Year in Review 2013 - A Global Perspective of the Most Significant Criminal Evidence Cases, United States

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YEAR IN REVIEW 2013 - A GLOBAL PERSPECTIVE
OF THE MOST SIGNIFICANT CRIMINAL
EVIDENCE CASES, UNITED STATES

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McWILLIAMS'
CANADIAN CRIMINAL EVIDENCE

YEAR IN REVIEW 2013
A Global Perspective
of the Most Significant Criminal Evidence Cases

2013:40 UNITED STATES

Rose Zoltek-Jick*

2013:40.10 Introduction

As this chapter is written for a non-American audience of students and practitioners of criminal law, a word or two is necessary to familiarize non-U.S. readers to some of the principles and peculiarities of American law. In particular, these cases cannot be understood without some background in the distribution of power between the federal government and the states in the area of criminal law and procedure and the virtually inextricable link between criminal “evidence” cases and the Constitutional framework within which it (almost) always arises.

U.S. criminal law was for most of American history largely defined by the states; federal criminal law was thought to be a lesser subject, at least for those acts with which a first year law school education and the real world’s ordinary definition of crime are associated. Jurisdictionally confined to places controlled by the federal government, or illegal actions that cross state lines, or illegal activities that use interstate commerce, federal jurisdiction catches cases such as those involving the distribution of drugs or pornography, or white collar offences and other forms of economic crime, that go beyond a single state’s borders. Important cases, to be sure, but federal jurisdiction was a somewhat rarified world.

However, federal criminal law has grown; Congress has inserted itself into the regulation of many more activities and defined those acts as federal crimes even when these acts might also be covered under state law. Substantive federal criminal law always contains the possibility that there are consequential evidentiary issues

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1 Such as military bases, Veterans’ Administration hospitals, federal parks, or post offices.
2 Such as might be the case in some kidnappings, or the human trafficking of sex trade workers under the Mann Act, 36 Stat. 825.
3 Such as mail or wire fraud.
that might reach the United States Supreme Court\(^5\) and if a case does so, it will derive jurisdictional validity from its status as a question of federal law. However, despite the exponential growth and prestige of federal criminal law, the evidence cases that arise this way remain few and far between.

The importance of evidence law flows together with jurisdictional authority. When the Federal Rules of Evidence were introduced in 1975, they were largely thought to be of importance not so much as for their application to the then-smaller scope of substantive federal criminal law, but rather as a model for the state rules that it was hoped would inevitably follow the federal lead in codifying the common law of evidence into a rule-based system. The Federal Rules of Evidence were much-discussed and debated, and once they took effect, the states did indeed codify their common law rules of evidence into statutes, and almost all states now have evidence codes that mimic — sometimes in their entirety — the federal rules. When state rules differ from the Federal Rules of Evidence, they do so consciously and deliberately. But whether one is looking at cases from before the introduction of the Federal Rules of Evidence\(^6\) or afterwards,\(^7\) the United States Supreme Court has trod lightly in the area of purely evidentiary law, be it civil or criminal.

The most important thing for non-Americans to appreciate about any Top 10 list of U.S. criminal evidence cases is that what matters is the presence of a constitutional issue. Without it, a case may have national prominence in popular culture but have almost no national significance as a matter of evidence law.

Arguably, the most important case in American criminal law in 2013 was the acquittal of George Zimmerman for the death of Trayvon Martin, a young black man in the gated community in Sanford, Florida in 2012. It certainly was the most intensively discussed “crime” of the previous year, and the most discussed trial of this past year. It was a case of some significance in substantive criminal law, and the political acceptability of “stand your ground” laws as a part of the legal framework of the justification of self-defence. It was, and still is, an even more significant case as a barometer of race relations in the United States. However, as an evidence case per se, it does not even make this list. Evidence follows the lead of substantive and procedural law, and is a handmaiden to its dictates. And in the United States, for a case to have national significance as a matter of evidence law, there must be a constitutional issue present in the case, and in the trial of George Zimmerman, there was not a constitutional issue of any import; even if there had been one, Zimmerman was acquitted, and in the United States there is no appeal against an acquittal even if there is an arguable question of law.

In the United States, there is the inextricable link between criminal evidence law and its relationship to the supremacy of the U.S. Constitution in all criminal cases, whether they are state-based or arise out of federal criminal law. Whether a case comes to the U.S. Supreme Court as question of federal law, or as a matter of appellate review of a state’s highest court’s determination of federal constitutional

\(^5\) Morissette v. U.S., 342 U.S. 246 (1952) is a non-constitutional case that delineated the limitations of strict liability crime. In particular, this case held that a crime that is founded on the theft of property must have some form of mens rea as part of the prosecution’s burden of proof. Here, the property was found on federal land, which gave the Court direct appellate jurisdiction as a construction of federal law.


right — a highly complicated question beyond the scope of this introduction or this commentary — the Supreme Court’s important voice in the area of criminal evidence law derives almost entirely from the construction of the provisions of criminal procedure contained in the Amendments to the U.S. Constitution.

Through a series of cases spanning several decades, the first eight Amendments to the Constitution now apply to the states through their “incorporation” into an understanding of the Fourteenth Amendment Due Process clause. This is of utmost importance in one’s understanding of the application of the Constitution to the world of criminal law, as all of the important provisions that govern investigations and prosecutions come from the Amendments rather than the body of the U.S. Constitution.

Criminal evidence law is (almost) always the hidden backdrop to a question of constitutional criminal procedure, or at least as such issues present themselves in the context of American jurisprudence. This link is mediated through the presence of the exclusionary rule as a deterrent to the police for the violation of a defendant’s constitutional rights. The answer as to whether the police or the prosecutor has violated the rights of a criminal defendant ultimately decides what evidence may be available and admissible to prove the case against the defendant. One could pick a system of criminal procedure without an exclusionary rule, which mandates, in the famous words of then-Judge Cardozo, that “the criminal is to go free because the constable has blundered”, but those are the words of a bygone era in American jurisprudence. It is now clear American constitutional law that, although a country could construct a system without an exclusionary rule, and it could very well be viewed as fair and just, it would not be viewed as American.

Although always under attack and revision as to its scope, the exclusionary rule is the hidden engine that drives all criminal evidence law into a Constitutional framework. It is this link between criminal procedure and admissible evidence, as mediated by the parameters of the exclusionary rules of the Fourth, Fifth, Sixth and Fourteenth Amendments, which defines the essence of the modern era of American criminal procedure, and its consequential effect on criminal evidence law. None of the cases in this Top 10 list of criminal evidence cases from 2013 can really be understood without this Constitutional framework, within which one can begin to assess a case’s importance based on the impact it is likely to have on the realities of criminal law as it is studied and practised in the United States.

Selective incorporation involves convincing the court that a particular constitutional right is “fundamental” by being “implicit in the concept of ordered liberty” or “deeply rooted in our nation’s history and traditions”, as defined in a line of cases summarized in Duncan v. Louisiana, 391 U.S. 145 (1968), and most recently applied in McDonald v. Chicago, 561 U.S. 302 (2010), that determined the Second Amendment right to “keep and bear arms” applies to the individual states. People v. DePore, 242 N.Y. 13, 21 (1926).

Incorporation is of course not the same exact issue as the existence and necessity of the exclusionary rule, and neither Duncan nor McDonald, referred to above at footnote 81, are exclusionary rule cases. For the purposes of this Introduction, it is admittedly somewhat of a shorthand to treat these two issues together. The two doctrines were, and continue to be the subject of much debate, but treating them as linked is certainly settled law, at least for the Fourth Amendment. In Mapp v. Ohio, 367 U.S. 643 (1964), the Supreme Court held that the Fourth Amendment’s mechanism of excluding illegally obtained evidence, enunciated in Weeks v. U.S., 232 U.S. 383 (1914) for the enforcement of federal criminal law, was part and parcel of the incorporation of that Fourth Amendment right under the Due Process clause.
This United Supreme Court case holds that in a non-custodial police interview, where the Miranda warnings do not apply, a person must positively assert the Fifth Amendment in order to receive its protection at trial. Because Miranda was not yet triggered, the prosecution may use the defendant’s silence and his physical reactions to a police question in its case-in-chief and in its closing argument as circumstantial evidence of consciousness of guilt.

This case’s holding may usher in a new era in the legal debate about the relationship between the Fifth Amendment and police action, not just in the station, but on the street where non-custodial questioning really takes place. The world of admissible courtroom evidence received the imprimatur of the Supreme Court in this seminal case. We have yet to see how Salinas will play itself out with respect to evidence that is available in the world, as the police adjust their investigatory techniques and defence counsel adjust their advice to their potential clients — and how quickly the media and the public pick up on this shift in the legal environment surrounding police-public interactions.

Facts

The police were investigating the murder of two brothers. Salinas had been a guest at their party the night before. When the police came to talk to him at his home, they observed that Salinas’s car matched the general description of the automobile that had sped away from the scene on the night of the murder. The defendant voluntarily handed over his shotgun for ballistics testing and agreed to accompany the officers to the police station for questioning. He had not been arrested and defence counsel conceded that Salinas was not in custody while being questioned and that the defendant’s right to receive the Miranda warnings, which were not given, had not yet been triggered. The police interviewed Salinas at the station and he answered the police officers’ questions but fell silent when asked whether ballistics testing of his shotgun would match the shell casings found at the crime scene. Salinas balked, with “movements that suggested surprise and anxiety”. He

"[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up", and most importantly, he did not answer the question. After a few moments of silence, the police resumed questioning and Salinas answered several other questions.

The case before the Supreme Court turned on the admissibility of Salinas's reaction to that one police question. The defendant objected to its admission at trial, claiming that the prosecution's use of the evidence of his silence and his accompanying physical reactions would violate his Fifth Amendment "right to silence". The trial court allowed the prosecution to use the evidence of the defendant's silence and his physical reactions to the police's question in its case-in-chief and allowed the prosecution to comment on the defendant's reaction in its closing as evidence of his consciousness of guilt.

The defendant was convicted, and appealed on this ground through the Texas appellate courts, which affirmed the decision. The Supreme Court granted certiorari and affirmed the trial court's ruling 5-4, allowing the conviction to stand.

Holdings

In a non-custodial context, a person must "assert" a claim to the protection of the Fifth Amendment as the right to silence is generally not "self-executing". Although there is no "ritualistic formula" necessary to invoke the privilege, a witness does not do so by "simply standing mute".

In a non-Miranda context, the prosecution is not bound by the rules of exclusion set forth in that decision and can use a defendant's silence and his or her physical reactions as circumstantial evidence of consciousness of guilt in its case-in-chief and in its closing argument.

The language of the Fifth Amendment is that no person may be compelled in any criminal case to be a witness against himself; it does not establish "an unqualified 'right to remain silent'".15

The waiver or forfeiture of a defendant's right to assert the Fifth Amendment need not be "knowing" in order to be "voluntary".

If the police officers do not misstate the law, they do not deprive the person of his or her ability to voluntarily invoke the Fifth Amendment.

Commentary

On the surface, the holding appears simple, but it is deceptively simple. This United States Supreme Court's holding that in a non-custodial police interview, a person must positively assert the Fifth Amendment in order to receive its protection at trial puts the criminal justice system right back at the beginning of a 50-year-old debate about the admissibility of confessions that led the Court to the Miranda decision in 1966. There have certainly been many cases in the past 50 years where Miranda was thought to be in jeopardy; those have turned out to be only partially true. Miranda has survived those cases in a curtailed and wounded form,

14 Supra, at p. 2178.
15 Supra, at p. 2183.
and while the case survives Salinas as well, this latest Supreme Court case stabs at Miranda's heart indirectly in what may prove to be the deepest cut of all.

