U.S. Supreme Court Update

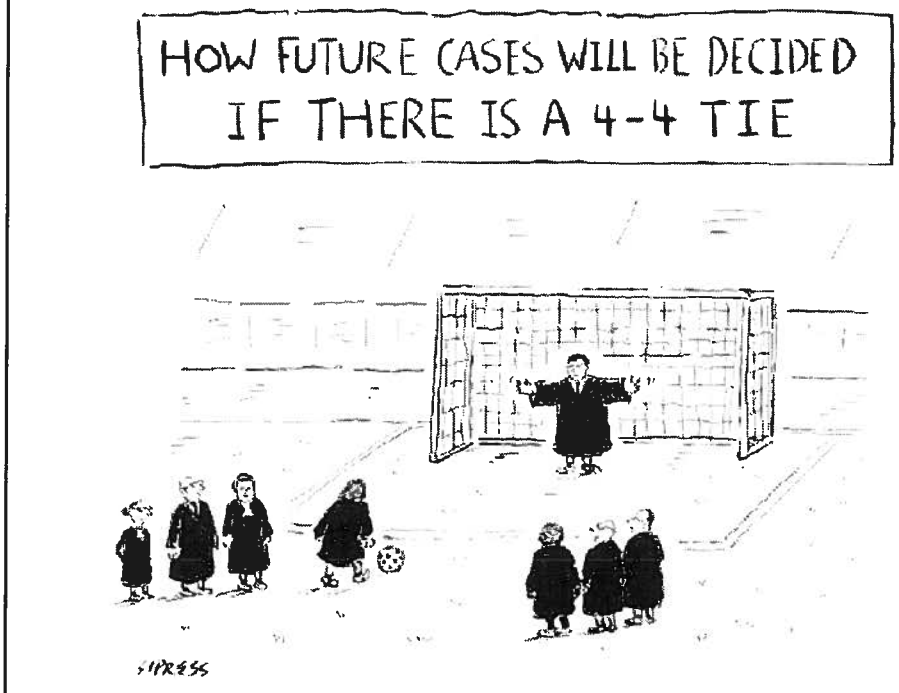
Akron Bar Association
Oct. 15, 2016

Criminal case statistics

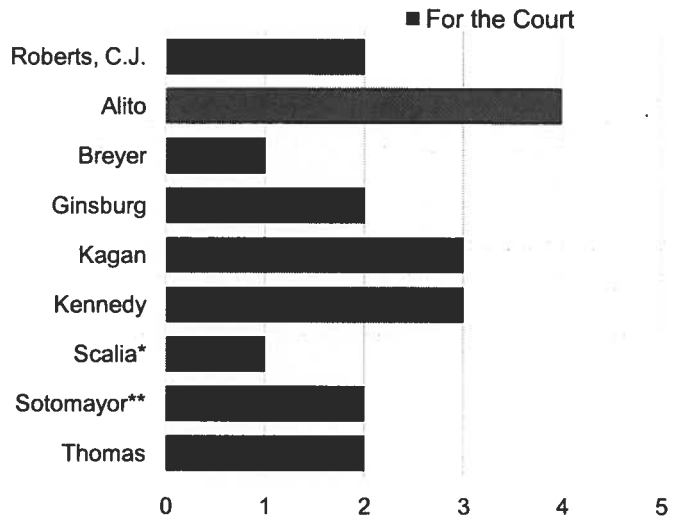
- 29 cases from 20 jurisdictions (11 states, 8 circuits)
- Jurisdictions with most cases: Fourth and Ninth Circuits
- Jurisdiction most often affirmed: Fourth Circuit
- Jurisdiction most often reversed: Ninth Circuit
- 21 cases were vacated or reversed
- 8 cases were affirmed

