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# CRIMINAL TRIAL TECHNIQUES & OVI DEFENSE

## OVI Case Law Update

**J. Dean Carro**
**Baker, Dublikar, Beck, Wiley & Matthews**

*Birchfield v. North Dakota*

4th Amendment - BAC (Breath) & Blood Draws

Implied Consent laws if driver refuses to provide breath sample = Suspension

ND / MN - Refusal to Provide breath and blood samples is a crime

Warrantless Seizures

Reasonableness Analysis

Obj./Subj. expectation of privacy

Legit. gov't. interest = prevent drunk driving

Search incident to lawful arrest

Breath = No significant intrusion
Blood = Significant intrusion

Holding- No punishment for refusal to provide blood sample - Refusal to provide breath sample= crime

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## BIRCHFIELD *v.* NORTH DAKOTA

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 14–1468. Argued April 20, 2016—Decided June 23, 2016*

To fight the serious harms inflicted by drunk drivers, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC is typically determined through a direct analysis of a blood sample or by using a machine to measure the amount of alcohol in a person's breath. To help secure drivers' cooperation with such testing, the States have also enacted "implied consent" laws that require drivers to submit to BAC tests. Originally, the penalty for refusing a test was suspension of the motorist's license. Over time, however, States have toughened their drunk-driving laws, imposing harsher penalties on recidivists and drivers with particularly high BAC levels. Because motorists who fear these increased punishments have strong incentives to reject testing, some States, including North Dakota and Minnesota, now make it a crime to refuse to undergo testing. In these cases, all three petitioners were arrested on drunk-driving charges. The state trooper who arrested petitioner Danny Birchfield advised him of his obligation under North Dakota law to undergo BAC testing and told him, as state law requires, that refusing to submit to a blood test could lead to criminal punishment. Birchfield refused to let his blood be drawn and was charged with a misdemeanor violation of the refusal statute. He entered a conditional guilty plea but argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected

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*Together with No. 14–1470, *Bernard* v. *Minnesota*, on certiorari to the Supreme Court of Minnesota, and No. 14–1507, *Beylund* v. *Levi, Director, North Dakota Department of Transportation*, also on certiorari to the Supreme Court of North Dakota. 2 BIRCHFIELD *v. 1*NORTH DAKOTA

his argument, and the State Supreme Court affirmed.

After arresting petitioner William Robert Bernard, Jr., Minnesota police transported him to the station. There, officers read him Minnesota's implied consent advisory, which like North Dakota's informs motorists that it is a crime to refuse to submit to a BAC test. Bernard refused to take a breath test and was charged with test refusal in the first degree. The Minnesota District Court dismissed the charges, concluding that the warrantless breath test was not permitted under the Fourth Amendment. The State Court of Appeals reversed, and the State Supreme Court affirmed.

The officer who arrested petitioner Steve Michael Beylund took him to a nearby hospital. The officer read him North Dakota's implied consent advisory, informing him that test refusal in these circumstances is itself a crime. Beylund agreed to have his blood drawn. The test revealed a BAC level more than three times the legal limit. Beylund's license was suspended for two years after an administrative hearing, and on appeal, the State District Court rejected his argument that his consent to the blood test was coerced by the officer's warning. The State Supreme Court affirmed.

*Held*:

1. The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. Pp. 13–36.

(a) Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment. See *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 616–617; *Schmerber* v. *California*, 384 U. S. 757, 767–768. These searches may nevertheless be exempt from the warrant requirement if they fall within, as relevant here, the exception for searches conducted incident to a lawful arrest. This exception applies categorically, rather than on a case-by-case basis. *Missouri* v. *McNeely*, 569 U. S. ___, ___, n. 3. Pp. 14–16.

(b) The search-incident-to-arrest doctrine has an ancient pedigree that predates the Nation's founding, and no historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches. The mere "fact of the lawful arrest" justifies "a full search of the person." *United States* v. *Robinson*, 414 U. S. 218,

235. The doctrine may also apply in situations that could not have been envisioned when the Fourth Amendment was adopted. In *Riley*

v. *California*, 573 U. S. ___, the Court considered how to apply the doctrine to searches of an arrestee's cell phone. Because founding era guidance was lacking, the Court determined "whether to exempt [the] search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests" Cite as: 579 U. S. ____ (2016)