In Miranda v. Arizona, the Court decided to abandon the "voluntariness" test under the Fifth and Fourteenth Amendment Due Process Clauses as the primary means for the regulation of the admissibility of confessions. Miranda created a self-contained system that premised the admissibility of a defendant's statement at trial on whether or not, if questioned while in police custody, he or she had received what have come to be known as the "Miranda warnings". In its desire to be proactive and precise in its curtailment of what it believed to be the excesses of police practices, the Court had for almost 10 years flirted with where else in the Constitution to rest its authority to control the police. In a series of cases between 1959 and 1964, and until the Miranda decision in 1966, the Court turned to the right to the assistance of counsel in the Sixth Amendment as the source of its potential authority to regulate the police. Indeed, John Flynn, the appointed counsel in the four consolidated cases that have come to be known as Miranda, submitted his written briefs entirely based on a Sixth Amendment argument of the right of a suspect to the assistance of counsel in his defence.

In Miranda, the Court made a surprising about-face, rooting its holding in that case on the Fifth Amendment privilege against self-incrimination. In what may arguably be one of the most disingenuous phrases in Supreme Court jurisprudence, Chief Justice Warren, writing for the 5-4 majority, stated in the opening paragraphs of his 87 page decision that "we start here... with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings", in a "reaffirm[ation]" that the confession cases have always been based on the Fifth Amendment. The accompanying footnote, which states that this is what the Court "meant in Escobedo when we spoke of an investigation which had focused on an accused" is equally unfaithful to any fair reading of the preceding precedents.

Miranda designedly created a new set of norms. If the prosecution wants to use the evidence of a defendant's statement, whether incriminating or not, in court as a part of its evidence against the defendant, then the police, before interrogating that person when she or he is in their custody, must give that person the four warnings set out in the case. In a phrase that is oddly echoed in the Salinas case's rejection of a "ritualistic formula" by which a person has the onus to assert a Fifth Amendment

16 Supra, footnote 11.
19 J.H. Israel et al., Criminal Procedure and the Constitution (St. Paul: West, 2013), at p. 408.
20 Miranda, supra, footnote 11, at p. 442.
21 Supra, at p. 442.
22 Supra.
23 It will be interesting to see if the gentler terms of "questioning" and "interviewing" will become the post-Salinas code words, with these being seen as what the police do when it involves pre-custodial or non-custodial interactions with the public, and "interrogation" confined to the interactions when it is custodial.
24 A person must be warned that he has the right to remain silent; that any statement he does make may be used as evidence against him; and that he has the right to the presence of an attorney, either retained or appointed. This last phrase is usually expanded to say that if a person does not have the money for an attorney, one will be provided for him.
right, the Court in *Miranda* stated that its warnings are not a constitutional "straitjacket". Congress or state legislatures were free to rewrite the warnings or devise other methodologies so long as they did not detract from the "rights" that were articulated in the decision itself. No legislature has seriously tried to re-word the *Miranda* warnings or tried other ways to meet the Fifth Amendment onus on the Government to meet this constitutional prerequisite for admissibility, and the warnings have become so well-known that they have entered the popular lexicon of American, if not world, culture.

*Salinas v. Texas* does not affect the status or the holding of *Miranda per se*. At the very least, *Salinas* delineates the limitations on the scope of that decision. Moreover, by rejecting a number of the important assumptions on which this case seemed to be based, or at the very least how the case has publicly been perceived, *Salinas* may prove to be the new beginning of a different post-*Miranda* world. *Salinas* certainly brings to a head yet again the almost 50 years of debate in the legal community about the meaning and scope of the Fifth Amendment and its relationship to *Miranda*. As certainly one of the most important decisions in the world of policing, the ripple effects of this decision are yet to unfold.

For years, elections and court cases have been fought on the question of *Miranda* being overturned or overruled; *Salinas* may have accomplished that goal far more effectively by leaving *Miranda* alone and intact. In effect, *Salinas* does an end-run around *Miranda*, first by emphasizing the limited nature of the *Miranda* "right" as custodially-based, and then by focusing on the language of the Fifth Amendment, articulating that an implicit "right to silence" is a mis-reading of the Constitution.

If one were to read the majority opinion in *Salinas* on its own and somewhat quickly, one could think that it is simply a non-*Miranda* case, and its effect as rather innocuous in terms of evidence, as opposed to constitutional law. Because the police "interview" of Salinas took place outside of the realm of a custodial interrogation, the evidence of the defendant's confession and his gestures and reaction to police questioning are simply questions of non-hearsay statements. Silence as an assertion has always been a fascinating question; one that the Court here in *Salinas* reminds us is "insolubly ambiguous". This question as to when silence is to be regarded as the defendant's own "statement" is rendered no less complex by its inclusion in the definition of that term in Rule 801(a) of the Federal Rules of Evidence. The Court here does not discuss the hearsay issue at much length, as this is not how the case presented itself to this Court.

The Court did however give evidence-watchers some empathetic solace. Salinas here was not just silent; his movements "suggested surprise and anxiety". Justice

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27 Congress did try to overturn them, by legislation as discussed in *Dickerson v. U.S.*, 530 U.S. 428 (2000). The Court in that case showed its growing unease with the basis in the Constitution of the *Miranda* "rights" but nevertheless upheld the continuing existence of the decision and the place it holds in American criminal jurisprudence.
28 There have been many cases that have already delineated the limited scope of *Miranda*, in particular the *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Hass*, 420 U.S. 714 (1975) decisions, which early on allowed a defendant's statement to be used as impeachment, or *New York v. Quarles*, 467 U.S. 649 (1984), which allows for a "public safety" exception to the exclusion of evidence gathered despite a violation of *Miranda*.
Alito, writing the majority opinion, expressed relief that its decision allowed the Court to escape the series of cases that would have inevitably flowed from a decision that had gone the opposite way. The Court would have, he predicted, been forced to decide when such reactions transform silence into “expressive conduct”, a question the Court says would have been “difficult and recurring”, as any professor or student of evidence, or any practising courtroom lawyer, will surely attest.

But if a gesture is deemed by the trial court to be “expressive content”, as it was in this case, then as a statement or admission by a defendant, it is admissible as part of the prosecution’s case-in-chief and may be used as part of the prosecution’s argument at closing. *Miranda* had complicated that, to be sure, and there have been a series of cases trying to delineate the scope of pre-arrest silence that were quite confusing, and that *Salinas* may have now resolved.

However, the case addresses more than the interesting though perplexing question of a non-hearsay admission and a further wrinkle on the meaning of silence or implied assertions as available evidence for a prosecution case. Simply put, it is the most important Supreme Court expression of the relationship between the police and the people it investigates since the *Miranda* decision itself 50 years ago. It effectively puts an end to the notion that the police, in a non-**Miranda** context, owe any duty to an interviewee to inform him or her of a Fifth Amendment right to silence. And perhaps even more importantly, it explicitly puts the onus the other way. By requiring a pre-custodial interviewee to positively assert a Fifth Amendment claim that he or she is entitled to a right to remain silent, it puts the responsibility for that squarely on the back of the person being questioned. Moreover, that interviewee is presumed to know and understand that, should that person eventually become a defendant in the case being investigated, his or her *silence* can be used as evidence in the prosecution’s case-in-chief, and commented upon as evidence of consciousness of guilt in the prosecution’s closing.

*Miranda*'s warning that “any statement [the person] does make may be used in evidence against him”, is just that and nothing more. Justice Alito in no uncertain terms states that so long as the police officer does not misstate the law — and the law, as expressed in and by *Miranda*, is limited to its own self-referential terms, and establishes no “unqualified” right of silence — the officer is under no duty under the Fifth Amendment to inform a citizen of his or her right to silence, or more particularly the need to assert that claim of being protected by right in order for its applicability to be properly assessed, and the potential to receive its protections at trial.

Moreover, the Court, in a seemingly throw-away sentence, puts a potential line of cases out of reach in a post-*Salinas* world. A waiver of a right, says the Court in its lead opinion, “need not be knowing” in order to be voluntary. In the next section of the majority opinion, the Court elaborates to a degree on the related question of whether the police have a duty to help the citizen know the right he or she may be

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30 *Supra.*
31 *Supra.*
32 *Supra.*
33 *Supra.*
34 *Supra.*
35 *Supra.*
36 *Supra.*
about to forfeit. Counsel for the defendant-petitioner in oral argument conceded that the police do not offend the Constitution when they "accurately state the law", which begs the question of whether the police are themselves under a positive duty to tell the person whom they are interviewing of the need to assert the right they may not know they have — a point much emphasized in Justice Breyer’s acerbic dissent.

In this last short section of the majority opinion, the Court puts an early end to those cases that might have premised a due process challenge under the Fifth or the Fourteenth Amendment test of pure "voluntariness" as a means to exclude a confession. The failure of the police to tell a person of their rights does not "shock the conscience" in a manner that would permit a trial court to exclude the confession on that alternative constitutional ground in federal or in state criminal cases. If the police are under no duty to tell the citizenry of its "rights", then the police's failure to do so logically cannot provide a basis on its own for a ruling on a motion to suppress or exclude a statement due to its involuntariness, or perhaps even be a factor in that calculus.

The Court here, in the most understated way possible, follows a line of cases that has arisen under the Fourth Amendment. Without citation, the Court adds this case to a line of case law that puts the police under no obligation to inform a person, whose outer body and clothing or whose possessions are about to be searched, that they have the right to refuse consent to search. Miranda stands on its own, the one island where a person has the right to a police "warning". In any situation other than a custodial interview by the police, a person must know his or her rights. It is not for the police to be either teacher or advisor. Their role is to investigate crime, and their interactions with the people they need to question, detain or search should be unfettered without obligation to also be the source of their knowledge of constitutional protections they may have in the situation.

Pre-custodial interviews are now explicitly fair game for prosecutors and the police have been given license to ask damning, probing questions on what may still be a fishing expedition. If the police turn out to have the right catch, then any silence, hesitation, nervousness or other reaction of the now-defendant during that pre-custodial interviewing process is admissible due to this case, which holds that Miranda's "implicit" promise that there is an "unqualified 'right to remain silent'" is outside of the protection of the Constitution. This case's importance lies in the paradoxical world Miranda itself created. Its warning gives you the right to know that one's "statement" can be used, so long as you are being subjected to custodial interrogation; pre-custodial questioning gives you no such right to an equivalent type of caution.

Defence counsel may seek a return to a world of "voluntariness" under the Fifth and Fourteenth Amendments but will find that that road was also blocked by this

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35 Justice Thomas's concurring opinion, with its textual focus, bases his separate opinion, at least in part, on the trial-based right not to be "compelled to be a witness" against oneself under the Fifth Amendment. In this context, compulsion under the Fifth Amendment and voluntariness under a Due Process analysis are the same impulse but Thomas concurs in part to accentuate the temporal difference between these two approaches, a point Thomas hints at but does not explicitly state, given that the case arose under the Fifth Amendment self-incrimination clause.


decision in *Salinas*. The Court here held that the waiver of one's Fifth Amendment right against self-incrimination need not be "knowing" to be "voluntary". Citizens beware! The police are under no duty to tell you the law; they only are forbidden under this case to not misstate it. Defence attorneys who advise their clients to "say nothing" will have to amend that advice: tell everyone who talks to the police under any circumstances to "say" that you want to say nothing and that the Constitution gives you that "right" to claim that you have a "right to silence". But it is just a claim; whether or not it was a proper claim of silence that can be enforced at trial will have to play itself out. This is the new reality in a post-*Salinas* world. The consequences of this shift in the emphasis to the pre-custodial moment have yet to be seen in the courts, and even more importantly, in the world of police/public interactions.