But wait, there's more…

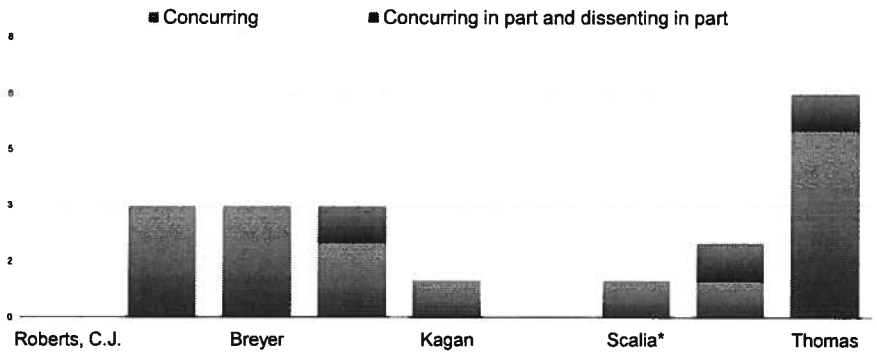
- 4 unanimous decisions
- 9 per curiam decisions
- **0** criminal cases unable to be decided due to a 4-4 split!



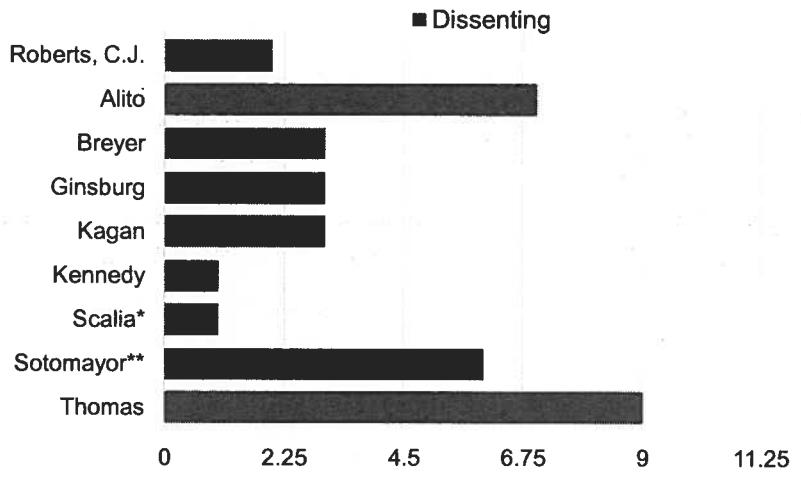
Writing the Majority Opinion



Concurring opinions



Dissenting Opinions



Cases, by Topic

Brady v. Maryland

Wearry v. Cain, 577 U.S. —, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) - Per curiam; Alito dissents, with Thomas.

- Withheld: Statements and medical records undermining testimony of 2 key witnesses in death penalty case
- Louisiana applied wrong standard
  - NOT whether defendant would more likely than not be acquitted if evidence hadn't been withheld
  - Test IS whether the new evidence is sufficient to undermine confidence in the verdict.
  - Analyze new evidence cumulatively, not separately.

Due Process

Williams v. Pennsylvania, – U.S. –, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016)

- Kennedy for the Court, with Ginsburg, Breyer, Sotomayor, and Kagan; C.J. Roberts dissented, with Alito; Thomas dissented
- Prosecutor who'd decided to seek death penalty was a justice on Penn. Supreme Court when it reversed PCR and reinstated death penalty
- SCOTUS: Impermissible risk of actual bias when judge earlier had significant, personal involvement as prosecutor in critical decision regarding defendant's case – even in multi-justice Court.
- Unconstitutional failure to recuse constitutes structural error - no harmless-error review

Guns

4 cases

Caetano v. Massachusetts

- 577 U.S. –, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) - Per Curiam; Alito concurring, with Thomas
- Overturned Massachusetts law that banned stun guns, which the Court held to fall within the 2d Amendment's protections, per *District of Columbia v. Heller*

Felons in Possession of Firearms

Voisine v. United States

- – U.S. –, 136 S.Ct. 2272, 195 L.Ed.2d 99 (2016) - Kagan for the Court; Thomas dissented with Sotomayor, as to two parts of the opinion
- Held: A misdemeanor domestic violence assault committed with the *mens rea* of recklessness qualifies as a "misdemeanor crime of violence" sufficient to make the offender liable for Federal prosecution under 18 U.S.C. §922(g)(9).