*Id.*, at ___. The same mode of analysis is proper here because the founding era provides no definitive guidance on whether blood and breath tests should be allowed incident to arrest. Pp. 16–20.
(c) The analysis begins by considering the impact of breath and blood tests on individual privacy interests. Pp. 20–23.
(1) Breath tests do not "implicat[e] significant privacy concerns." *Skinner*, 489 U. S., at 626. The physical intrusion is almost negligible. The tests "do not require piercing the skin" and entail "a minimum of inconvenience." *Id.*, at 625. Requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale "deep lung" air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek, *Maryland* v. *King*, 569 U. S. ___, ___, or scraping underneath a suspect's fingernails, *Cupp* v. *Murphy*, 412 U. S. 291. Breath tests, unlike DNA samples, also yield only a BAC reading and leave no biological sample in the government's possession. Finally, participation in a breath test is not likely to enhance the embarrassment inherent in any arrest. Pp. 20–

22.
(2) The same cannot be said about blood tests. They "require piercing the skin" and extract a part of the subject's body, *Skinner*, *supra*, at 625, and thus are significantly more intrusive than blowing into a tube. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. That prospect could cause anxiety for the person tested. Pp. 22–23.
(d) The analysis next turns to the States' asserted need to obtain BAC readings. Pp. 23–33.(1) The States and the Federal Government have a "paramount interest . . . in preserving [public highway] safety," *Mackey* v. *Montrym*, 443 U. S. 1, 17; and States have a compelling interest in creating "deterrent[s] to drunken driving," a leading cause of traffic fatalities and injuries, *id.*, at 18. Sanctions for refusing to take a BAC test were increased because consequences like license suspension were no longer adequate to persuade the most dangerous offenders to agree to a test that could lead to severe criminal sanctions. By making it a crime to refuse to submit to a BAC test, the laws at issue provide an incentive to cooperate and thus serve a very important function. Pp. 23–25.(2) As for other ways to combat drunk driving, this Court's decisions establish that an arresting officer is not obligated to obtain a warrant before conducting a search incident to arrest simply because there might be adequate time in the particular circumstances to obtain a warrant. The legality of a search incident to arrest must be

judged on the basis of categorical rules. See *e.g., Robinson, supra,* at
235. *McNeely, supra,* at ___, distinguished. Imposition of a warrant requirement for every BAC test would likely swamp courts, given the enormous number of drunk-driving arrests, with little corresponding benefit. And other alternatives—*e.g.,* sobriety checkpoints and ignition interlock systems—are poor substitutes. Pp. 25–30.
(3) Bernard argues that warrantless BAC testing cannot be justified as a search incident to arrest because that doctrine aims to prevent the arrestee from destroying evidence, while the loss of blood alcohol evidence results from the body's metabolism of alcohol, a natural process not controlled by the arrestee. In both instances, however, the State is justifiably concerned that evidence may be lost. The State's general interest in "evidence preservation" or avoiding "the loss of evidence," *Riley, supra,* at ___, readily encompasses the metabolization of alcohol in the blood. Bernard's view finds no support in *Chimel* v. *California,* 395 U. S. 752, 763, *Schmerber,* 384 U. S., at 769, or *McNeely, supra,* at ___. Pp. 30–33.

(e) Because the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Blood tests, however, are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. In instances where blood tests might be preferable—*e.g.,*where substances other than alcohol impair the driver's ability to operate a car safely, or where the subject is unconscious—nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies. Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. No warrant is needed in this situation. Pp. 33–35.

1. Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. Pp. 36–37.
2. These legal conclusions resolve the three present cases. Birchfield was criminally prosecuted for refusing a warrantless blood

draw, and therefore the search that he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. Because there appears to be no other basis for a warrantless test of Birchfield's blood, he was threatened with an unlawful search and unlawfully convicted for refusing that search. Bernard was criminally prosecuted for refusing a warrantless breath test. Because that test was a permissible search incident to his arrest for drunk driving, ,the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it .Beylund submitted to a blood test after police told him that the law required his submission. The North Dakota Supreme Court, which based its conclusion that Beylund's consent was voluntary on the erroneous assumption that the State could compel blood tests, should reevaluate Beylund's consent in light of the partial inaccuracy of the officer's advisory. Pp. 37–38.