2013:40.30 *Nevada v. Jackson*
133 S.Ct. 1990 (2013)

*Witness — Credibility — Impeachment — Extrinsic evidence — Collateral evidence — Exclusion of attacking or supporting credibility through specific instances of witness's bad conduct or pattern of previous false allegations does not offend Sixth Amendment Confrontation Clause
Witness — Sixth Amendment — Defendant's right of confrontation limited to cross-examination
Witness — Constitutionality of notice provisions required of defendant
Witness — Rape — Exception allowing victim's credibility to be impeached through extrinsic evidence unconstitutional*

*Why Is It On the List?*

In this *per curiam* opinion, the United States Supreme Court quietly did some rather astonishing things. It explicitly upheld the traditional evidence rule excluding extrinsic evidence for the purpose of impeachment in the face of a criminal defendant's direct constitutional challenge, clarifying that the right to confront a witness under the Sixth Amendment is limited to the right of cross-examination.

The Court further held that a statutory requirement that criminal defendants give notice of their intent to introduce evidence is not unconstitutional, and that, if a defendant fails to give the notice required under a statute, the Constitution may not necessarily require that the evidence be subjected to a balancing test, weighing the defendant's need for the evidence against the state's interest in upholding its procedural rule before it can be excluded from the case.

*Facts*

Calvin Jackson had a 10-year "tumultuous" relationship with Annette Heathmon, which she had tried to leave several times. In 1998, when she moved to an apartment in North Las Vegas, the defendant tracked her down, assaulted her and threatened to kill her with a screwdriver if she did not have sex with him. After
raping her, he assaulted her, stole a ring from her bedroom and dragged her out of the apartment and towards his car by her neck and hair. When confronted by a passerby, the defendant fled and was eventually arrested.

The defendant’s theory at trial, at which he did not testify, was that Heathmon had fabricated her story of “rape” in order to control him. To bolster this theory, the defendant sought to introduce police testimony and reports about prior calls that Heathmon had made to the police alleging that he had raped or otherwise assaulted her, and that the police had been skeptical of her claims, and had not investigated or pursued any of those incidents. Although the trial court allowed wide latitude in the cross-examination of Heathmon on this issue, it did not allow either the police who had investigated the prior incidents to testify nor did it allow their reports into evidence, refusing to allow this trial to become a “mini-trial” of those events.

Nevada has a version of Fed. Rule Evid. 608(b), which ordinarily allows only cross-examination of a witness’s bad acts that relate to his or her own credibility, and excludes extrinsic evidence. Nevada state law however makes an exception for rape cases but requires that the defendant give notice of his or her intent to introduce extrinsic evidence and in this case, no such notice was given. The Nevada Supreme Court upheld the exclusion of the evidence and its state law requiring notice under this exception.

In his federal habeas proceedings, the Ninth Circuit ordered the state to either retry or release Jackson, on the ground that the exclusion of the extrinsic evidence violated Jackson’s constitutional “right to present a complete defense”, and that the state supreme court’s contrary decision was an unreasonable application of United States Supreme Court precedent — which is the standard for review in the federal court system of a state’s highest court’s ruling on the meaning of its own state statute. The Ninth Circuit further held that requiring a criminal defendant to give notice was unconstitutional, or that the Sixth Amendment at least requires that a trial court do a case-by-case balancing of interests before the failure to comply with a notice requirement can be enforced.

The United States Supreme Court reversed, per curiam, holding that the state supreme court’s application of its clearly established precedents was in fact reasonable, when no prior decisions by the United States Supreme Court clearly established that the exclusion of the extrinsic evidence in this case violated Jackson’s constitutional rights on either ground of his appeal.

The case was remanded to the Nevada courts for further proceedings, which would flow from this opinion. Given that the Supreme Court upheld the Nevada trial court’s original decision in this case, the effect of this ruling would be to reinstate the defendant’s conviction. However, since the defendant did not avail himself of the exception in Nevada law that allows extrinsic evidence to impeach a rape victim’s credibility, that provision may yet stand with its notice requirement intact.

Holdings

The rule of evidence precluding the admission of extrinsic evidence, other than of a conviction, to impeach a witness’s character for truthfulness is constitutional.
The Court further held that the exclusion of extrinsic evidence does not even implicate the Sixth Amendment's right to confront a witness, which is confined to the cross-examination of a witness.

The Court held that "[n]o decision of this Court clearly establishes that this notice requirement is unconstitutional". The Court further held that "nor...do our cases clearly establish that the Constitution requires a case-by-case balancing of interests before such a rule can be enforced".39

Commentary

This decision may be short but it sure packs some punches for defence counsel, and for the Ninth Circuit's opinion, which it overturns not only summarily, but rather dismissively and pointedly.

Although the Court here states that it had only "rarely" held that "the right to present a complete defense" was violated by the exclusion of defence evidence under a state rule of evidence, reading this opinion makes it clear that the Court does not itself buy the notion that the right of a criminal defendant to have "a meaningful opportunity to make a complete defense"40 is an unlimited Constitutional right.

This case is a victory for those Court observers who have long felt that every evidence or procedural rule that restricted anything that thwarted whatever defence counsel wanted to do was about to fall victim to a defence challenge under the Sixth Amendment. Here the Court affirms a long-standing common law evidence rule that limits the scope all counsel have in the cross-examination of a witness on issues relating to that witness's credibility. You may cross-examine vigorously about a witness's actions that relate to his or her credibility and most courts will give counsel a wide berth as to what acts do relate to the witness's credibility, in part because cross-examination is the only tool that the evidence rules allow in this situation.

It is a commonplace in evidence law that you must "take the witness's answer as you find it" on issues that relate solely to credibility. This is shorthand for the rule that you must leave a witness's answer standing, even if you as counsel not only believe that he or she is lying on the stand, and even when you have the evidence that you believe would prove that witness's evidence to be a lie. As counsel, you may be exasperated, frustrated, and furious knowing that you have caught your opposing witness in a lie, but if the matter is "collateral" to the case, you are hamstrung. No extrinsic evidence will be admitted to prove the witness's answer to be the lie you know it to be. If the issue is one of credibility only, you are stuck there with that answer and must await a later perjury trial of that witness for vindication, if it ever comes, and however little good that will do your case.

While there are good policy reasons of trial efficiency and fairness to witnesses not to allow a case to be diverted into a "mini-trial" of issues that factually fall outside the relevant facts of the case, one could imagine defence counsel arguing that an exception ought to exist, at least when it comes to the witnesses for the prosecution, in this case the rape victim. Should the criminal defendant not at least be allowed more leeway in this situation under the Sixth Amendment Confrontation

Clause to confront the accusing witness with the evidence that might destroy his or her credibility?

Indeed, Nevada has exactly a version of this constitutionally-based concept written into its evidence rules applying this exception to defendants in rape cases. In those prosecutions, and those cases only, defence counsel may use extrinsic evidence to prove that the witness is lying, or has a character for untruthfulness. While this evidentiary rule is in accord with a defendant's desire to confront an accusing witness, because the exception applies only to rape cases, one is entitled to suspect that its impetus is rather in accord with old patterns of substantive and evidentiary rules that traditionally made exceptions for rape cases that benefitted accused rapists in a myriad of ways.  

But this exception to the ordinary rule for rape cases requires notice, and defence counsel here failed to provide it. The Court could have ducked the deeper constitutional questions entirely by holding, in accord with the Ninth Circuit, that the failure to comply with the notice requirement was inconsequential when weighed against the importance of the impeachment evidence to the defendant's case. Or, the Supreme Court could have sent the case back, requiring the trial court to at least consider a balancing of interests so that this particular defendant could make the case that his failure to meet the notice requirement unconstitutionally precluded him from making his point about the credibility of this prosecutrix, as alleged rape victims used to be called.

There are no small measures of irony in this Nevada rule. The prosecution would have dearly loved to parade the defendant's previous assaults against his partner in this "romantic relationship", as the Supreme Court characterized it, but was blocked in doing so by the propensity rule in Fed. Rule Evid. 404(a) and the balancing of interests test codified in Fed. Rule Evid. 403. Those very incidents, where the police regarded her calls alleging rape and assaultive behaviour by the defendant with skepticism and did not deign to investigate, are now the very incidents and witnesses that this defendant is seeking to call to impeach her. The line between the alleged commission of a rape and the victim's credibility is a thin line to walk, especially in rape accusations of non-stranger defendants, and this Nevada law embodied that thin line.

It is always a puzzle to figure out in any particular case what evidence goes to the character of the defendant, as opposed to the commission of the offence and/or the credibility of a witness. This Nevada law not only decides that line in favour of the defendant but by making exception for the impeachment of acts relating to an alleged victim's credibility, this statutory provision is in direct contradiction of the policies behind rape shield rules that decide that only certain acts of sexual behaviour of the alleged victim are admissible to prove the substance of the defendant's attack on the prosecution's case.

41 For example, there was under the common law a series of rules that made exceptions to the general law for rape cases. One will suffice to make the point, as this particular exception is apposite to the discussion in this case of rules regarding an alleged rape victim's credibility. The judge was required, when instructing the jury, to give it a special cautionary instruction regarding that alleged victim's testimony. Because Wigmore characterized a rape accusation as "easy to make and hard to disprove", the jury must be instructed that it must take "special caution" in weighing her credibility. Virtually all jurisdictions have overturned this provision, largely through common law decisions.
And there is another measure of irony in the procedural position of the case, as this exception to the ordinary evidence rules played itself out in this case. Due to the defendant’s failure here to give notice, the Court was in a position where it could reach the traditional rule of the exclusion of extrinsic evidence. The Court was able to uphold this traditional rule against a constitutional attack under the Sixth Amendment’s Confrontation Clause, and make a point about the Confrontation Clause that it had perhaps been longing to make for a while, restricting that Clause’s meaning to the right of the defendant to cross-examination. Had the defendant exercised his notice, the case either would have not reached an appellate court due to his acquittal, or because of the exceedingly strong inculpatory evidence in this case, even if he had been convicted, he would have had no ability to frame the issue as a violation of his Sixth Amendment right of confrontation. He would have called the police witnesses and introduced their records, and still been convicted. It is only because of defence counsel’s ineffective assistance in missing the filing deadline that this case made it to the Supreme Court at all.

The Supreme Court disposed of the question of notice near the end of the opinion, as the main point that it clearly wanted to make was about the Sixth Amendment and the limitation of its meaning to cross-examination. The Ninth Circuit needed to make the defendant’s failure to give notice vanish in order to vindicate the defendant’s right to do more than cross-examine his partner about her credibility with respect to their “tumultuous” relationship. However, our cases do not hold that notice provisions that apply to defendants are clearly unconstitutional, says the Supreme Court. The rules do apply to you, and if you fail to comply with them, the procedural rules on notice will not save you. Strike One against defence counsel.

Then the Court took aim at the Ninth Circuit on the same point. The Court held that the circuit court’s understanding of the precedential case on which it had relied, *Michigan v. Lucas,* was “very far afield”. Whether a defence counsel’s failure to meet notice requirements should result in the preclusion of the proffered evidence should be left for the state courts in the first instance; the Supreme Court had not addressed the question, much less held that a case-by-case balancing test is required before preclusion can be applied. Strike One against the Ninth Circuit.

With the failure to comply with the notice provision out of the way, the question about the applicability of the ordinary rule of the exclusion of collateral extrinsic evidence was squarely before the Court. Should the ordinary rule excluding extrinsic evidence on matters solely relating to the credibility of a prosecution witness fall in the face of the constitutional provision giving criminal defendants a confrontational right?

There was some reason to believe that this could be the case. The *Federal Rules of Evidence* themselves in Rule 404(a)(2) make an exception, for example, for criminal defendants giving them a one-way option to put on positive character witnesses. The criminal defendant’s own criminal record in Fed. Rule Evid. 609 is treated differently than that of other witnesses, even defence witnesses, in evaluating the admissibility of a defendant’s criminal record as impeachment evidence. And there are a series of Supreme Court cases, referred to in the case, where defendants were
exempted from the application of traditional evidence rules, ranging from hypnosis, to statements against interest and the rules limiting the compulsion of co-defendants' testimony. These cases were few in number, to be sure, but they were not quite so "rare" as the Court characterizes them in this case. Together, they formed an understanding that when applied to a criminal defendant, the evidence rules themselves occasionally bent, and the Constitution could also force those rules to bend, when the unfairness of their application impaired the defendant's ability to make his or her case.

