Appellate Court Decisions - Week of 2/19/13

Note: Anything that has "OVERVIEW" in front of it is the Lexis summary of a case.

First Appellate District of Ohio

***State v. Robbins*, Appeal No. C-120107, Trial No. B-1003748**

***Miranda*: Sentencing: Postrelease Control**

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120107_02222013.pdf

Only three years of postrelease control on a felony of the second degree are mandatory. It is error for a trial court to fail to address the issue of court costs at sentencing and to fail to make the appropriate order in its judgment entry. It is also error for a trial court not to make findings before imposing consecutive sentences.

Summary from the First District:

In a trial for aggravated murder, murder and felonious assault, the trial court did not err in denying the defendant's motion to suppress statements made following his arrest where the totality of the circumstances demonstrated that the defendant had voluntarily waived his right to remain silent.

The trial court did not err in notifying the defendant about postrelease control where the defendant had been found guilty of felonious assault in addition to murder, but the court erred in notifying the defendant that he was subject to five years of postrelease control because three years of postrelease control was required for a second-degree felony.

The trial court erred in failing to address court costs when sentencing the defendant.

The trial court erred in imposing consecutive sentences without first having made the statutorily mandated findings; therefore, the sentences are contrary to law, and the cause must be remanded for resentencing.

Second District Court of Appeals

***State v. Flemming*, C.A. Case No. 2012 CA 59, T.C. No. 12CR118**

Postrelease Control: Search and Seizure

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-503.pdf

A parole officer cannot conduct a warrantless search of the residence of someone on postrelease control, even in good faith and despite the fact that the postrelease control agreement allowed him to do so, when the defendant was not properly placed on postrelease control.

Mr. Fleming was indicted on three counts of trafficking in drugs (R.C. 2925.03(A)(2)), three counts of possession of drugs (R.C. 2925.11(A)), and two counts of having a weapon while under disability (R.C. 2923.13). Mr. Fleming filed a motion to suppress which was granted, and the State appealed.

Mr. Fleming was convicted in 2003 of aggravated burglary (R.C. 2911.11) and possession drugs (R.C. 2925.11). Mr. Fleming served a seven-year sentence. At the sentencing for those convictions, the trial court notified him that "post release control is mandatory in this case up to a maximum of five years."

Back to the trafficking, possession, and weapons under disability charges, they came about when his parole officer received information that Mr. Fleming was not living at the location his was placed, and that Mr. Fleming had been involved in a shooting. Based on that information, and because Mr. Fleming, as part of his postrelease control, agreed to allow parole officers to conduct warrantless searches of his residence, etc., the parole officer went to the place where Mr. Fleming was staying and searched it.

During his search of the location where Mr. Fleming was staying, the parole officer found a gun and a powder he believed to be cocaine.

The Second District held that the trial court was correct to suppress the gun and the powder because the trial judge never placed him on postrelease control nor mentioned postrelease control at the sentencing hearing. Postrelease control was mentioned at the change of plea hearing and in the sentencing entry, but both times the "up to" language was used when it instead should have said the mandatory amount of time. Because Mr. Fleming was never put on postrelease control, he had not agreed to warrantless searches and the search of his him should have been suppressed.

Fourth District Court of Appeals

***State v. Reid*, Case No. 12CA3**

OVI: Intoxilyzer 8000: Challenging the Machine

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/4/2013/2013-ohio-562.pdf

Under *Vega*, the Intoxilyzer 8000 cannot be challenged through a "general attack." It is possible to attack a "specific testing procedure," but the Furth District was unable/declined to determine the difference between the two types of attacks.

This is an appeal by the State of a Circleville Municipal Court order to exclude Intoxilyzer 8000 test results from evidence at Ms. Reid's trial for operating a motor vehicle with a prohibited breath-alcohol concentration (4511.19(A)(1)(h)).

Before trial, Ms. Reid moved to suppress the breath test results, arguing that the Intoxilyzer 8000 is not a proven, reliable method to accurately detect breath-alcohol concentration. The trial court held that it would permit the state to introduce the test results if it could demonstrate the Intoxilyzer 8000's reliability. After another hearing, the trial court determined that the state failed to show that the Intoxilyzer 8000 is a reliable breath testing instrument.

The Fourth District points out in its opinion that "[s]ince Vega [12 Ohio St.3d 185 1984], courts have agreed that a defendant may not challenge the general reliability of an [Ohio Department of Health]-approved chemical analysis technique or method to detect a defendant's bodily alcohol concentration." However, the Fourth District said, "A close reading of Vega arguably leaves room for debate about whether a trial court must admit Intoxilyzer 8000 results into evidence." While general attacks on the machine are not allowed, *Vega* states that an "accused may attack the reliability of the specific testing procedure."