No. 14–1468, 2015 ND 6, 858 N. W. 2d 302, reversed and remanded; No. 14–1470, 859 N. W. 2d 762, affirmed; No. 14–1507, 2015 ND 18, 859 N. W. 2d 403, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J, and KENNEDY, BREYER, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

Syllabus

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# SUPREME COURT OF THE UNITED STATES

Syllabus

## JAE LEE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16–327. Argued March 28, 2017—Decided June 23, 2017

Petitioner Jae Lee moved to the United States from South Korea with his parents when he was 13. In the 35 years he has spent in this country, he has never returned to South Korea, nor has he become a U. S. citizen, living instead as a lawful permanent resident. In 2008, federal officials received a tip from a confidential informant that Lee had sold the informant ecstasy and marijuana. After obtaining a warrant, the officials searched Lee's house, where they found drugs ,cash, and a loaded rifle. Lee admitted that the drugs were his, and intent to distribute. Lee retained counsel and entered into plea discussions with the Government. During the plea process, Lee repeatedly asked his attorney whether he would face deportation; his attorney assured him that he would not be deported as a result of pleading guilty. Lee was sentenced to a year and a day in prison. Lee had in fact pleaded guilty to an "aggravated felony" under the Immigration and Nationality Act, 8 U. S. C. §1101(a)(43)(B), so he was, contrary to his attorney's advice, subject to mandatory deportation as a result of that plea. See §1227(a)(2)(A)(iii). When Lee learned of this consequence, he filed a motion to vacate his conviction and sentence arguing that his attorney had provided constitutionally ineffective assistance. At an evidentiary hearing, both Lee and his plea-stage counsel testified that "deportation was the determinative issue" to Lee in deciding whether to accept a plea, and Lee's counsel acknowledged that although Lee's defense to the charge was weak, if he had known Lee would be deported upon pleading guilty he would have advised him to go to trial. A Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated. The District Court, however, denied relief, and 2 JAE LEE *v.* UNITED STATES

the Sixth Circuit affirmed. Applying the two-part test for ineffective assistance claims from *Strickland* v. *Washington*, 466 U. S. 668, the Sixth Circuit concluded that, while the Government conceded that Lee's counsel had performed deficiently, Lee could not show that he was prejudiced by his attorney's erroneous advice.

*Held*: Lee has demonstrated that he was prejudiced by his counsel's erroneous advice. Pp. 5–13.

(a) When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U. S. 52, 59.

Lee contends that he can make this showing because he never would have accepted a guilty plea had he known the result would be deportation. The Government contends that Lee cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to acquittal. Pp. 5–8.

(b) The Government makes two errors in urging the adoption of a *per se rule that a defendant with no viable defense cannot show prejudice* from the denial of his right to trial. First, it forgets that categorical rules are ill suited to an inquiry that demands a "case-by-case examination" of the "totality of the evidence." *Williams* v. *Taylor*, 529 U. S. 362, 391 (internal quotation marks omitted); *Strickland*, 466 U. S., at 695. More fundamentally, it overlooks that the *Hill* v. *Lockhart* inquiry focuses on a defendant's decision making, which may not turn solely on the likelihood of conviction after trial.

The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See *INS v. St. Cyr*, 533 U. S. 289, 322–323. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For Lee, deportation after some time in prison was not meaningfully different from deportation after somewhat less time; he says he accordingly would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial. Pointing to *Strickland*, the Government urges "a defendant has no entitlement to the luck of a lawless decisionmaker " 466 U. S., at 695. That statement, however, was made in the context of discussing the presumption of reliability applied to judicial proceedings, which has no place where, as here, a defendant was deprived of a proceeding altogether. When the inquiry is focused on what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it

would have affected the defendant's decisionmaking. Pp. 8–10.

(c) Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences. In the unusual circumstances of this case, Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation: Both Lee and his attorney testified that "deportation was the determinative issue" to Lee; his responses during his plea colloquy confirmed the importance he placed on deportation,and he had strong connections to the United States while he had no ties to South Korea.

The Government argues that Lee cannot "convince the court that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla* v. *Kentucky since deportation* would almost certainly result from a trial. Unlike the Government, this Court cannot say that it would be irrational for one in Lee's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation. Pp. 10–13.