The Court put an end to that notion in this case and sent a message loudly and clearly to defence counsel. When it comes to the Sixth Amendment Confrontation Clause, at least, the notion that evidentiary rules will bend to a defence counsel's needs in a particular case is over. State and federal rulemakers have "broad latitude under the Constitution to establish rules that exclude evidence from criminal trials" and those rules have "rarely" come into conflict with the Constitution.

The Court's real point however, and the importance of this case, is the restrictive meaning the Court gives to the Sixth Amendment. The Court was very clear and precise in delineating that the Sixth Amendment Confrontation Clause is a right to confront the witnesses against the defendant through cross-examination, not a general right of confrontation in whatever manner a defendant so desires in order to make out his or her case, or attack the prosecution's case. Despite the language of a "meaningful opportunity to present a complete defense", the opinion itself makes it clear that this "right" is far from complete and is itself limited completely by the exact wording of the Constitution. A victory for the textualists to be sure and Strike Two against defence counsel, in whose interests it has been to read the Confrontation Clause more broadly.

The case takes further aim on defence counsel not just in this case but across the country who have been operating with the mistaken notion that the Sixth Amendment's Confrontation Clause and the provision that follows it, the right of the defendant to "have Compulsory Process for obtaining witnesses in his favor", together gave the defendant a right to "make a complete defense". The sum of the parts, they hoped, made a greater whole. By restricting the right of the Sixth Amendment right to that of cross-examination, the Court took aim at that notion and shot a hole through its heart. If there is no right to do more than cross-examine under the Confrontation Clause, then there is no real meaning, and no constitutional support for the rhetoric of "making a complete defence" under the Sixth Amendment. Strike Three against defence counsel. They are out . . . of luck . . . and down for the count on this way of thinking about their ability to flout the text of the Constitution.

The Court does not limit its tongue lashing to overzealous defence counsel, eager to use the Constitution to defeat the prosecution's case. On this point, it again verbally rebuked the Ninth Circuit. The Court underscored this important limitation of the Sixth Amendment right by stating that the precedents cited by

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47 Crane, supra, footnote 40, at p. 690, quoting California v. Trombetta, supra, footnote 40.
the Ninth Circuit "elided the distinction between cross-examination and extrinsic evidence by characterizing the cases as recognizing a broad right to 'present evidence bearing on [a witness’] credibility’." 48 The Court made it clear that it has "never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes", 49 but rather that the clause is "generally satisfied when the defense is given a full and fair opportunity to . . . expose [testimonial] infirmities through cross-examination". 50

The Court certainly used the opportunity to express its collective lack of tolerance for defense arguments, and circuit court opinions, that characterize the Confrontation Clause too broadly and challenge long-established evidentiary rules. But the Court’s showing of impatience with the Ninth Circuit’s holding may be a bit of a psychological projection on its part. An offensive attack may be in part a defensive reaction on the part of this unanimous Supreme Court in this unusual per curiam decision. This tongue-lashing and rebuke of both the Ninth Circuit and the over-reaching rhetoric of defense counsel may perhaps be the by-product of the Court’s frustration with the number of cases and lack of clarity in its own articulation of the meaning of the Confrontation Clause in the near-decade that has followed the Crawford decision. 51

2013:40.40 Florida v. Harris  
133 S.Ct. 1050 (2013)

Fourth Amendment — Probable cause — Totality of evidence — Rigid bright-line rules do not apply

Fourth Amendment — Probable cause — Totality of evidence — Rigid bright-line rules do not apply to dogs as well as to human informants

Fourth Amendment — Probable cause hearing — Procedure to test reliability of dog sniff is same as in ordinary probable cause hearings as well as to human informants

Dog sniff — Reliability of evidence — Lack of complete field records or reports not conclusive

Dog sniff — Reliability of evidence — False positives not conclusive

Dog sniff — Reliability of evidence — Field records or reports not inherently reliable; preference for evidence from controlled testing environments over field testing

Dog sniff — Reliability of Evidence — Preference for evidence from certification or training

Pre-trial motions to suppress — Objections to evidence — Waiver if not raised in timely manner

50 Fensterer, supra, at p. 22.
Why Is It On the List?

This case, decided unanimously by the United States Supreme Court, reversed the Florida Supreme Court decision that had held that when probable cause for a warrantless search is based on a dog sniff, the lack of field records for the dog’s performance is conclusive evidence, and that the evidence gathered must be suppressed. The Court held that this reasoning is the antithesis of the governing "totality of the circumstances" test for probable cause, articulated in the 1983 case of Illinois v. Gates, and indicated the Court’s lack of tolerance for any per se rule governing the determination of probable cause. The Court held that all of the ordinary attributes of a probable cause hearing apply to the evaluation of whether, in an individual case, a dog sniff satisfies the "fluid" test of probable cause and does not differ in any material way from a hearing based on human informants.

Facts

Clayton Harris’s truck was pulled over because it had an expired license plate by Officer Wheetley, a K-9 officer out on routine patrol. The officer was accompanied by Aldo, a German shepherd trained in the detection of a range of narcotics, including methamphetamine. On approaching the car, the officer saw that Harris was "visibly nervous", unable to sit still, shaking, and breathing rapidly. The officer also noticed an open can of beer in the truck’s cup holder. The officer asked for permission to search the car but Harris refused to consent. At that point, Wheetley retrieved Aldo from the patrol car and walked him around Harris’s truck for a "free air sniff". Aldo alerted at the driver’s side door handle — signaling, through a distinctive set of behaviors, that he smelled drugs there.

Wheetley concluded that he had probable cause, based principally on Aldo’s alert, to search the truck. His search did not turn up any of the drugs the dog was trained to detect but he did find large quantities of five ingredients all used in the manufacture of methamphetamine. Harris was arrested and upon properly being given the Miranda warnings, admitted that he routinely "cooked" methamphetamines at his house and could not go more than a few days without using. Harris was charged with the possession of pseudoephedrine for use in manufacturing methamphetamine, and released on bail.

While out on bail, Harris was again pulled over by Officer Wheetley for a broken brake light. Aldo again alerted at the driver’s door handle but this time, nothing was found.

Before trial, Harris moved to suppress the evidence found in his truck on the ground that Aldo’s alert had not given the officer probable cause for a valid search. At a hearing on that motion, Wheetley testified as to his and Aldo’s training in drug detection, his and the dog’s regular training exercises which Aldo routinely satisfactorily passed, and about Aldo’s certification from a private company that

53 Supra, at p. 1054.
54 Supra, at p. 1054.
55 Supra, at pp. 1053-54.
56 Supra, at p. 1054.
57 Supra, at p. 1054.
specializes in testing and certifying K-9 dogs, a certification that Florida law does not require. On cross-examination, defence counsel chose not to contest the officer or the dog’s training or expertise, but rather focused on Aldo’s certification, which had expired a year before the search of the defendant’s vehicle, and the officer’s lack of a log for the second stop at which no drugs were found. Wheeley, on rebuttal, while admitting that he did not keep records of sniffs that did not result in arrests, nevertheless defended Aldo’s alert of a seemingly drug-free car, testifying that Harris had probably transferred the odour of methamphetamines to the door handle and that Aldo had responded to that “residual odor”.

The trial court concluded that probable cause did exist for the search and denied the motion to suppress. Harris then entered a no-contest plea, reserving his right to appeal the trial court’s ruling on the motion. An intermediate appellate court summarily affirmed.

The Florida Supreme Court reversed, holding that in a dog alert case, “the fact that the dog has been trained and certified is simply not enough to establish probable cause”. In these cases, the prosecution “must” produce a wider array of evidence, inter alia, “field performance records (including any unverified alerts)”. The Florida Supreme Court particularly stressed that without “evidence of the dog’s performance history” in the field (including records of false positives — how often the dog has alerted in the field without illegal contraband having been found), an officer could “never” have the requisite cause to think that the dog is a “reliable” indicator of the presence of drugs.

Justice Kagan, writing the unanimous decision of the Court, reversed. By upholding the trial court’s determination of probable cause to search the truck, the defendant’s conviction will stand.

Holdings

The test for probable cause is not “reducible to a precise definition or quantification” and is based on a “totality of circumstances test”. As such, “rigid rules, bright-line tests, and mechanistic inquiries”, or any other “neat set of rules” are not appropriate for this “fluid concept”.

This fluid test for probable cause applies to dog informants, as well as to human informants.

A probable cause hearing on the reliability of a dog sniff is no different than any other, and the defendant is free to challenge the reliability of the dog in the particular instance that gave rise to the case, or overall through cross-examination or by introducing his or her own fact or expert witnesses.

58 The defence raised this issue for the first time at the Supreme Court in its briefs. Justice Kagan summarily dismissed this attempt to raise the question of the adequacy of the dog’s training at this late date. A claim cannot be raised for the first time at the Supreme Court when no objection or challenge or doubts were “voiced” at the time of the hearing or at trial.
59 Harris, supra, footnote 53, at p. 1054.
60 Supra, at 1054-55.
61 Supra, at 1055.
62 Supra, at 1055-56.
63 Supra, at 1055-58.
Commentary

This unanimous Court was polite — Justice Kagan’s tone is not that of Justice Scalia’s — but its rebuke of the Florida Supreme Court was clear. It had ignored the clear meaning of Illinois v. Gates,64 which in 1983 overturned the long and tangled web of determinations of probable cause that had plagued the Court for over two decades,65 and the Court was having none of it. In Gates, the Court reversed course from the particularized evaluation of the reliability of the information and the veracity of the informant, a two-pronged test that had grown spokes and wheels, and instead substituted a test of the “totality of the circumstances” that has governed probable cause hearings ever since.66

Even Harris’s counsel at oral argument conceded that the Florida Supreme Court’s opinion could look “rather didactic” but the argued that it did not in fact impose “a specific recipe that can’t be deviated from”. The United States Supreme Court disagreed, reading the decision below as “establishing a mandatory checklist”, taking the lower court’s opinion “at its (oft-repeated) word”.67 The word “must” was the killer; it is the opposite of the Gates mandate — you are ordered to be flexible, and we mean it, says the Supreme Court through Justice’s Kagan’s voice, without any hint of irony.

Moreover, the “common-sense” standard of the totality of the circumstances applies equally to dog as well as to human informants. The evaluation of probable cause and all other aspects of the procedures of this motion in limine to suppress the evidence gathered in a search apply to all informants, be they human, or canine.

This mandate of flexibility, of an individualized assessment of each case, has surfaced in other Supreme Court cases particularly in the area of the Fourth Amendment. In Richards v. Wisconsin,68 for example, the Court rejected a per se rule proposed by that state’s highest court establishing an exception in all drug cases to the ordinary procedure of “knock and announce”. There is always the impetus to make procedures or legal tests efficient by announcing a blanket rule that applies to all cases. Uniformity may be efficient, but it is not the way the Constitution should operate. This attitude of the Court is not itself uniformly applied to all criminal constitutional areas69 and transcends the simplistic political ideology of pro-law enforcement and pre-defendant, of pro-Right and pro-Left characterizations of the Supreme Court. Richards was a defeat for the police and thus seemingly a defeat of the Right wing of the Court; this case is a vindication of the ability of the police’s judgment and whose victory is it? Is this a progressive or a traditionalist’s victory? A victory perhaps for those whose cause is animals’ rights but a more nuanced view of Supreme Court jurisprudence in the area of constitutional criminal law seems appropriate.