- Two-thirds of the states prosecute DV assaults that are committee recklessly
- Key to the Court's reasoning: Volition.
  - A "misdemeanor crime of domestic violence" includes the "use" of force as an element.
  - Any "use" of force necessarily involves a volitional act, not an accident

- Dissent:
  - "Use" of physical force requires intentional conduct; therefore, *mens rea* must be knowing or intentional conduct, not reckless conduct.
  - Not merely "volitional" action
  - Ex: the "angry plate thrower" and the "door slammer" intended to cause damage to a plate or a door, but didn't intend to cause harm to the person who was nevertheless injured; force wasn't directed at the person who was hurt

Mathis v. United States

- 579 U.S. –, 136 S.Ct. 2243, 196 L.Ed.2d 604 (2016) - Kagan for the Court; Kennedy and Thomas concur; Breyer dissents with Ginsburg; and Alito dissents
- Armed Career Criminal Act (ACCA), 18 U.S.C. §924(a) - 15-year mandatory minimum sentence on felons in possession of firearm after three previous convictions for "violent felonies."
- Question: Is a crime an ACCA predicate if the statute lists multiple, alternative means of satisfying one or more elements?

- Court: Yes.
  - Look at the elements the prosecution had to prove, not at the facts.
  - Ex: Iowa's burglary statute applies not only to break-ins at buildings and structures (which is generic offense) but also into *vehicles*.
  - Vehicles and structures = facts; they are multiple *places* where burglary can occur; means by which burglary may be accomplished

Welch v. United States

578 U.S. –, 136 S.Ct. 1257, 194 L.Ed.2d 387 - Kennedy for the Court; Thomas dissents

- Question: Does a SCOTUS decision invalidating a provision of the ACCA as being *void for vagueness* that came down after Welch's conviction operate retroactively to vacate his conviction on collateral review?
- Held: Yes. The prior decision "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied."

Search & Seizure

Birchfield v. North Dakota

- – U.S. –, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) - Alito for the Court; Sotomayor with Ginsburg concurring and dissenting; Thomas concurring and dissenting
- Three cases involving DUI offenses from 2 states
  - North Dakota and Minnesota make refusal of blood or breath test a misdemeanor

- Held: 4th Amendment allows warrantless breath tests incident to DUI arrests, but not blood tests.
  - Blood draws, breath tests are *searches*
  - Privacy interest = key
- Also held: States cannot criminally punish drivers for refusing to submit to warrantless blood tests

Utah v. Strieff

- – U.S. –, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016) - Thomas for the Court; Sotomayor dissented, with Ginsburg; Kagan dissented, with Ginsburg (in part)
- Held: The attenuation doctrine applies (and the exclusionary rule doesn't) when discovery of valid arrest warrant breaks link between illegal stop and search incident to arrest.

Sotomayor's dissent:

"Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants – even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent."

Practice pointers

- Apply the three attenuation factors: temporal proximity; intervening circumstances; and purpose and flagrancy of official misconduct
  - Use framework of Kagan/Ginsburg dissent
  - Use Sotomayor's language and evidence of systemic practices
  - Use any evidence of local systemic/recurrent practice

Sixth Amendment - Right to Counsel

Luis v. United States

- 578 U.S. –, 136 S.Ct. 1083, 194 L.Ed.2d 256 (2016)
- Plurality holding of Breyer, Roberts, Ginsburg, and Sotomayor: Government's pretrial restraint of a defendant's legitimate, untainted assets, which could be used to pay counsel of choice, violates the 6th Amendment

- 6th Amendment includes defendant's right to a fair opportunity to secure counsel of his choice (within limits)
- Freezing *all* defendant's assets undermines the value of that right – takes away ability to use assets to pay for her chosen attorney
- Thomas, concurring: Constitutional rights protect "those closely related acts necessary to their exercise."