825 F. 3d 311, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined except as to Part I. GORSUCH, J., took no part in the consideration or decision of the case

OCTOBER TERM, 2016

Syllabus

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# SUPREME COURT OF THE UNITED STATES

Syllabus

## WEAVER *v.* MASSACHUSETTS

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 16–240. Argued April 19, 2017—Decided June 22, 2017

When petitioner was tried in a Massachusetts trial court, the courtroom could not accommodate all the potential jurors. As a result, for two days of jury selection, an officer of the court excluded from the courtroom any member of the public who was not a potential juror, including petitioner's mother and her minister. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. Petitioner was convicted of murder and a related charge. Five years later, he filed a motion for a new trial in state court, arguing, as relevant here, that his attorney had provided ineffective assistance by failing to object to the courtroom closure. The trial court ruled that he was not entitled to relief. The Massachusetts Supreme Judicial Court affirmed in relevant part. Although it recognized that the violation of the right to public trial was a structural error, it rejected petitioner's ineffective-assistance claim because he had not shown prejudice.

*Held*:

1. In the context of a public-trial violation during jury selection where the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial. Pp. 5–14.

(a) This case requires an examination of the proper application of the doctrines of structural error and ineffective assistance of counsel. They are intertwined, because the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error. Pp. 5–10.

(1) Generally, a constitutional error that "did not contribute to the verdict obtained" is deemed harmless, which means the defend

ant is not entitled to reversal. *Chapman* v. *California*, 386 U. S. 18,
24. However, a structural error, which "affect[s] the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U. S. 279, 310, defies harmless error analysis, *id.*, at 309. Thus, when a structural error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm.

There appear to be at least three broad rationales for finding an error to be structural. One is when the right at issue does not protect the defendant from erroneous conviction but instead protects some other interest—like the defendant's right to conduct his own defense—where harm is irrelevant to the basis underlying the right. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4. Another is when the error's effects are simply too hard to measure—*e.g.*, when a defendant is denied the right to select his or her own attorney—making it almost impossible for the government to show that the error was "harmless beyond a reasonable doubt," *Chapman*, *supra*, at 24. Finally, some errors always result in fundamental unfairness, *e.g.*, when an indigent defendant is denied an attorney, see *Gideon* v. *Wainwright*, 372 U. S. 335, 343–345. For purposes of this case, a critical point is that an error can count as structural even if it does not lead to fundamental unfairness in every case. See *Gonzalez-Lopez*, *supra*, at 149, n. 4. Pp. 5–7.

(2) While a public-trial violation counts as structural error, it does not always lead to fundamental unfairness. This Court's opinions teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. See *Waller* v. *Georgia*, 467
U. S. 39; *Presley* v. *Georgia*, 558 U. S. 209, 215–216. The fact that the public-trial right is subject to exceptions suggests that not every public-trial violation results in fundamental unfairness. Indeed, the Court has said that a public-trial violation is structural because of the "difficulty of assessing the effect of the error." *Gonzalez-Lopez*, *supra*, at 149, n. 4. The public-trial right also furthers interests other than protecting the defendant against unjust conviction, including the rights of the press and of the public at large. See, *e.g.*, *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 508–510. Thus, an unlawful closure could take place and yet the trial will still be fundamentally fair from the defendant's standpoint. .Pp. 7–10.

(b) The proper remedy for addressing the violation of the right to a public trial depends on when the objection was raised. If an objection is made at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." *Neder* v. *United States*, 527
U. S. 1, 7. If, however, the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance claim, the defendant generally bears the burden to show deficient performance and that the attorney's error "prejudiced the defense." *Strickland* v. *Washington*, 466 U. S. 668, 687. To demonstrate prejudice in most cases, the defendant must show "a reasonable probability that . . . the result of the proceeding would have been different" but for attorney error. *Id.*, at 694. For the analytical purposes of this case, the Court will assume, as petitioner has requested, that even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the defendant shows that attorney errors rendered the trial fundamentally unfair.

Not every public-trial violation will lead to a fundamentally unfair trial. And the failure to object to that violation does not always deprive the defendant of a reasonable probability of a different outcome. Thus, a defendant raising a public-trial violation via an ineffective-assistance claim must show either a reasonable probability of a different outcome in his or her case or, as assumed here, that the particular violation was so serious as to render the trial fundamentally unfair.