66 Gates, supra, footnote 64, at p. 238.
69 See Miranda v. Arizona, 384 U.S. 436 (1966), for example, as the quintessential uniform standard designedly imposed on the fluid test of voluntariness that had preceded it. While the Fifth and Fourteenth Amendments’ test under due process were not overturned by Miranda, and still exist to supplement it, that case certainly saw the value of efficiency present in regulating police conduct and training.
The Court went deeper into the checklist that the Florida Supreme Court mandated and took issue not only with the existence of the checklist per se, but also with its rigidity with respect to various items on that list, particularly the dog's field performance reports. According to Justice Kagan, the lower court treated these reports as if they are the "gold standard" in evidence when in most cases; they are of "limited import". Field searches abound with false negatives as well as with false positives. These records' omissions — in both directions — can be explained and do not taint the dog's performance in standard training and certification settings, any more than they might hurt a human being's performance in the field. The "better" measure of a dog's reliability comes "away from the field, in controlled testing environments". This part of the Court's ruling may be of use in many other contexts, where scientific expertise can be based on "procedures where you should know whether you have a false positive, unlike most operational situations". 70

It is interesting to note that the Court reached this conclusion without reference to Daubert71 and its lengthy discussion of how expertise is to be evaluated by the processes that must substantiate reliable conclusions. While this is not a case of expert evidence per se, the dog is being treated as if it were an expert and as if its alert were an opinion, yet there is no mention of that related area of law. While it is true that the issues were not raised and framed that way, there is the question of whether this case resonates with other areas of law where training and controlled environments are the cornerstones for the authority and weight of the opinion.

The Court, in this ruling, favours operational flexibility in its assessment of probable cause; for science, it prefers standardization and a control test. A consciousness of irony is one thing, but that does not stop Justice Kagan from having fun at being a wordsmith. This case, she opines, is whether “a sniff is up to snuff” and she decisively ruled that this one indeed did.

2013:40.50 Maryland v. King
133 S.Ct. 1958 (2013)

DNA — Mouth swab — Fourth Amendment — Unreasonable search
DNA — Mouth swab — Fourth amendment — Not sufficiently intrusive to be violation of due process
DNA — Mouth swab — Admissibility of evidence into case other than one for which sample was obtained

Why Is It On the List?

The Supreme Court holds that the police may, as part of a routine booking at the police station, obtain a mouth swab of an arrested person, and the DNA is admissible not only in that case, but in other cases where it proves to be a match. This case opens up the possibility for the resolution of “cold” cases and ups the incentive for the police to use arrest and booking as an investigatory technique.


Facts

In 2003 a man, wearing a covering on his face and armed with a gun broke into a woman's house, and raped her. Unable to identify him, the police did obtain a sample of the perpetrator's DNA from the semen left on the rape victim.

In 2009, Alonzo King Jr. was arrested for assault for menacing a group of people with a gun. As part of the routine booking procedures for serious offences under Maryland law, a DNA sample was taken by inserting a cotton swab — known as buccal swab — into his mouth to scrape the side of his inner cheek. When the sample eventually made it to an FBI national database, it matched. King was tried and convicted of rape.

It is the constitutionality, and the resultant admissibility into evidence, of that initial swab which was under review in this case. The Maryland Court of Appeals set the conviction aside, ruling that the DNA swab contravened King's rights under the Fourth Amendment because the swab was an unreasonable search of his person. The United States Supreme Court reversed, which would have the effect of restoring the conviction and approving the constitutionality of the statute.

Holdings

A buccal swab is not an unreasonable search of a person upon being booked at a police station and the DNA evidence found is admissible not only in the case for which the person is arrested but in other cases where the evidence is held to be a match.

A DNA swab, much like fingerprinting and photographing, is a constitutionally legitimate booking procedure, and does not require a warrant.

The intrusion into the person's body is minimal, and as such, is not unreasonable.

Commentary

Perhaps the best way to underscore this case’s importance is the stinging summation of the case given by Justice Scalia in his dissent: “Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national database if you are ever arrested, rightly or wrongly, and for whatever reason”.

This case marks a new turning point not just in the use of DNA as evidence at a trial, but as part of the technological advances that are going to make crime-detection part of the police booking process. As such, this case is an important moment for those who fear the Big Brother police state with information on us all available to the government, and who view the Constitution as the only bulwark against governmental intrusion on individual liberty. This concern may explain the extra vehemence with which Justice Scalia makes his arguments in dissent.

It is no small moment that Justice Scalia accentuated the role that such data may play no matter if you are “rightly or wrongly” arrested. This focus on the inter-relationship between the rights of the accused and the rights of the innocent — or at the very least, those not yet proven to be guilty — has been a running question in criminal constitutional jurisprudence. In this case at least, Justice Scalia vehemently

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argues that the protections of the Fourth Amendment apply not just "to thee and me", but to all.

The Supreme Court here treats this case as if it were not such a big deal. The solution of cold cases is a serious matter and this case gives the official imprimatur of the use of DNA as a constitutional tool in investigatory work of unsolved crimes. Whatever the person may have done in the past is now part of his or her "profile" that the police may constitutionally begin to assemble at the time of a person's arrest. This case allows the police to then investigate to see if there is a match with any unsolved other crimes. And then if there is, the Court's opinion here treats that DNA as admissible evidence in the previous case.

Justice Kennedy, writing for the majority in this 5-4 opinion, insisted that this case did not differ markedly — or in any way that mattered constitutionally — from the fingerprinting and mug shot photographing that already takes place as part of the routine administrative work of booking an arrested person at the station. The Court dwelled on the fingerprinting analogy; they both are reliable as scientific "markers" of identification and the FBI already maintains a database for fingerprints. Justice Kennedy wrote at considerable length to show that the opinion flowed from clearly established law or constitutional norms.

One may think that Justice Kennedy doth protest a bit too much. If his decision were really all that close to existing constitutional norms, why go on at such length?

While it is accepted law in all 50 states that DNA may be taken from someone convicted of a crime, the Maryland law under which King's mouth was swabbed was different, argues the dissent. Until this ruling, the Court had never extended the permission to take DNA from someone involuntarily if he or she were taken into custody, and then for it to be able to be sent to the national FBI database to see if there was a match with any old and unsolved crime.

The majority characterizes the invasion of King's body as minimal; there was no pain and there was no significant invasion of his privacy, especially with the reduced expectation of privacy already due to his presence at the station. It was, the majority stressed a "safe and secure way" for the police to confirm the true identity of the suspect and that includes the suspect's criminal history as to what may exist in their own police files, and to make a proper assessment of the appropriate bail.

Given the time that the procedure takes to resolve an identity question through DNA testing, the question of an arrestee's identity in this case may not be the real purpose of the law. Rather, its purpose is the resolution of old cases, argues Justice Scalia. The law allows the police to gather evidence by a search of the person's mouth without any probable cause to suspect that the person being arrested has committed any other crime. He then likens this procedure to the detested "general warrants" used by the British in their rule over the colonies that the Fourth Amendment was designed to end forever.

Justice Scalia is nothing if not pointed. "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection". The police should not be able to search a suspect in any way if they have no evidence to justify suspicion of that person for a particular crime without justification for that search through a court order backed up with probable cause.

\[73\text{ Supra.}\]
\[74\text{ Supra.}\]
Moreover, the dissent argues that while the majority opinion stresses that, under the Maryland law, this procedure is “limited to serious crimes”, there is nothing in the opinion to suggest that the law may not be extended to more minor crimes in the future, which would allow DNA sampling of anyone arrested for any offence. The majority does not answer this point, and may render the quotation from Justice Scalia’s opinion, with which this commentary began, not as far-fetched as it may have initially seemed.

2013:40.60 Alleyne v. U.S.
133 S.Ct. 2151 (2013)

Trial — Right to jury trial — Element of crime — Burden of proof — Includes sentencing
Actus reus — Lesser and included offences
Sentence — Maximum mandatory sentence — Mandatory minimum sentence — Aggravating factor — Proof beyond reasonable doubt — Right to jury trial

Why Is It On the List?

This United States Supreme Court case clarifies that all elements of a crime must be proven by the prosecution to a jury’s satisfaction beyond a reasonable doubt, including those elements which increase a defendant’s sentence to a mandatory minimum level.

Facts

Allen Alleyne and an accomplice planned to rob a store manager on his way to make the store’s daily deposits. By feigning car trouble, they tricked the manager into stopping. Alleyne’s accomplice approached the manager with a gun, and he surrendered the money. Although the jury convicted Alleyne, a question remained as to the proof adduced for his conviction for using or carrying a firearm in relation to a crime of violence under 18 U.S.C.S. §924(c)(1)(A) which carries a minimum five-year sentence, but which is increased to a seven-year minimum if the firearm was brandished. The jury form indicated that the jury found that the defendant used the firearm in relation to a crime of violence, but not that the firearm was “brandished”.

However, during sentencing, the judge found that the brandishing of the weapon had been proven to him beyond a reasonable doubt. The defendant appealed and the district and circuit courts affirmed, based on Harris v. U.S. Certiorari was granted and the United States Supreme Court reversed, overruled Harris, and sent the case back for resentencing in accordance with the jury’s finding.

Holding

If an element of an offence results in the increase of the penalty to which a defendant is subjected, that element must be found by the jury to have been proven

beyond a reasonable doubt in order to comply with the defendant’s Sixth Amendment right to a jury.

Commentary

The Sixth Amendment provides that in every criminal case, the “accused shall enjoy the right to . . . an impartial jury of his peers”. The Court here takes the last step in a series of cases that began with Apprendi v. New Jersey, which held that when the sentence for a crime is specifically set forth and defined by the legislature, as opposed to being left to a judicial determination, this renders the increase in the sentence an element of the “crime” that must be proven beyond a reasonable doubt to a jury.

The essential Sixth Amendment concern is whether a fact is an element of a crime. Because there is no way to distinguish between those facts that are part of a crime that raise the mandatory minimum sentence from those that increase the maximum sentence, the Court held that every element of the crime and its sentence, if such sentence is part of the legislation that defines the elements of a crime, must be proven beyond a reasonable doubt, and submitted to the jury.

This case is perhaps the last in a series of cases that began with Apprendi v. New Jersey, and overruled Harris v. U.S. Overruling Harris comes as no surprise. Indeed, that case was the anomaly, and had been widely criticized as throwing the courts below into confusion not so much as to how to apply it, but rather as how to understand its rationale. The Court’s decision in this case laid to rest a constitutional dilemma in the making and rendered the Court’s jurisprudence in this area logically consistent.

Justice Thomas, writing for the Court, found that it was “indisputable” that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a defendant is exposed, and that when the legally prescribed range is a penalty “affixed to the crime”, that is a “new penalty and constitutes an ingredient of the offense”. This case is not an attack on broad sentencing, or on judicial discretion in the area of sentencing; its focus is rather narrow. It does not decide that sentencing is not the province of the judge, but rather that all elements of a crime, including those that aggravate it, or potentially subject a defendant to a particular punishment, must be proven to the jury, and to its satisfaction beyond a reasonable doubt.

Even Justice Breyer, the “father” of the U.S. Sentencing Guidelines, whose demise was prompted by this series of case, agreed. Although he continued to protest

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76 530 U.S. 466 (2000).
77 Apprendi, supra, and accompanying cases.
78 Supra; see also Ring v. Arizona, 536 U.S. 584 (2002) (holding an Arizona trial judge sitting alone cannot determine the imposition of death penalty due to a violation of a defendant’s Sixth Amendment right); Blakely v. Washington, 542 U.S. 296 (2004) (holding that the Sixth Amendment right to a jury trial stops judges from stronger criminal sentences when using factors outside those determined at trial); U.S. v. Booker, 543 U.S. 220 (2005) (holding requiring that facts determined at trial by a jury or admitted by the defendant was a basis for a judge to calculate sentencing); Cunningham v. California, 549 U.S. 270 (2007) (holding California law that allowed judges to increase sentences based on facts not found by the jury as unconstitutional under the Sixth Amendment).
79 Harris, supra, footnote 75.
the distinction between facts that go to an offence and those that go to sentencing, even he conceded that this view was no longer the "relevant legal regime", and that even he could not tolerate the anomaly created by Harris.