The Fourth District was unable to determine the difference between a "general attack" and attacking a "specific testing procedure." It chose to stick with previous authority and hold that the exclusion of the Intoxilyzer 8000 results was erroneous. It did, however, urge the Supreme Court of Ohio to reevaluate *Vega* to end the uncertainty surrounding the Intoxilyzer 8000. Until then, however, the Court said it will continue to follow *Vega*.

Ninth District Court of Appeals

***State v. Goode*, C.A. No. 26320, Trial No. 11 CRB 10642**

R.C. 2905.05(A): Child Enticement: Constitutionality

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/9/2013/2013-ohio-556.pdf

Ohio's child enticement statute, R.C. 2905.05, is unconstitutionally overbroad.

Mr. Goode was convicted of one count of child enticement under R.C. 2905.05. On appeal, he argued that R.C. 2905.05(A) was unconstitutionally overbroad and the Ninth District agreed. Specifically, it said, "[b]ecause there is no requirement that a person have ill-intent when asking the child to accompany him or her, R.C. 2905.05(A) prohibits a wide variety of speech and association far beyond the statute's purpose of safeguarding children." The Court also said it is "unable to conclude that R.C. 2905.05(C) saves the statute from being overbroad" because "it still would not protect a child asking another child to go to an after-school event or on a bike ride."

The cases cited to support this decision include:

- *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157 (2d Dist.)
- *State v. Romage*, 10th Dist. No. 11AP-822, 2012_ohio-3318, ¶ 10
- *Cleveland v. Cieslak*, 8th Dist. No. 92017, 2009-Ohio-4035, ¶ 12-16

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

***United States v. Shaw*, No. 11-6433 (Decided Feb. 21, 2013)**

Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/13a0048p-06.pdf

Search and Seizure

In a situation in which police officers had a search warrant to search the home at a certain address, and there was no home with that address on the front, but rather two homes with the same numbers – close the number being sought out – on their fronts on opposite sides of the street, it was unreasonable for the officers to simply go to the occupied house, represent that they had a warrant for that address, and then search that address. (This is especially true because they managed to guess the wrong house.)

Memphis Police Officers Cheirs and Robinson were trying to serve an arrest warrant on Phyllis Brown at 3171 Hendricks Avenue. When they got to Hendricks Avenue, there was no house with a 3171 address. They did, however, find two houses, on opposite sides of the street, with a 3170 address. Rather than determine which side of the street had odd-numbered address, checking city records, checking on the internet, or simply asking someone, they decided to just go to the one house of the two that was occupied.

When Officer Cheirs knocked on the door, a woman answered and then shut the door. Officer Robinson went to the back of the house and Officer Cheirs knocked again. The woman eventually opened the door, but it took 7 or 8 minutes. Officer Cheirs did not ask what the home's address was, if Phyllis Brown lived there, or if they were on the odd-numbered side of the street. Instead, Officer Cheirs told the woman he had a warrant "for this address." This was not true, as he had a warrant for 3171 Hendricks, not 3170.

The woman had no reason to doubt the officer's statement, so she let the officers inside. There was a problem, however – the home was that of Brown's neighbor, Steven Shaw. Upon entering, the officers did a protective sweep of the house. During the sweep, the officers found a large amount of cocaine. The officers arrested Shaw and he was charged with several drug-dealing and drug-possession offenses.

The district court denied Shaw's motion to suppress the drugs. He pled guilty to distributing cocaine but reserved his right to appeal the suppression ruling.

This situation raises two Fourth Amendment questions: "Did the officers permissibly enter the house? And did they permissibly stay there long enough to see the cocaine?"

Regarding the first question, the Sixth Circuit said the answer was no, as the Fourth Amendment prohibits "unreasonable searches and seizures" and this search was

unreasonable. The officers gave five potential reasons for entering Shaw's house to serve the warrant: (1) This house was occupied, the other wasn't; (2) a woman answered the door, and Phyllis Brown is a woman; (3) the woman closed the door upon first seeing them; (4) the officers saw scales in the house; and (5) the officers had a fifty-fifty chance of being right, and that alone allowed them to take this approach. The Sixth Circuit said none of these justifications was reasonable, either singularly or cumulatively.

Based on that, there was no need to answer the second question, so the Sixth Circuit reversed the district court's contrary Fourth Amendment decisions and remanded the case for further proceedings.