Neither this reasoning nor the holding here calls into question the Court's precedents deeming certain errors structural and requiring reversal because of fundamental unfairness, see *Sullivan* v. *Louisiana*, 508 U. S., at 278–279; *Tumey* v. *Ohio*, 273 U. S. 510, 535; *Vasquez* v. *Hillery*, 474 U. S., at 261–264, or those granting automatic relief to defendants who prevailed on claims of race or gender discrimination in jury selection, *e.g.*, *Batson* v. *Kentucky*, 476 U. S. 79,
100. The errors in each of these cases were preserved and then raised on direct appeal. The reason for placing the burden on the petitioner here, however, derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance claim.

When a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed, but when a defendant first raises the closure in an ineffective-assistance claim, the trial court has no chance to cure the violation. The costs and uncertainties of a new trial are also greater because more time will have elapsed in most cases. And the finality interest is more at risk. See *Strickland*, *supra*, at 693–694. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or in an ineffective-assistance claim. Pp. 10–14.

2. Because petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial. Although potential jurors might have behaved differently had petitioner's family or the public been present, petitioner has offered no evidence suggesting a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to demonstrate fundamental unfairness. His mother and her minister were indeed excluded during jury selection. But his trial was not conducted in secret or in a remote place; closure was limited to the jury *voir dire*; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers, not the judge; venire members who did not become jurors observed the proceedings; and the record of the proceedings indicates no basis for concern, other than the closure itself. There was no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case, *e.g.*, misbehavior by the prosecutor, judge, or any other party. Thus, even though this case comes here on the assumption that the closure was a Sixth Amendment violation, the violation here did not pervade the whole trial or lead to basic unfairness. Pp. 14–16.

474 Mass. 787, 54 N. E. 3d 495, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, SOTOMAYOR, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. ALITO, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined.

OCTOBER TERM, 2016

Syllabus

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# SUPREME COURT OF THE UNITED STATES

Syllabus

## PENA-RODRIGUEZ *v.* COLORADO

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 15–606. Argued October 11, 2016—Decided March 6, 2017

A Colorado jury convicted petitioner Peña-Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H. C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H. C. The court acknowledged H. C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner* v. *United States*, 483 U. S. 107, and *Warger* v. *Shauers*, 574 U. S. ___, both of which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.

*Held*: Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pp. 6–21.

(a) At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Some American jurisdictions adopted a more flexible version of the no-impeachment bar, known as the "Iowa rule," which prevented jurors from testifying only about their own subjective beliefs, thoughts, or motives

during deliberations. An alternative approach, later referred to as the federal approach, permitted an exception only for events extraneous to the deliberative process. This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule ,appearing open to the Iowa rule in *United States* v. *Reid*, 12 How. 361, and *Mattox* v. *United States*, 146 U. S. 140, but rejecting that approach in *McDonald* v. *Pless*, 238 U. S. 264.

The common-law development of the rule reached a milestone in1975 when Congress adopted Federal Rule of Evidence 606(b), which sets out a broad no-impeachment rule, with only limited exceptions. This version of the no-impeachment rule has substantial merit, promoting full and vigorous discussion by jurors and providing considerable assurance that after being discharged they will not be summoned to recount their deliberations or otherwise harassed. The rule gives stability and finality to verdicts. Pp. 6–9.

(b) Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule. At least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations. Three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias.

In addressing the common-law no-impeachment rule, this Court noted the possibility of an exception in the "gravest and most important cases." *United States* v. *Reid*, *supra*, at 366; *McDonald* v. *Pless*, *supra*, at 269. The Court has addressed the question whether the Constitution mandates an exception to Rule 606(b) just twice, rejecting an exception each time. In *Tanner*, where the evidence showed that some jurors were under the influence of drugs and alcohol during the trial, the Court identified "long-recognized and very substantial concerns" supporting the no-impeachment rule. 483
U. S., at 127. The Court also outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony: members of the venire can be examined for impartiality during *voir dire*; juror misconduct may be observed the court, counsel, and court personnel during the trial; and jurors themselves can report misconduct to the court before a verdict is rendered. In *Warger*, a civil case where the evidence indicated that the jury forewoman failed to disclose a pro-defendant bias during *voir dire*, the Court again put substantial reliance on existing safeguards for a fair trial. But the Court also warned, as in *Reid* and *McDonald*, that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at ___–___, n. 3. *Reid*, *McDonald*, and *Warger* left open the question here: whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. Pp. 9–13.

