact-finding by an appellate court raises questions about the appropriate remedy when a lower court applies the law incorrectly. Interestingly, this is the only case thus far on the court's docket raising a death-penalty issue.

Kahler v. Kansas: Is the insanity defense constitutionally required?

This case asks whether the Eighth and Fourteenth Amendments permit a state — here, Kansas — to abolish the insanity defense. Kansas has a statute that provides that a defendant may raise as a defense that, "as a result of mental disease or defect," he "lacked the mental state required as an element of the offense charged." Otherwise, "[m]ental disease or defect is not ... a defense."[4]

This is a departure from the traditional M'Naghten rule which excuses a defendant from criminal responsibility, "(1) where he does not know the nature or quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect from that act."

The Kansas statute was passed in 1995 in response to public outcry about perceived injustices resulting from acquittals based on the insanity defense. Three other states — Montana, Idaho and Utah — have also abolished the insanity defense.

The defendant here argues that the abolition of the insanity defense violates the Eighth Amendment's prohibition on cruel and unusual punishment because those who cannot distinguish between right and wrong are not fit for criminal conviction and punishment.

Kansas argues that the M'Naghten test is not "deeply rooted" in American history and that no particular approach to the insanity defense is required. The U.S. Department of Justice has filed a brief endorsing Kansas's statute as constitutional.

To be sure, the M'Naghten test is typically taught as part of substantive criminal law and not viewed as a procedural right guaranteed by the Constitution (such as the right against self-incrimination or the right to counsel). But defense counsel makes a compelling argument in support of recognizing a constitutional dimension to the right to present an insanity defense. This case will be argued on Monday.

Mathena v. Malvo: When can a minor be sentenced to life without parole?

The Supreme Court's decision in Malvo will likely guide the sentencing of minors for violent crimes for many years to come. Malvo is the younger of the two Washington D.C. snipers who shot and killed 10 individuals and wounded many others. Malvo's co-conspirator was convicted and then executed in 2009.

Minors can commit horrible crimes, as Malvo indisputably did here, but neuroscience and psychology have taught us that minors do not have a fully developed brain and therefore may lack the impulse control that we associate with free will.

The state of Virginia, petitioning for certiorari through the warden of the state prison system, asks the court to interpret the Supreme Court's recent ruling in Miller v. Alabama,[5] which held that a sentence of life without parole, imposed on a defendant who was under the age of 18 at the time of their offense, violates the Eighth Amendment's prohibition on cruel and unusual punishment because it prevented courts from considering whether the defendant's youth supports a lesser sentence.

The Supreme Court later held in Montgomery v. Louisiana,[6] that Miller applied retroactively to cases on collateral review as a new substantive rule of constitutional law under Teague v. Lane.[7] Montgomery also appeared to state that the rule of Miller should apply in all cases in which a minor was sentenced to life imprisonment without the possibility of parole — whether as the result of a mandatory life statute (as existed in Miller and Montgomery) or as the result of a discretionary decision made without consideration of whether the defendant's youth might warrant a lesser sentence (as Montgomery indicated it should, and as appears to be the case here).

Since Montgomery, a split of state and federal appellate courts has developed, with some holding that Miller only addresses mandatory life without parole sentences, while others have held that Miller announced a rule that applied to all sentences of life without parole (whether mandated by statute or discretionary). The Fourth Circuit granted Malvo habeas corpus relief, holding that he was entitled to a new

sentencing proceeding in which the trial judge would consider whether Malvo warranted a sentence less than life without parole based on his youth.

Juvenile justice experts may rightly be alarmed that, of the many possible cases that raise this Miller-Montgomery issue, the court picked the one involving the most serious crime. One wonders if this indicates the court's intention to limit Miller.

Justice Anthony Kennedy, long a proponent of limiting the punishment of minors and the author of Montgomery, retired from the court in 2018. On the other hand, Chief Justice John Roberts joined Justice Kennedy's majority opinion in Montgomery, and has shown himself to be concerned with preserving the institutional prestige of the court. This case will be argued on Oct. 16, 2019.