Supreme Court of the United States

***Florida v. Harris*, No. 11-817, 2013 U.S. LEXIS 1121, 568 U.S. ___ (2013)**

Search and Seizure: Probable Cause: Dog Drug Sniffs

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-817_5if6.pdf

A drug-sniffing police dog in Florida gave false positives on the vehicle of the same person in two separate incidents. The Florida Supreme Court held that the officer lacked probable cause, overturned the man's conviction, and created a strict evidentiary checklist to assess a drug-detection dog's reliability for determining probable cause.

The U.S. Supreme Court overturned the Florida Supreme Court and upheld the man's conviction. It held that probable cause is not to be determined by strict evidentiary checklists, but rather a totality of the circumstances standard. Furthermore, the U.S. Supreme Court held that the dog's performance in controlled settings is the more reliable way to test a dog's reliability, not its performance in the field – though that may have some relevance. Defendants, it said, should have the opportunity to contest the dog at a short probable cause hearing, and the courts should be able to weigh the competing evidence to determine the dog's reliability and probable cause.

In this case, the dog's reliability was upheld because it had gone through extensive training and the defense did not challenge the dog's training – instead, it challenged the dog's field record. The result of this case is that in challenging a dog's reliability, the better method is to attack it and its handler's training, not as much its field record (though it's not irrelevant). I don't believe anything has changed regarding probable cause as that aspect is Florida-specific here, but the Supreme Court has indicated the proper way to challenge a dog's reliability and probable cause anywhere.

Syllabus from the U.S. Supreme Court:

Officer Wheetley pulled over respondent Harris for a routine traffic stop. Observing Harris's nervousness and an open beer can, Wheetley sought consent to search Harris's truck. When Harris refused, Wheetley executed a sniff test with his trained narcotics dog, Aldo. The dog alerted at the driver's-side door handle, leading Wheetley to conclude that he had probable cause for a search. That search turned up nothing Aldo was trained to detect, but did reveal pseudoephedrine and other ingredients for manufacturing methamphetamine. Harris was arrested and charged with illegal possession of those ingredients. In a subsequent stop while Harris was out on bail, Aldo again alerted on Harris's truck but nothing of interest was found. At a suppression hearing, Wheetley testified about his and Aldo's extensive training in drug detection. Harris's attorney did not contest the quality of that training, focusing instead on Aldo's certification and performance in the field, particularly in the two stops of Harris's truck. The trial court denied the motion to suppress, but the Florida Supreme Court reversed. It held that a wide array of evidence was always necessary to establish probable cause, including field-performance records showing how many times the dog has falsely alerted. If an officer like Wheetley failed to keep such records, he could never have probable cause to think the dog a reliable indicator of drugs.

***Held*:** Because training and testing records supported Aldo's reliability in detecting drugs and Harris failed to undermine that evidence, Wheetley had probable cause to search Harris's truck. Pp. 5-11.

(a) In testing whether an officer has probable cause to conduct a search, all that is required is the kind of "fair probability" on which "reasonable and prudent [people] act." *Illinois* v. *Gates*, 462 U. S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527. To evaluate whether the State has met this practical and common-sensical standard, this Court has consistently looked to the totality of the circumstances and rejected rigid rules, bright-line tests, and mechanistic inquiries. *Ibid.*

The Florida Supreme Court flouted this established approach by creating a strict evidentiary checklist to assess a drug-detection dog's reliability. Requiring the State to introduce comprehensive documentation of the dog's prior hits and misses in the field, and holding that absent field records will preclude a finding of probable cause no matter how much other proof the State offers, is the antithesis of a totality-of-the-circumstances approach. This is made worse by the State Supreme Court's treatment of field-performance records as the evidentiary gold standard when, in fact, such data may not capture a dog's false negatives or may markedly overstate a dog's false positives. Such inaccuracies do not taint records of a dog's performance in standard training and certification settings, making that performance a better measure of a dog's reliability. Field records may sometimes be relevant, but the court should evaluate all the evidence, and should not prescribe an inflexible set of requirements.

Under the correct approach, a probable-cause hearing focusing on a dog's alert should proceed much like any other, with the court allowing the parties to make their best case and evaluating the totality of the circumstances. If the State has produced proof from

controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, the court should find probable cause. But a defendant must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant may contest training or testing standards as flawed or too lax, or raise an issue regarding the particular alert. The court should then consider all the evidence and apply the usual test for probable cause—whether all the facts surrounding the alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. Pp. 5-9.