As a practical matter, if a statute prescribes a particular punishment to be inflicted on those who commit that offence, or if there are particular aggravating circumstances that would increase the defendant's punishment, those must be specified in the indictment. The move in criminal law towards more particularized jury forms, and towards special verdicts or interrogatories more associated with civil cases may be in the offing for these type of cases. The opaque verdict of "guilty" or "not guilty" must include yield to more transparency and specificity in certain types of criminal cases.

This case can of course be seen as a substantive law decision, as much as an evidence case. These distinctions are rather arbitrary and this case is an excellent example of the fundamental inextricable link between these two subjects. This case collapses this distinction and points to the holistic nature of criminal law and evidence law. A prosecutor needs to understand from the beginning of the case what he or she needs to prove beyond a reasonable doubt, and whether the evidence exists to meet that burden. All that this case adds is the possibility that when the legislature defines the crime, if any element of it alters the sentencing in any manner, that too must be proven by evidence that satisfies the fact finder beyond a reasonable doubt.

For those of us who teach in this area, this case is an excellent example to illustrate that all begins and ends with the definition of a crime and its elements. For those who practise, this question translates into whether those elements have the requisite level of proof required to sustain a guilty verdict, or whether the defence can attack the element that leads to a higher sentence, no matter what form it make take in the legislation, as not having been proven to the fact-finder's satisfaction.

2013:40.70 U.S. v. Freeman
730 F.3d 590 (6th Cir. 2013)

Opinion testimony — Police officer as lay witness — Fed. Rule Evid. 701 — Helpfulness of testimony

Opinion testimony — Police officer as lay witness — Fed. Rule Evid. 701 — Foundation for the opinion — Personal knowledge of police officer

Opinion testimony — Police officer as lay witness — Fed. Rule Evid. 701(b) and 704 — Meaning or significance of terms used or actions by defendant and others as opposed to theory of prosecution's case — Usurps jury's role

Why Is It On the List?

In this case, the Sixth Circuit joins five others circuit courts of appeal in rejecting the admissibility of a police officer testifying as a lay opinion witness. This case adds to the growing number of complicated and split decisions among the circuits — four circuits go the other way—that are trying to resolve when and whether a police officer

He was a passionate advocate for limitations on judicial discretion in articles that preceded his tenure as a judge.
can give an opinion as a lay witness. This area of law is one fraught with danger for counsel; it illustrates the delicacy and care with which counsel must navigate in these cases, where the line between the opinions that a lay and expert witness may give is a virtual Scylla and Charybdis.

Facts

As part of a federal drug investigation, in which the FBI intercepted more than 23,000 cellular telephone calls, they learned of a conspiracy to commit a murder for hire. The victim, Leonard Day, who himself was wanted for murder in Detroit, was thought to have stolen $100,000 in cash, $250,000 in jewelry and car keys from Roy West, at whose home in Akron, Ohio he was hiding out. West began to search for Day and offered to pay money to anyone who would go to the Akron bus station where Day was thought to be boarding a bus to return to Detroit with a “heater” because “there was ‘nothing to talk about’”. The FBI, fearing that Day’s life was in danger, similarly searched the bus station but did not locate Day.

West continued to look for Day and when he learned that he had indeed returned to Detroit, he and his other co-defendants gathered bulletproof vests and firearms in preparation for a manhunt.

The defendant Freeman joined in the search for Day in Detroit, using his connection to the victim’s cousins to gain information about Day’s whereabouts, while hiding from them his connection to West. In several intercepted calls, the defendant was heard talking with West before and directly after Day’s murder. When the defendant was arrested on a separate offence, the FBI also intercepted calls with his girlfriend while he was in jail.

At the defendant’s trial, the prosecution used portions of 77 of these calls to prove the conspiracy before the murder and the defendant’s efforts to arrange payment after the killing had been accomplished. The FBI agent in charge of the investigation was the witness, through whom the recordings were introduced into evidence, explaining them as the recordings were played for the jury and then entered into the trial record as exhibits.

Both parties agreed that the agent was properly qualified as an expert witness to identify voices and nicknames, and give his interpretation of the substantive meaning of various statements, in particular the meaning of certain code words and drug slang, and he did so.

However, when the officer “interpreted” conversations between the defendant and his co-conspirators that were in “plain, vague English”, the defendant objected. The defendant first objected near the beginning of the officer’s testimony, stating that this testimony exceeded “the scope of both the notice [the defence] received regarding this witness’s expertise and his expertise. Both.” While the prosecution conceded that the officer had gone too far, it argued that he was now testifying as a lay witness, providing his opinions based on “personal impressions” and “personal knowledge of the investigation”.

The evidence was admitted and the defendant was convicted of conspiracy to use interstate commerce facilities in the commission of a murder for hire. He appealed

on the ground that the police officer’s opinion testimony as a lay witness should have been excluded, and on other grounds inter alia, to the Sixth Circuit, which reversed the conviction on the first ground, and sent the case back for a new trial.

**Holdings**

The police officer’s opinion testimony as a lay witness under Fed. R. Evid. 701 was improperly admitted, and was not harmless error.

A police officer may testify as an expert witness de-coding and interpreting special terms and language, but not when the conversations involve “plain, vague English” and “common words used in common ways”.

Lay opinion testimony by a police officer cannot “interpret” events that form the basis of the prosecution’s theory of the case, as this does not help the jury and may usurp the jury’s function, especially when there is the danger that the jury will “defer to the officer’s superior knowledge of the case and past experiences with similar crimes”.

Lay opinion testimony from a police officer has the danger of drawing “inferences that counsel could do but with the . . . imprimatur of testifying as a law enforcement officer”. A witness cannot “effectively spoon-fed . . . the government’s theory of the case to the jury”. The line gets crossed when a witness’s “testimony is no longer evidence and becomes argument”.

Lay opinion testimony from a police officer has the danger of using hearsay or other inadmissible testimony that may “effectively smuggle in” such evidence, or at least “that the jury [c]ould think he ha[s] knowledge beyond what [is] before them”, when he is “doing nothing more than speculating”.

Lay opinion evidence from a police officer must be based on personal experiences, and not generic information and references to the investigation as a whole, or a witness’s general information of police work. The jury, while “left in the dark regarding the source of [the officer’s] information”, the fair inference is that he is “not limiting himself to personal perceptions”.

**Commentary**

This case vividly illustrates the real problem in the interaction between the lay and expert opinion rules as applied to police testimony and the hidden though equally thorny problem of police as opinion versus fact witnesses.

In this particular case, both sides agreed that the witness, who was the FBI agent in charge of large investigation that involved surveillance and extensive wiretaps, was properly qualified as an expert witness to identify voices and nicknames, and give his interpretation of the substantive meaning of various statements, in particular the meaning of certain code words and drug slang.

84 U.S. v. Albertelli, 687 F.3d 439 (1st Cir. 2012).
85 Freeman, supra, footnote 82, at pp. 597-98.
86 Albertelli, supra, footnote 84, at p. 447.
87 Hampton, supra, footnote 83, at p. 983.
88 Albertelli, supra, footnote 84.
89 Freeman, supra, footnote 82, at p. 596, quoting U.S. v. Garcia, 413 F.3d 201, 203 (2nd Cir. 2005).
However, this witness’s testimony slipped beyond its proper scope, when the agent interpreted not just “code words” but also plain English, even when at times its terms may be vague. This seems at first blush a perfectly reasonable distinction. Just keep to slang or code words about gang membership or the drug trade and you can be an expert, but touch on plain English and you hit the limits of where expertise is needed and begin to invade the jury’s function to “divine on its own” what is the meaning of conversations and phrases.

But this distinction is a hard, if not an impossible one, for counsel to implement in his or her examination of the witness, to which a witness may easily adhere, or for courts to enforce. For example, although the statements in this case are rife with the mélange of jargon or slang and plain English, just take a look at the one sentence quoted above in the facts section of this case comment. When West first thought he had located Day, the victim, at the bus station, he told his cohorts to take along a “heater” because there was “nothing to talk about”. According to the holding of this case, an extremely astute and careful counsel would ask the police expert witness only about the meaning of the word “heater” and leave the rest alone, as that is clearly common parlance. Or is “heater” also a word that the jury should be left to figure out on its own? One certainly can guess its meaning from the context. Is that going to be the legal test? Parsing a single sentence into the parts that properly require expertise and those where the jury should be left to its own interpretations may not be as clear as the Court here seems to wish it to be. Mixed-up sentences that have code words and plain English all coupled together is how people speak and decoupling them, or knowing which is “code” and which is plain English is not an easy task, nor something that courts themselves have any desire or expertise in regulating.

But the solution to this problem is certainly not to leave this all to the police as expert witnesses. The Court indicates that it understands this point. At the end of its opinion, it discusses harmless error indicating, albeit in dicta, that it is doubtful that the FBI agent would have been able to testify as an expert witness and interpret all of the recordings from that position. That was not the fatal matter here in this part of the Court’s analysis. Appellate courts can overlook failures of procedural notice and mistakes in the rule’s implementation under the “harmless error standard”, if the outcome would be the same. Because the prosecutor did not ask the trial court to treat the witness that way, all of the following is legally dicta but the Court here expresses severe doubts that the witness would have been qualified as a witness under Fed. Rule Evid. 702, the expert witness rules. What was this witness’s special training? His methodology? And most importantly, what help would he offer to a jury in matters of interpreting plain English? In that most important respect, expert evidence rules come back to the same starting point as lay witness opinion rules. The jury must be assisted in some way in order for the evidence to be admissible, to add something of value to the jury’s deliberations.

This latter point about the inadmissibility of expert testimony from the police about plain language is undoubtedly a correct position in terms of evidence law, as well in terms of public policy and simple justice. If police could, as opinion witnesses, instruct the jury as to the correctness of their sense and interpretation of the evidence and their theory of the case, what would be the point of a jury? Or even more starkly,
what would be the point of a trial? Self-justification could easily be seen as valid opinion evidence, and vice versa.

Literary theory instructs that interpretation is everything, and if that is so, then this is nowhere more clear than in the issue in cases like this one. But no literary theory appropriate to a classroom or a law review article makes the practical challenges for counsel in preparing a witness through this type of coupled conversations any less real.

The second way that the prosecutor ran into difficulty was his fall-back position of characterizing the FBI agent as a lay witness. The problem here is that the officer was the agent in charge of the investigation and not the person on the ground listening to the tapes or doing the surveillance or the activities described in the recordings. He was the boss, not the underling, or the many underlings who do the legwork of any such large-scale operation. But as a result, the agent lacked the foundational element necessary to be a lay opinion witness. He had no personal experience on which to base his testimony, just his generic knowledge as an officer with 15 years of experience, and his general knowledge of this operation; a point the Court stresses by its own italicization of the personal knowledge necessary to be a lay witness. The FBI agent in charge was a “summary witness”; one whose only purpose, outside of his expertise with code words, was to bolster and argue the government’s theory of the case and thereby usurp the function of the jury to evaluate the case on its own, without his inferences and conclusions. Without a personal fact story to tell, the FBI agent had nothing upon which to base any opinion and as such became the prosecutor’s shill and the undoing of this conviction.

Here, the Court distinguishes the present case from one where the agent testifying was the person who had personally de-coded cryptic language that appeared nonsensical, devising code upon code as they went along.90 But the Court misreads this case that it cites; such a witness would also be an expert even though he or she would be basing the opinion on their personal efforts to de-code this evolving mystery. Personal knowledge is one of the many ways that an expert witness can reach a valid conclusion. The distinction here is not expert knowledge versus personal knowledge; that is a mismatch. They can and do co-exist.