Maryland v. Kulbicki

- 577 U.S. –, 136 S.Ct. 2, – L.Ed.2d – (2015) - Per Curiam
- Comparative Bullet Lead Analysis or CBLA factored into conviction
- 11 years later, Kulbicki argued his counsel should have predicted CBLA would eventually be discredited.
- SCOTUS: Failure to divine doesn't make counsel ineffective

United States v. Bryant

- – U.S. –, 136 S.Ct. 1954, 195 L.Ed.2d 317 (2016) - Ginsburg for a unanimous court; Thomas concurs
- 18 U.S.C. §117(a): Domestic assault in "Indian country" is Federal offense if offender has at least two prior DV convictions
- Question: Do uncounseled DV convictions count as "convictions" under 18 U.S.C. §117 where the underlying proceedings complied with Indian Civil Rights Act of 1968?
- Court: Yes. Neither 6th Amendment right to counsel nor 5th Amendment due process rights were violated.

Woods v. Etherton

578 U.S. –, 136 S.Ct. 1149, 194 L.Ed.2d 333 (2016) - Per Curiam

- Reversed Sixth Circuit
- At trial, Etherton's counsel didn't object on Confrontation Clause grounds to information about an anonymous tip
- His appellate counsel didn't raise Confrontation Clause error or ineffective assistance claims

SCOTUS: Where tip was consistent with Etherton's defense…

- Trial counsel wasn't ineffective for failing to object;
- Appellate counsel wasn't ineffective for failing to raise Confrontation Clause error; and
- Appellate counsel wasn't ineffective for failing to raise IAC error

Speedy Trial

***Betterman v. Montana*, – U.S. –, 136 S.Ct. 1609, 194 L.Ed.2d 723 (2016)** - Ginsburg for a unanimous Court; Thomas concurs, with Alito; Sotomayor concurs

- Question: "Does the Sixth Amendment's speedy trial guarantee apply to the sentencing phase of a criminal prosecution?"
- SCOTUS: Nope. "We hold that the guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges."
- But… for sentencing delays, a defendant can look to "tailored relief" under Due Process clauses of 5th and 14th Amendments

Sufficiency

***Musacchio v. United States*, – U.S. –, 136 U.S. 709, 193 L.Ed.2d 639 (2016)** - Thomas for a unanimous Court

- When you bring a sufficiency of the evidence challenge to a conviction, analyze the evidence against the elements of the charged crime, not against the jury instructions

"In a war - and even in peacetime - heroes are the people who know their jobs and do them."

–Lt. Col. Richard Cole, USAF (Ret.), one of Doolittle's Raiders

Montgomery v. La.

- P. 80
- Opinion Kennedy; Scalia, Thomas and Alito dissented
- Reversed and remanded
- Montgomery was given death sentence in 1963, two weeks past his 17th birthday.
- potentially affects up to 2,300 cases nationwide

- *Miller v. Alabama*, (2012): 8th Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders and requiring judges who sentence defendants under the age of eighteen to take their youth into account and make sure the punishment was appropriate for each individual)

- *Miller* is retroactive in cases on state collateral review because *Miller* announced a new substantive rule.

- Substantive rules of constitutional law include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"

- *Miller* therefore announced a substantive rule of constitutional law, which, like other substantive rules, is retroactive because it " 'necessarily carr[ies] a significant risk that a defendant' "— here, the vast majority of juvenile offenders—" 'faces a punishment that the law cannot impose on him

Trend on Juvenile Punishment

- SCOTUS has continued the trend that defendants under 18 must not necessarily get as severe a punishment as adults for similar crimes.

- I.E., no DP for juveniles who commit murders, no LWOP for juveniles who commit crimes in which the victim is not killed.

- Based upon recognition that children differ from adults in their "diminished culpability and greater prospects for reform..." *Miller*

- Kennedy has written many of the opinions in recent years giving juveniles greater protection.

- *Montgomery* seems to go beyond *Miller* ruling. Holds that LWOP is always unconstitutional for a juvenile unless found to be "irreparably corrupt" or "permanently incorrigible."

Death Penalty

SCOTUS ended 2014-2015 term by upholding Oklahoma's lethal injection protocol. But four Justices dissented from that decision – including Breyer who suggested that the DP itself may be unconstitutional.