(b) The record in this case amply supported the trial court's determination that Aldo's alert gave Wheetley probable cause to search the truck. The State introduced substantial evidence of Aldo's training and his proficiency in finding drugs. Harris declined to challenge any aspect of that training or testing in the trial court, and the Court does not consider such arguments when they are presented for this first time in this Court. Harris principally relied below on Wheetley's failure to find any substance that Aldo was trained to detect. That infers too much from the failure of a particular alert to lead to drugs, and did not rebut the State's evidence from recent training and testing. Pp. 9-11.

***Bailey v. United States*, No. 11-770, 2013 U.S. LEXIS 1075, 568 U.S. ___ (2013)**

Search and Seizure: *Michigan v. Summers*: Detention incident to the execution of a search warrant

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-770_j4ek.pdf

Police were about to search a basement apartment when two men left the gated area above the apartment. The detectives waited for the men to leave, followed them for a mile, then stopped the car. In patting down one of the men, police found keys. The man, Bailey, said he lived in the apartment, then later denied living there. The men were handcuffed and taken back to the apartment, where the other police had already executed their search warrant and found a gun and illicit drugs. After the arrest, tested Bailey's keys on the door and one worked.

At trial, Bailey's motion to suppress the key and the statements he made when stopped was denied. The Second Circuit affirmed the denial of the motion to suppress, finding that *Michigan v. Summers*, 452 U.S. 692 justified Bailey's detention as incident to the execution to the execution of a search warrant.

The U.S. Supreme Court reversed and remanded the decision of the Second Circuit, holding that the rule in *Summers* is "limited to the immediate vicinity of the premises to be searched and does not apply here, where Bailey was detained at a point beyond and reasonable understanding of the

immediate vicinity of the premises in question." In particular, the Court said that none of the three important law enforcement interests that, together, justify detention – officer safety, facilitation of the completion of the search, and preventing flight – apply "with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched. And each is also insufficient, on its own, to justify an expansion of the rule in *Summers* to permit the detention of a former occupant, wherever he may be found away from the scene of the search."

Note: This does not prevent people who have left a place about to be searched by police to be stopped and searched under *Terry*, or probable cause, if the police have reason to do so.

Syllabus from the U.S. Supreme Court:

While police were preparing to execute a warrant to search a basement apartment for a handgun, detectives conducting surveillance in an unmarked car outside the apartment saw two men—later identified as petitioner Chunon Bailey and Bryant Middleton—leave the gated area above the apartment, get in a car, and drive away. The detectives waited for the men to leave and then followed the car approximately a mile before stopping it. They found keys during a patdown search of Bailey, who initially said that he resided in the apartment but later denied it when informed of the search. Both men were handcuffed and driven in a patrol car to the apartment, where the search team had already found a gun and illicit drugs. After arresting the men, police discovered that one of Bailey's keys unlocked the apartment's door.

At trial, the District Court denied Bailey's motion to suppress the apartment key and the statements he made to the detectives when stopped, holding that Bailey's detention was justified under *Michigan* v. *Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340, as a detention incident to the execution of a search warrant, and, in the alternative, that the detention was supported by reasonable suspicion under *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. Bailey was convicted. The Second Circuit affirmed denial of the suppression motion. Finding that *Summers*authorized Bailey's detention, it did not address the alternative *Terry* holding.

***Held*:** The rule in *Summers* is limited to the immediate vicinity of the premises to be searched and does not apply here, where Bailey was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question. Pp. 4-15.

(a) The *Summers* rule permits officers executing a search warrant "to detain the occupants of the premises while a proper search is conducted," 452 U.S., at 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340, even when there is no particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers, *Muehler* v. *Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299. Detention is permitted "because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." *Id.*, at 98, 125 S. Ct.

1465, 161 L. Ed. 2d 299. In *Summers* and later cases the detained occupants were found within or immediately outside the residence being searched. Here, however, petitioner left the apartment before the search began and was detained nearly a mile away. Pp. 4-6.

(b) In *Summers,* the Court recognized three important law enforcement interests that, taken together, justify detaining an occupant who is on the premises during the search warrant's execution, 452 U.S., at 702-703, 101 S. Ct. 2587, 69 L. Ed. 2d 340. The first, officer safety, requires officers to secure the premises, which may include detaining current occupants so the officers can search without fear that the occupants will become disruptive, dangerous, or otherwise frustrate the search. If an occupant returns home during the search, officers can mitigate the risk by taking routine precautions. Here, however, Bailey posed little risk to the officers at the scene after he left the premises, apparently without knowledge of the search. Had he returned, he could have been apprehended and detained under *Summers*. Were police to have the authority to detain persons away from the premises, the authority to detain incident to the execution of a search warrant would reach beyond the rationale of ensuring the integrity of the search by detaining those who are on the scene. As for the Second Circuit's additional concerns, if officers believe that it would be dangerous to detain a departing individual in front of a residence, they are not required to stop him; and if officers have reasonable suspicion of criminal activity, they can instead rely on *Terry*. The risk that a departing occupant might alert those still inside the residence is also an insufficient safety rationale for expanding the detention authority beyond the immediate vicinity of the premises to be searched.