What the Court here is really rejecting is not just the police officer parading as a lay witness when he is really acting as a shill for the prosecutor in a closing, but the equally thorny but hidden problem associated with calling commanding police officers to testify as fact witnesses. Calling every officer who did the surveillance and the recording would be onerous in this kind of a case. A summary witness is so much more efficient but those officers in charge lack the foundational basis to testify as fact witnesses, and cannot hide after this case under lay witness opinion rules. The simple solution will not work. One must call the officers who did the work, with all of the practical and logistical issues that this raises for prosecutors to prove their cases in a streamlined manner. Fact witnesses or experts . . . it is that middle ground of police witnesses with lay opinion where the prosecution ship can go astray and flounder, stuck between the proverbial rock and a hard place. They have both the challenge of designating the top police officers as expert witnesses on code words,

90 U.S. v. Rollins, 544 F.3d 820 (7th Cir. 2008).
and not succumbing to the temptation of asking for the witness’s interpretation of any word that might be deemed to be understandable to the jury on its own, and the logistical nightmare of calling every officer involved in the operation to stick to the facts and issues upon which the officers have personal knowledge.

As a final note, this case was decided as a purely evidentiary matter. But one can see the parallels with those cases involving complicated police work where the Confrontation Clause rears its even thornier head. Crawford v. Washington and its progeny were borne out of this dilemma of calling the summary witness instead of all the fact witnesses along the way who can be cross-examined as to what they did and did not do. This case did not go there; it did not have to. But the United States Supreme Court is deeply immersed in that very question, just one step beyond where this case points.

2013:40.80 U.S. v. de Jesus-Casteneda
705 F.3d 1117 (9th Cir. 2013)

Witnesses — Demeanour evidence — Disguises to hide identity — Sixth Amendment — Confrontation Clause

Why Is It On the List?

In a case of first impression for this court of appeals, the Ninth Circuit held that, despite the importance of demeanour evidence, wearing a disguise to hide a witness’s identity in order to help ensure his or her safety and protection does not offend the Confrontation Clause of the Sixth Amendment. The circuit court here seems to draw a distinction between disguises that still allow the eyes to be revealed and other ways of trying to obscure the identity of a witness as the methodology that keeps this practice within constitutional limits.

Facts

The trial court allowed a confidential informant, whose visual appearance and identity was known to the defendant but not to his associates, to wear a disguise while testifying. Originally, the prosecution had requested that the witness be allowed to wear a wig, a mustache and sunglasses but the Court disallowed the last aspect of the disguise, ruling that the uncovering of the eyes were necessary to both the jury’s assessment of the witness’s credibility and to preserve the essence of the right of the defendant to be confronted with the witness against him under the Sixth Amendment’s Confrontation Clause. The defendant was convicted and appealed, arguing that the disguise still infringed on his constitutional right, but the Ninth Circuit disagreed and upheld the judge’s exercise of discretion.

Holdings

A judge may allow a witness to testify wearing a disguise so long as the “essence” of confrontation is still preserved.

92 U.S. v. de Jesus-Casteneda, 705 F.3d 1117 (9th Cir. 2013).
Demeanour evidence is important in that it allows the fact-finder to assess a witness's credibility but is an evidentiary concern wholly apart from the constitutional mandate, and is subsumed by it.

Commentary

Although there is no United States Supreme Court case on the issue of disguises and their relationship to the Confrontation Clause per se, this case necessarily revisits a series of cases from the 1990s that focused on the meaning of the Sixth Amendment's Confrontation Clause as to how to protect a witness, particularly child witnesses and victims of sexual assault during their testimony. In those cases a number of techniques, such as screens or closed circuit television monitors that blocked the witness from being viewed by the defendant or being intimidated by their alleged abuser's presence, were used to make it psychologically easier for victims to come to court and testify. In those cases, which were hotly debated, the Court struck a balance that allowed a trial judge to allow those techniques that were tailored to meet the individual and precise psychological needs of a particular witness but still preserved the "essence" of the right of the defendant to "physically confront" the witness against him. Although the concern here is one of the witness's physical safety, rather than the psychological trauma of testifying, the Court used that reasoning to guide its decision.

These earlier cases also established a procedure that a trial judge must follow in any alteration of the ordinary methodologies of courtroom layout, or as applied in this case, a procedure designed to protect the witness by means of a disguise. The court must hold a hearing to focus on this particular trial and this particular witness, and determine whether testifying in an altered fashion is necessary so that the court may receive the benefit of that person's sworn testimony. This particularized inquiry is what satisfies the Constitution; a "face to face" confrontation is not the exact language of the federal Constitution. As a result of focusing on the absence of this word in the federal constitutional right, there may be changes from the ordinary procedures so long as there is still an opportunity to have witnesses be both examined and cross-examined, albeit in a limited fashion.

The Supreme Court does not recognize a witness's "right" to anything; it is the defendant's rights that are protected by the Constitution. That is one reason why these cases that tried to balance the defendant's constitutional right of Confrontation in the 1990s were so important; they did try to strike some sort of a balance between the defendant's right under the Sixth Amendment and the obligation of every witness to testify in a court of law if summoned. The balance struck by the Court was an unusual one; a defendant's right here is protected if the "essence" of that right is preserved, and that essence is the "opportunity" for cross-examination.

Constitutional rights are normally what they are, defining its "essence" is

94 Craig, supra, at p. 857.
95 However, "face to face" is the language of many state constitutions, and that has led to state constitutional decisions that are far more exacting on the alteration of a courtroom.
itself a limitation, and saying that a vindication of the essence of a right is sufficient is yet a further limitation.

This limitation on what a defence counsel may want received Supreme Court attention again this term in *Nevada v. Jackson*, discussed at 2013:40.30, above. The roots of that holding, and this one, lie in an earlier Supreme Court case, *Delaware v. Fensterer*, decided *per curiam* in 1985, where a witness’s safety was physical was mentioned in the case, but was not the subject of it. The Court did lay down important limitations on a defendant’s Sixth Amendment rights that are apposite to this case as well:

[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish”.

In common law jurisdictions that do not have the additional constraints of a constitutional confrontation clause, this type of case usually rests its rationale on the ability of the jury as fact-finder to assess the credibility of the witness and judge his or her demeanor in deciding the weight to be accorded to the testimony. Usually styled as “demeanour evidence”, this is an important component of the atmosphere of a case and is much discussed as part of the lore of the courtroom. In the United States, it is hard to even find a criminal case that even discusses this issue outside of the context of the Confrontation Clause.

The opinion in this case begins with some almost poetic musings about demeanor evidence and its importance but Judge Bea, writing for the Court, quickly turns to the Sixth Amendment, setting his musings as almost fanciful, as if they were close to being legally irrelevant. What a difference a Constitution makes; it sucks up all the available legal energy, leaving common law principles in its wake.

**2013:40.90 U.S. v. Brooks**

727 F.3d 1291 (10th Cir. 2013)

*Circumstantial inference of guilt — Change in financial circumstances — Possession of large amounts of cash over time — Possession of large amounts of cash in more than one transaction*

**Why Is It On the List?**

In a case that raised five issues on appeal, the salient one for our purposes is the admissibility of testimony concerning the defendant’s possession of large amounts of cash over a relatively extended period of time without any plausible non-criminal explanation. This case holds that this evidence is admissible to infer that change in financial circumstances of the defendant is a circumstantial evidence of guilt as part of the prosecution’s case-in-chief.

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Facts

Anthony Brooks was convicted of the armed robbery of a bank. Before the robbery, the defendant was impoverished. He was on unemployment insurance until one month before the robbery, and had no reported income for the year following the robbery.

After the date of the robbery, the defendant was involved in several transactions that involved large amounts of cash. Over the defendant's objection, the prosecution offered evidence that the defendant paid for the repaving of his driveway at a cost of $3,000 to $4,000 with $100 bills, that the witness testified was drawn from a foot-deep box that appeared to be stacked with rows of $100 bills. A police officer testified that, at a routine traffic stop when the defendant was asked for his vehicle registration and opened up the console of his car to retrieve it, several thousand dollars in $20 denominations were readily visible. The estranged husband of the defendant's girlfriend testified that the defendant told him that he had a couple of thousand dollars stored in his home that he had made on eBay. The defendant offered no evidence adduced to back up this last explanation for the defendant's possession of large amounts of cash, nor any other evidence of legal activity to explain the change in his financial situation.

The judge admitted the testimony of these witnesses and the Tenth Circuit upheld the exercise of the judge's discretion in so doing.98

Holdings

The unexplained and sudden change in a person's financial circumstances is admissible as circumstantial evidence of guilt in the prosecution's case-in-chief.

The possession of large amounts of cash, over an extended period of time, is circumstantial evidence of guilt. The time period by which the relevance of the possession of cash is to be judged varies according to the amount of the money alleged to have been procured by criminal means.

The possession of large amounts of cash, in more than one transaction, is circumstantial evidence of guilt.

Commentary

This case is yet another example of the multitude of circumstances that may be relevant in helping to prove a prosecution's case through circumstantial evidence of guilt. This case is somewhat unusual in that it does not operate to show motive or consciousness of guilt as so many other cases do. This set of facts do not operate through an inference that goes through the defendant's thought processes, whether they be characterized as going to show intent or identity as elements of the case. As the Court itself says, this is not a "property as motive" case. Here, rather, the circumstantial evidence is being offered to prove the act itself. Although it may initially appear to be evidence of identity, i.e., "Who else could have committed the robbery?", the more precise and damning question here is, "How else could you have gotten this much money, if not through robbery?", i.e., the act itself.

98  U.S. v. Brooks, 727 F.3d 1291 (10th Cir. 2013).
This case highlights the infinite malleability of logical relevance. Make a link that otherwise would not exist, and so long as it in any way helps build the case, you have passed the low bar of the relevancy threshold.

**2013:40.100  U.S. v. Smith**  
725 F.3d 340 (3rd Cir. 2013)

*Character evidence — Similar act evidence — Propensity evidence — Foundation — Prejudice — Fed. Rule Evid. 404(a) and (b) — Fed. Rule Evid. 104(b) — Fed. Rule Evid. 403*

**Why Is It On the List?**

The Third Circuit Court of Appeals' holding in this case raises the bar for the test of admissibility required before non-charged crimes, wrongs or acts may be introduced as evidence, as set forth in the United States Supreme Court case of *Huddleston v. U.S.* The circuit court held that before an extrinsic act may be introduced, the party proffering the evidence must establish that no link of the chain of the relevance of the evidence is based on the impermissible propensity inference.

**Facts**

As part of an ongoing drug investigation, three undercover officers were out of routine patrol in an unmarked car with tinted glass. As the car approached a particular street corner, most people scattered but Durrell Smith remained standing. The officers testified that they lost sight of him for a moment but he then reappeared, and came at the car with a weapon drawn. The defendant was arrested, and no drugs were found on his person. Durrell Smith was charged with threatening several federal officers with a gun.

The defendant claimed self-defence, saying that he did not know that the men coming towards him were police officers and had not identified themselves. The defendant told an investigating officer at the station after his arrest that he feared for his life because two weeks prior, a similar car had been involved in a shooting in the neighbourhood.

The prosecution sought to prove that the defendant was “motivated” to behave in a threatening manner and intended to assault the officers, and that the case was not one of self-defence. To establish this non-propensity inference, the government was allowed to introduce testimony by a police officer that two years, the defendant before had been arrested on that same corner for selling heroin. The prosecution sought to rely on the evidence of this uncharged crime to rebut the claim of self-defence. Their position was that the defendant was instead “protecting his turf” against potential rivals and that, although no firearm had been involved in the previous case, drug dealers often carry guns and keep their stash of guns in a separate place than their drugs.

The Third Circuit reversed and sent the case back for a new trial.