During this term, the Court denied review in *Tucker*. Breyer and Ginsburg dissented and observed that if Tucker had "committed the same crime but been tried and sentenced just across the river in" a different jurisdiction, he "would not now be on death row..." They would have granted review of the first question presented by Tucker's petition: "whether the imposition of the death penalty constitutes cruel and unusual punishment in violation of" the Constitution.

Kansas v. Carr (and *Gleason*)

- P. 20
- Scalia Opinion; Sotomayor dissented
- Reversed and remanded
- 2 cases joined together
- Carr brothers brutal kidnapping, rape and murder of 5 people; 2 day testimony of a survivor ("Shocking cases make too much law")

- Both juries told that they should impose a death sentence if they found "unanimously beyond a reasonable doubt" that at least one of the aggravating factors existed and was "not outweighed by any mitigating factors found to exist." No instruction that mitigating need not be BRD.

- Carr brothers argued that joint sentencing hearing to decide if death violated 8th Amendment right to an individualized sentencing determination. SCOTUS dismissed and thought might actually be better.

- Dissent: Too much opinion about what a state might want to do to provide extra protections (i.e., in Ohio capital defendants tried separately unless good cause). "Court risks discouraging States from adopting valuable procedural protections even as a matter of their own state law."

Hurst v. Fla.

- P. 18
- Sotomayor Opinion; Alito dissented
- Reversed and remanded to determine if harmless error

- Florida's capital sentencing scheme violates the 6th Amendment (as did Az.'s in *Ring v. Az.*, 2002).

- Judge made ultimate decision re: DP with "advisory sentence" from jury.

- *Apprendi* applies because any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury.

- Breyer noted in a separate opinion that he believes that the Eighth Amendment's ban on "cruel and unusual punishment" requires a jury, rather than a judge, to decide whether to impose a death sentence.

Lynch v. Az.

- P. 23
- Per Curium; Thomas and Alito dissented
- Reversed and remanded (no briefing or oral arguments).

- When the state urged the jurors to consider future dangerousness in sentencing, and conceded that the only other sentence that he could receive besides the death penalty was life without parole, Lynch was entitled to tell jurors that he was not eligible for parole.

- Dissent: Found "a remarkably aggressive use of our power to review the State's highest courts." Also, concerned that the legislature could change or clemency awarded.

Puerto Rico v. Sanchez Valle

- P. 27
- Kagen Opinion; Breyer and Sotomayor dissented
- Affirmed.
- Defendants sold guns to undercover and were indicted pursuant to PR law. At same time, indicted federally. Pled guilty to federal charges and moved to dismiss the PR charges on DJ.

- Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the same offence ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

- Not applicable when the entities that seek successive prosecution for the same course of conduct are separate sovereigns (state and federal pros. OK; not city and state.) "dual-sovereignty test"

- PR not a separate sovereign because ultimate source of power is the same (US Congress) so does not have independent authority to prosecute someone for the same crime that has been charged in federal court. Not about self-governing authority.

- Ginsburg concurring opinion, Thomas joined, suggested that Court should reconsider permission for multiple prosecutions for the same crime even with separate sovereigns.

PUBLIC OFFICIALS/HOBBS

Ocascio v. United States

- P. 16
- Alito Opinion; Sotomayor and Roberts and Thomas dissented
- Affirmed.
- Police officer and auto repair shop agree to scheme where cop steers cars in accidents to shop for a kickback.

- The Hobbs Act, 18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce..., by robbery or extortion or attempts or conspires so to do...shall be fined under this title or imprisoned not more than twenty years, or both

- "Extortion" means the obtaining of property ***from another***, with his consent...under color of official right.

- *Evans* (1992): "rough equivalent of what we would now describe as 'taking a bribe.'" (Thomas disagrees with *Evans* because extortion means person giving money is victim)

- can a public official be guilty of conspiring with someone to obtain the property of that person?

- SCOTUS: yes, conspiracy law dictates that a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator.