(c) The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184,
192. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309; struck down laws and practices that systematically exclude racial minorities from juries, see, *e.g.*, *Neal* v. *Delaware*, 103 U. S. 370; ruled that no litigant may exclude a prospective juror based on race, see, *e.g.*, *Batson* v. *Kentucky*, 476 U. S. 79; and held that defendants may at times be entitled to ask about racial bias during *voir dire*, see, *e.g.*, *Ham* v. *South Carolina*, 409
U. S. 524. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose* v. *Mitchell*, 443
U. S. 545, 555, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers* v. *Ohio*, 499 U. S. 400, 411. Pp. 13–15.

(d) This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in *McDonald*, *Tanner*, or *Warger*, ,implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the *Tanner* safeguards may be less effective in rooting out racial bias .But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right. Pp. 15–17.

(e) Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote

to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule, and the experience of courts going forward, will inform the proper exercise of trial judge discretion. The Court need not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside and a new trial be granted. Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful *voir dire* and a trial court's instructions to jurors about their duty to review the evidence, deliberate together, and reach a verdict in a fair and impartial way, ,free from bias of any kind. Pp. 17–21.

350 P. 3d 287, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined.

**THE STATE OF OHIO, APPELLANT, *v.* KLEMBUS, APPELLEE.**
**[Cite as *State v. Klembus,* 146 Ohio St.3d 84, 2016-Ohio-1092.]**
*Criminal law—Operating a vehicle while under the influence—Trial court's application of R.C. 4511.19(G)(1)(d) and 2941.1413 to OVI offender with five OVI convictions in preceding 20 years did not violate equal protection—Court of appeals' judgment reversed.*
(No. 2014-1557—Submitted November 17, 2015—Decided March 22, 2016.)
APPEAL from the Court of Appeals for Cuyahoga County,
No. 100068, 2014-Ohio-3227.

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**SYLLABUS OF THE COURT**

The application of R.C. 4511.19(G)(1)(d) and 2941.1413 to offenders with five or more convictions in the preceding 20 years for operating a motor vehicle while under the influence does not violate equal protection

**SLIP OPINION NO. 2016-OHIO-8448**
**THE STATE OF OHIO, APPELLANT, *v.* RICHARDSON, APPELLEE.**
**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Richardson,* Slip Opinion No. 2016-Ohio-8448.]**
*Criminal law—R.C. 4511.19(A)—Operating a vehicle while under the influence—Court of appeals erred in concluding that prosecution failed to present sufficient evidence linking defendant's ingestion of drug of abuse with his impairment—Court of appeals' judgment reversed and cause remanded.*
(Nos. 2015-0629 and 2015-1048—Submitted February 10, 2016—Decided December 29, 2016.)
APPEAL from and CERTIFIED by the Court of Appeals for Montgomery County,
No. 26191, 2015-Ohio-757.

The issue in Richardson was whether an OVI conviction, based on consumption of a drug of abuse, could be supported by testimony of a police officer without scientific evidence. An officer responding to the scene of a rear end collision noticed that the defendant had difficulty lighting a cigarette, had difficulty putting his truck in park, had slurred speech, and had difficulty exiting the vehicle. The defendant failed the field sobriety tests but refused to submit to a blood test. At a bench trial, the state offered the testimony of the other person involved in the rear end collision and the attending officer. The defendant testified on his own behalf and while admitting that he had a prescription for hydrocodone acetaminophen, denied that he was currently under the influence of the medication at the time of the accident and furthermore that he no longer suffered negative side effects from taking the medication. While the defendant offered medical testimony as to an alternative theory of the effect of the medication on him, the state did not offer any scientific evidence.

The Supreme Court found that the certified question was not a true conflict and therefore turned to the state's proposition of law. That question was whether a conviction was supported by sufficient evidence in the absence of scientific evidence. At trial the defendant's admissions to taking the drug of abuse were admitted as well as the officer's testimony of what he observed after the accident. Since the officer was experienced and well-trained, his testimony supported the conviction and the conviction was affirmed.

Jae Lee v. United States (2017)

Ineffective assistance of counsel in a guilty plea setting

Strickland v. Washington(1984)defendant with burden to prove both deficient performance and prejudice.

Hill v. Lockhart(1985) – D must show a reasonable probability that but for ineffectiveness the D would not have pled guilty and would have gone to trial.

Padilla v. Kentucky(2010) – noncitizen must be informed of repercussions of guilty plea relative to immigration status.