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Holding

In order for acts that are not elements of the crime to be admitted, there must be a non-propensity purpose to the evidence, see Fed. Rule Evid. 404(a) and (b). However, before such evidence may be introduced, the party offering the evidence must establish, to the judge's satisfaction, that the evidence "must do more than conjure up a permissible purpose — [it] must also establish a chain of inferences no link of which is based on a propensity inference". 100

Commentary

Although Fed. Rule Evid. 404(b) is often referred to as a rule of inclusion, since it provides a non-exhaustive list of reasons as to why evidence may be admitted that seemingly avoids the impermissible propensity inference with which the same evidence might be characterized. This case highlights that even if the ultimate conclusion that the party wishes to draw is a non-propensity inference, none of the steps that the judge logically must consider when weighing the admission of this evidence must operate through a propensity inference. The case highlights the need for a judge to spell out his or her chain of reasoning and the care that must be taken in order to assure that the evidence is not capable of being used for the impermissible inference of bad character.

This distinction is not one that is ever easy to draw, since evidence of acts extrinsic to the events under consideration and outside of the elements of the case will inevitably give rise to questions of character, and raises into question the finding of whether the conviction (or the civil wrong) is based on the person, rather than the charged conduct. Although the Court here recognized that this distinction is often a "subtle one", 101 if a finding of guilt is based on who you are, and not what you have done, then one's past is never over, one's time is never really served, and the possibility of wrongful convictions is enhanced. This moral question, and its policy implications are captured by this rule, and this case underscores the dangers inherent in this type of evidence.

Here, in this case where the previous offence did not involve firearms and the current case did not involve drugs, the link between the two crimes is "weakened" to the point where the jury has to make inferences about the defendant's earlier conduct in order to learn about Smith's "motivations". Even if the prosecution did not explicitly make a propensity argument, its summation did invite the jury to make an inferential leap; this is part of the "overpersuasiveness" of the evidence that Michelson v. U.S. 102 (one of the most famous U.S. Supreme Court evidentiary cases) warns against. And this is a danger that neither the Fed. Rule Evid. 403 balancing test, nor a limiting instruction, can cure.

Indeed, it was this last issue that drove the point home for the Court. Although discretely tucked away in a footnote, 103 the Court comments that even a properly framed curative instruction would have been "infused" with propensity influences.

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100 U.S. v. Smith, 725 F.3d 340, 345 (3rd Cir. 2013).
101 Supra, at p. 345.
102 335 U.S. 469, 476 (1948).
103 Smith, supra, footnote 100, at p. 348, footnote 5.
In *Huddleston*, the United States Supreme Court — in another of the few high court cases in the whole of evidence law — gave lower courts a four-step guide so as to avoid impermissible propensity character inferences. First, find a proper non-propensity purpose, as from the non-exhaustive list outlined in Fed. Rule Evid. 404(b); then check for the evidence’s relevance, make sure that the probativeness of the evidence substantially out weighs the danger of its prejudicial effect as outlined in Fed. Rule Evid. 403, and then if all that is in order, be sure to give a limiting instruction as to proper use of the evidence.

This case shows how difficult that row is to hoe, especially in those cases where the evidence is so deeply laden with inference. In forcing the logical chain of the court’s reasoning for admissibility into a more transparent realm, the case is an important harbinger of a change in the traditional characterization of this rule as one of inclusion. It may prove quite difficult for most chains of inference not to reveal a propensity link somewhere along the way, and if so, Fed. Rule Evid. 404(b) may turn out to be one of exclusion, even before the exclusion based on a balancing of probativeness and prejudice mandated by Fed. Rule Evid. 403 is ever done.

**2013:40.110 U.S. v. Nelson**

725 F.3d 615 (6th Cir. 2013), petition for rehearing en banc filed September 20, 2013

Witness — Testimony — Hearsay — Non-hearsay purpose — 911 call — Background context for manner of arrest


**Why Is It On the List?**

A 911 call may be introduced by an arresting officer and will survive a hearsay objection so long as the details of the call are relevant for the non-hearsay purpose of explaining the manner in which the arrest took place.

The background to an arrest is not relevant if the officer’s state of mind is not at issue in the case.

**Facts**

The local police received an anonymous 911 call that a black man, wearing a blue shirt with a "poufy" Afro and riding a bicycle, was armed with a pistol. Two officers were initially dispatched but three more quickly came on the scene. They found a person who matched the description the tipster had provided. When the first two officers tried to talk to him, the suspect tried to leave the scene on his bicycle. He was pursued and was seen throwing a heavy object into the bushes as he attempted to flee. The five officers, with guns drawn, quickly stopped the suspect and searched him. Several bullets were found in his pockets and a gun was located on the ground in the nearby bushes. Jerry Nelson was convicted for being a felon in the possession
of a firearm and for possession of ammunition that had travelled through interstate commerce, which are federal offenses.

At trial, over objection, the five officers testified as to the details of the 911 call, recapitulating what the 911 dispatcher had heard as to the description of the person, and in particular that the person was “armed with some type of a handgun”. The defendant had argued that the 911 call was inadmissible hearsay but the prosecution convinced the judge that all of the details were needed as “background information” for the arrest.

The defendant was convicted and appealed on several grounds, including the characterization of the 911 call as non-hearsay evidence. The Sixth Circuit, while concurring that there was a sufficiency of evidence to sustain the verdict, nevertheless reversed the conviction on the hearsay question and sent the case back for a new trial. The Court held that in this case, the admission of the 911 call was hearsay admitted to prove that the defendant had a gun and went to the key issue for the jury to resolve. The Court stated that the details of the 911 call were not necessary for the Government to present the jury with a “coherent narrative explaining the officers’ actions” and that the error was too prejudicial to have been cured by a limiting instruction, and that it was more likely than not that the admission of this evidence had a material impact on the jury’s verdict.

The Court stated that even if the evidence were deemed necessary for the jury to understand what prompted the police response (as it might be in a more complex investigation), the evidence here should have been stripped of any reference to the key issue in the case — the possession of a firearm. The Court suggested that the evidence as to the 911 call could have been that the police were responding to “illegal activity in the area” or that they were responding to a man believed to be “dangerous” but that the mention of a “gun” made the evidence hearsay as it went to the heart of what the Government was under a burden to prove.

Holding

A 911 call may be admitted in circumstances where the details of the call are necessary for the non-hearsay purpose of explaining the manner of the arrest. However, when such evidence is not relevant to an issue in the case, the 911 call is inadmissible hearsay and must be excluded from the trial.

Commentary

While American defence lawyers often rush to turn to the Constitution to resolve questions that may result in the exclusion of evidence from a criminal case, this case is a refreshing reminder that defence counsel does not necessarily have to go that route if the ordinary evidence rules will allow you to achieve the result you are seeking — especially if the prosecutor helps you along by overreaching.

At issue in this case was the definition of hearsay and in particular, the thorny question of when there is a non-hearsay purpose to the evidence. In this case, the prosecution succeeded in convincing the trial judge that the contents of the 911 call, identifying a suspect as someone matching a particular description and in possession  


106 Supra, at p. 619.
of a gun, were admissible not as substantive evidence but rather to explain the "background" for the arrest. Without the details of the call, the prosecution argued that the jury might be "confused" as to why that number of police officers was needed in the arrest of the defendant, or why the officers drew their guns, and might think that the police had used excessive force.

The trial court here accepted that the details of the 911 call were admissible for a non-hearsay purpose of providing the background for the arrest, with a limiting instruction offered after each officer's testimony that the contents of the call as to the details of the suspect's appearance were being admitted not for their truth. But the prosecution did not stop while it was ahead. The Government called all five police officers to testify as to their arrest of the defendant. While any one officer could have testified to the presence of the five, and the supposed necessity of bringing all five officers to the scene, the testimony of all of the officers helps us understand the hidden subtext of this case — and the argument it gave to defence counsel as a way to overturn the conviction and send the case back for a retrial.

The Sixth Circuit here accepted the basic premise of the prosecution's argument at trial. The contents of a 911 call may be admissible to provide background information or context for an arrest. There are cases where the details of a 911 call may be probative of a relevant issue in the case — how the officers arrived at probable cause for an arrest to explain why a particular person was targeted, or in cases involving informants or a complex police action. In those situations, a 911 call may very well be introduced as admissible non-hearsay, where the state of mind of the officers was relevant in understanding the narrative of the actions of the police.

But this was not that case. And the recitation of the mantra of "background information" or "narrative" will not allow for the admission of that evidence if the content of the 911 call is the very issue that goes to the charged offence, and where the state of mind of the officers is irrelevant to the elements of the case that the Government has to prove. That mantra will not paper over cases where hidden prejudices are being appealed to under the pretext of context.

The Court essentially gave the prosecution a lesson in the evidentiary limits of how far they can go in translating a 911 call into admissible evidence. In dicta, the Court said that while the actions of the police could have been explained by the simple statement that they were responding to a 911 call, or that they were responding to a complaint that there was "illegal activity" going on in that neighbourhood, or even that they knew that they were looking for a man who was "dangerous", to mention a gun is to tread too closely to the elements of the case the Government needs to establish — the classic problematic mirroring between the truth of the matter asserted in the statement and the truth of the charge to be established.

Standing back from this holding, the key to understanding this case lies in the unstated relationship between the five officers and the presence of the gun that was indeed found in the bushes. Those are the facts. The subtext is the race of the defendant. Were five officers with guns drawn needed to take down a guy on a bicycle, even one with a handgun? And more importantly for trial lawyers and for this evidence ruling, what do we make of using five police witnesses all testifying to a 911 call tip that the person was armed?
Calling five officers to make a questionable point of relevance leads one to suspect that while in some cases, the content of a 911 call might be admissible evidence and relevant to a real issue in the case, here the prosecution was trying precisely to use the evidence for a hearsay purpose — to use the untested 911 call to help prove its case. But by calling five officers to testify, the prosecution tipped its hand, so to speak, about the reason it was using the details of the tip. The Sixth Circuit here goes easy on the prosecution, saying merely that the consistency of the five officers' evidence made it more likely that the jury would credit their testimony and left it there. The officers' testimony, despite the Government's "contention" that the details of the tip were relevant, was "prejudicial" error.

But what is remarkable in this case is what the Sixth Circuit could have said but did not say. The Court could have decided this case using Fed. Rule Evid. 403 explicitly and did not. The Court's opinion uses the concept of "prejudice" gingerly when it is fair to wonder if it is the non-legal definition of prejudice that may have been the real concern.

The Court neither mentioned Fed. Rule Evid. 403's concern about the "unfair" prejudice that might ensue to the defendant from the admission of the content of the 911 call as being a person who deserves to be in jail for the possession of a gun, nor the "cumulative evidence" of calling five witnesses when one would have done. Instead, they use the definition of hearsay to more subtly make their point. In this case, the officers' knowledge going into the arrest was irrelevant. There was therefore no relevance to the facts they already knew about the suspect from the call and no credible non-hearsay purpose to this evidence. All that is left therefore is precisely the relevance of the contents of the 911 call to the charge — which is dependent on the truth of the assertion of the untested out-of-court declarant — the classic conundrum in the characterization of a hearsay purpose and an evidence professor's dream.

A statement is hearsay depending on the purpose for which it is used and while the prosecution contended that it was used here to explain the circumstances of the arrest and to dispel a concern that the police used excessive force, this was a problem they themselves created. One thinks they doth protest too much. There was no need to go into the details of the tip other than both to bolster the prosecution's case, and to raise the specter of the defendant's bad character, which in the case of a black defendant may carry racial stereotypes and appeal to the jury in a manner that is inflammatory.

This is a case where defence counsel lost the battle but won the war, relying on the ordinary evidence rules to overturn his client's conviction. The gun may have been found in the bushes but because the Government used the testimony of five officers to pad its case, that smacked of prejudice, and not just the legal kind. A curative instruction could not cure this error. Five officers were too many; they revealed the real prejudice that the Government was playing to, and the Sixth Circuit called them on it.