- A defendant must merely reach an agreement with the "specific intent that the underlying crime be committed" by some member of the conspiracy capable of committing it.

- overrules *Brock* (6th Cir. 2007) ("another" means outside the conspiracy)

Taylor v. United States

- P. 78
- Alito Opinion; Thomas dissented
- Affirmed.
- Outlaw gang called the "Southwest Goonz" targeted drug dealers in home invasion robberies- not public corruption

- The Hobbs Act makes it a crime for a person to affect commerce by robbery.

- Commerce element satisfied when theft of marijuana dealer's drugs or proceeds because, even if "purely local activities," it is part of an economic "class of activities" that have a substantial effect on interstate commerce.

McDonnell v. United States

- P. 113
- Roberts unanimous Opinion
- Reversed and remanded with instructions for lower courts to reconsider whether the government's evidence of corruption is strong enough to try him again.
- Charges dismissed by Gov. against the ex-Va. Gov.

- Case about a Va. Businessman seeking favors but unanimous SCOTUS said the case was not about "tawdry tales of Ferraris, Rolexes, and ball gowns." The Court's concern is "with the broader legal implications of the government's boundless interpretation of the federal bribery statute."

OFFICIAL ACT

Convictions:

-conspiracy to commit honest-services wire fraud, 18 U.S.C.S. § 1349

-honest-services wire fraud, 18 U.S.C.S. § 1343

-Hobbs: obtaining property under color of official right, 18 U.S.C.S. § 1951

"official action" 18 U.S.C.S. § 201(a)(3)- "any decision or action ***on*** any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

OFFICIAL ACT

Rejected an interpretation that included any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official's official capacity.

Setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an "official act."

STATUTORY CONSTRUCTION

Lockhart v. United States

- P. 111
- Sotomayor Opinion; Kagan and Breyer dissented
- Affirmed.
- the convicted sex offender lost; 10-year min. sentence and increased max. sentence if D has prior state court conviction relating to aggravated sexual abuse or sexual abuse, adult or child.

"...relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct ***involving a minor or ward***."

"series qualifier rule" (modifies all items in the list of predicate crimes ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct")) vs. "rule of the last antecedent" (modifies only the one item that immediately precedes it ("abusive sexual conduct")).

HABEAS

White v. Wheeler

- P. 60
- Per Curiam; no dissent
- 6th Circuit, reversed again; OK to resolve in favor of state jurors "ambiguous" answers about being able to give "appropriate consideration" to imposing DP.

- AEDPA: state court ruling "lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

- *Witherspoon*: 6th Amendment guarantees of impartial jury confers right to jury not "uncommonly willing to condemn a man to die."

- Also acknowledged State's "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes."

Johnson v. Lee

- P. 49
- Per Curiam; no dissent

Federal habeas courts generally refuse to hear claims defaulted in state court pursuant to an independent and adequate state procedural rule.

"adequate" = firmly established and regularly followed.

No habeas if claimed errors could have been, but were not, raised in direct appeal (*Dixon Bar* in Cal.; but exists everywhere)

Kernan v. Hinojosa

- P. 45
- Roberts Opinion; Thomas dissented.
- 29 years after conviction; habeas granted

- *Batson* challenge- 5 potential black jurors kept off the jury for racial reasons; at least as to 2 of those jurors, that there was no reason but race for excluding them

- extremely fact specific: detailed documents regarding jury selection and strategy regarding black jurors received in public records request

- Proffered reasons for the strikes applied to nonblack panelists who were allowed to serve; other evidence of intent included shifting explanations and misrepresentations of the record.

Foster v. Chatman

- P. 56
- Per Curiam; Sotomayor and Ginsburg dissented.

- When state courts adjudicate the prisoner's federal claim "on the merits," federal habeas review is deferential, rather than de novo, as mandated by the AEDPA.

- Cal. SC's denial of petition was on the merits so 9th Circuit should have reviewed claim through deferential, rather than de novo, review

- Dissent: The Cal. SC not on the merits but affirming of lower court's decision that Petition filed in wrong court.