United States v. Sineneng-Smith: Does the federal statute criminalizing behavior that "encourages or induces an alien to come to, enter, or reside in" the U.S. run afoul of the First Amendment?

On Friday, the court granted certiorari in another criminal case: a First Amendment challenge to a rarely used statute that makes it a crime to "encourage or induce" unlawful immigration (with a heightened penalty when such activity was done for financial gain). The defendant in this case ran an immigration consulting business that involved providing services to immigrants without legal status seeking work authorization and green cards. However, when the law changed so that such status was no longer available, she continued taking on clients and telling them that she could assist them in obtaining work authorization.

In light of this conduct, the government prosecuted. After trial, she appealed, arguing that this statute was facially overbroad because it would chill speech that fell within the ambit of the First Amendment. In a unanimous panel ruling, the U.S. Court of Appeals for the Ninth Circuit agreed.

In keeping with the Department of Justice's recent focus on immigration prosecutions, the solicitor general's office sought cert., which the court has now granted. For the coming term, this adds another hot-button question to a docket already jam-packed with controversy.

On one hand, the court has shown itself, in recent times, to be highly skeptical of any law that comes close to infringing on the First Amendment right to free speech. On the other, the Trump administration has sought to increase immigration enforcement through every available avenue, and the court has generally appeared hesitant to stand in its way. While a grant of certiorari on a liberal-leaning opinion from the Ninth Circuit often presages a quick and unequivocal reversal, the speech issues implicated here may not break down quite as neatly along typically left-right lines.

Zamudio v. United States: How much trust should courts place in the experience and training of law enforcement officers?

The Supreme Court has not yet granted a writ of certiorari, but another worthy addition to its 2019 docket would be Zamudio v. United States.[8] This case presents the question of whether knowledge that a person is involved in a drug conspiracy — without further individualized reason for suspicion — provides adequate probable cause to support a search warrant of that person's residence.

The practice of seeking search warrants relying on the "experience and training" of law enforcement officers to establish that drug dealers have evidence of drug crimes at their homes is widespread, but the accuracy of this assertion is questionable.[9] The petition for certiorari argues there is a circuit split on this issue, but the U.S. solicitor general's brief in opposition disagrees.

In the current climate, where police conduct has come under greater scrutiny than in the past, it will be interesting to see whether this case draws the court's attention.

Conclusion

It is hard to believe that the issues raised by these cases remain unresolved after 230 years of constitutional law and history. How can it be that we still do not know whether the Constitution guarantees the right to a unanimous verdict in a criminal case or whether there is a right to assert an insanity defense?

But, more importantly, these are not just theoretical questions. These decisions will have a real impact on the lives of many individual defendants — the difference between a conviction and an acquittal may hang in the balance, or the difference between life imprisonment and a term of years.

In addition, the death penalty and juvenile justice are two areas of law on which Justice Kennedy left his mark. Will the court's approach to these decisions still be informed by his emphasis on the need for the court to protect human dignity? We expect an answer to these questions and others before Chief Justice Roberts gavels out the court's term in June 2020.

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[1] Timbs v. Indiana, 139 S. Ct. 682 (2018)

[2] Apodaca v. Oregon, 406 U.S. 404 (1972).

[3] Eddings v. Oklahoma, 455 U.S. 104 (1982).

[4] Kan. Stat. Ann. §22-3220 (2009).

[5] Miller v. Alabama, 567 U.S. 460 (2012),

[6] Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

[7] Teague v. Lane, 489 U.S. 288 (1989).

[8] The decision below was United States v. Zamudio, 909 F.3d 172 (7th Cir. 2018).

[9] See Davis v. District of Columbia, 156 F. Supp. 3d 194 (D.D.C. 2016) (Section 1983 action against the District of Columbia and its officers using data to challenge the Metropolitan Police Department's practice of seeking search warrants based on "training and experience").