Lafler v. Cooper/Missouri v. Frye(2012) – the right to effective assistance of counsel extends to all critical stages including plea-bargaining and entering of a guilty plea.

Performance prong – government conceded attorney gave incorrect information about the effect of a plea on the clients immigration status. Since he pled to an aggravated felony there was mandatory deportation.

Prejudice prong-even with no defense, absent the improper advice defendant would have chosen trial. Prejudice is established. Even a small chance of success, however improbable allows the defendant to establish prejudice.

Weaver v. Massachusetts (2017)

Necessary to object to closure of courtroom to preserve public trial right.

Ineffective assistance of counsel v. structural error

Arizona v.Fulminante(1991)-trial error= error that can be evaluated and determined based upon all of the evidence presented. Subject to harmless error.

Structural error= error that affects the fact-finding integrity of the judicial process. Not subject to harmless error.

Structural error,1) a right that protects an independent interest of the defendant(right to self representation)

2) the denial of the right is impossible to measure(right to select own attorney)

3) the right to fundamental fairness is violated(right to counsel for an indigent felon).

Right to public trial violation, if raised on direct review per an objection may constitute automatic reversal.

Right to public trial violation, if not preserved requires proof of prejudice.

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Peña – Rodriguez v. Colorado(2017)

Aliunde rule, which generally prevents impeachment of a verdict by a juror may be overcome depending upon the nature of the information.

History of non-impeachment rule.

Encourages full consideration of views and evidence by all jurors.

Importance of removing racial prejudice from the administration of justice. Overrides desire for sanctity of jury verdict process.

Must be strong showing of overt racial bias casting serious doubt on fairness/impartiality of the jury's deliberation and subsequent verdict. Racial animus was a significant motivating factor in the juror's vote. Subject to trial court's discretion.

Cleveland v. Oles (2017)

Whether a suspect in a traffic stop is in custody for purposes of Miranda is a question of the totality of the circumstances. Placement in a police cruiser is one factor.

Facts-D subject to proper traffic stop, officer detected alcohol order, defendant moving with difficulty, placed in cruiser, admitted alcohol consumption, exit the vehicle failed field sobriety tests.

Miranda – applies in custodial interrogation setting.Offsets coercive atmosphere of incommunicado setting.

Custodial – objective person would not feel free to terminate and leave.

Interrogation – questions or functional equivalent of questions.

Berkemer. McCarty(1984) – valid traffic stop followed by roadside questioning does not automatically trigger the need for Miranda. In public questioning, short-term,

frequent contact between police and public, is not incommunicado setting.

Totality of the circumstances – questioning in the front seat alone does not constitute custodial interrogation. Factors to consider, whether the intrusion is minimal, whether the questioning and detention are brief, and whether the interaction is nonthreatening or non-intimidating.

Holding – not a custodial setting therefore no Miranda requirement.

State v. Klembus(2016)

No equal protection violation for enhancement of DUI with five or more convictions in the past 20 years.

Facts – 2012 OVI charge, 2008, 2004, 2007, 1997 and 1992 OVI convictions.

Equal protection analysis under Ohio and federal constitutions are identical.

Strict scrutiny – suspect classification or a fundamental in interest.

Rational basis review – all other situations.

Driving is not a constitutional right but rather a privilege.

Government has a valid interest in preventing recidivism. Constitutes a rational purpose and therefore the statute is constitutional.

State v. Richardson(2016)

OVI conviction is proper, when testimony of an experienced police officer is offered establishing the effect of a drug of abuse even in the absence of scientific testimony.

Facts – D had a rear end collision with a car stopped at a traffic light, slurred speech, difficulty performing simple physical activities, failed field sobriety tests.

Suspected drug hydrocodone acetaminophen.

Certified conflict question/difference between sufficiency of the evidence and the manifest weight of the evidence. Sufficiency – constitutional challenge, evidence construed in favor of the state and the verdict, does not require unanimous appellate decision, if established retrial barred.

Manifest weight of the evidence – state constitutional issue, Court of Appeals acts as 13$^{th}$ juror, and multiple factors considered, retrial is not barred.

Sufficiency claim here – if the evidence is believed it supported the verdict as a matter of law. The officer was experienced and offered testimony that the driver was under the influence of a drug of abuse. The drug here is categorized as a drug of abuse, therefore conviction was proper. Defendant admitted taking pain medication. Other circumstances suggested impairment. Expert testimony not necessary.