The second law enforcement interest is the facilitation of the completion of the search. Unrestrained occupants can hide or destroy evidence, seek to distract the officers, or simply get in the way. But a general interest in avoiding obstruction of a search cannot justify detention beyond the vicinity of the premises. Occupants who are kept from leaving may assist the officers by opening locked doors or containers in order to avoid the use of force that can damage property or delay completion of the search. But this justification must be confined to persons on site as the search warrant is executed and so in a position to observe the progression of the search.

The third interest is the interest in preventing flight, which also serves to preserve the integrity of the search. If officers are concerned about flight in the event incriminating evidence is found, they might rush the search, causing unnecessary damage or compromising its careful execution. The need to prevent flight, however, if unbounded, might be used to argue for detention of any regular occupant regardless of his or her location at the time of the search, *e.g.*, detaining a suspect 10 miles away, ready to board a plane. Even if the detention of a former occupant away from the premises could facilitate a later arrest if incriminating evidence is discovered, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290.

In sum, none of the three law enforcement interests identified in *Summers* applies with the same or similar force to the detention of recent occupants beyond the immediate

vicinity of the premises to be searched. And each is also insufficient, on its own, to justify an expansion of the rule in *Summers*to permit the detention of a former occupant, wherever he may be found away from the scene of the search. Pp. 6-12.

(c) As recognized **[*6]** in *Summers,* the detention of a current occupant "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant," 452 U.S., at 703, 101 S. Ct. 2587, 69 L. Ed. 2d 340, but an arrest of an individual away from his home involves an additional level of intrusiveness. A public detention, even if merely incident to a search, will resemble a full-fledged arrest and can involve the indignity of a compelled transfer back to the premises. P. 12.

(d) Limiting the rule in *Summers* to the area within which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Because petitioner was detained at a point beyond any reasonable understanding of immediate vicinity, there is no need to further define that term here. Since detention is justified by the interests in executing a safe and efficient search, the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place. Pp. 13-15.

(e) The question whether stopping petitioner was lawful under *Terry* remains open on remand. P. 15.

***Chaidez v. United States,* No. 11-820, 2013 U.S. LEXIS 1613, 568 U.S. __ (2013)**

Immigration: Guilty Pleas: Deportation Risks: Defense Attorneys: Informing Clients

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-820_j426.pdf

The U.S. Supreme Court's decision in *Padilla v. Kentucky*, "that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation risks of guilty pleas" ... "does not apply retroactively to cases already final on direct review."

Syllabus from the U.S. Supreme Court:

Immigration officials initiated removal proceedings against petitioner Chaidez in 2009 upon learning that she had pleaded guilty to mail fraud in 2004. To avoid removal, she sought to overturn that conviction by filing a petition for a writ of *coram nobis*, contending that her former attorney's failure to advise her of the guilty plea's immigration consequences constituted ineffective assistance of counsel under the Sixth Amendment. While her petition was pending, this Court held in *Padilla* v. *Kentucky*, 559 U. S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 295, that the Sixth

Amendment requires defense attorneys to inform non-citizen clients of the deportation risks of guilty pleas. The District Court vacated Chaidez's conviction, determining that *Padilla* did not announce a "new rule" under *Teague* v. *Lane*, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334, and thus applied to Chaidez's case. The Seventh Circuit reversed, holding that *Padilla* had declared a new rule and should not apply in a challenge to a final conviction.

***Held*:** *Padilla* does not apply retroactively to cases already final on direct review. Pp. 3-15.

(a) Under *Teague,* a person whose conviction is already final may not benefit from a new rule of criminal procedure on collateral review. A "case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague,* 489 U. S., at 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334. And a holding is not so dictated unless it would have been "apparent to all reasonable jurists." *Lambrix* v.*Singletary,* 520 U. S. 518, 527-528, 117 S. Ct. 1517, 137 L. Ed. 2d 771. At the same time, a case does not "announce a new rule, [when] it [is] merely an application of the principle that governed" a prior decision to a different set of facts. *Teague*, 489 U. S., at 307, 109 S. Ct. 1060, 103 L. Ed. 2d 334. Thus, garden-variety applications of the test in *Strickland* v. *Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, for assessing ineffective assistance claims do not produce new rules, *id.,* at 687-688, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

But *Padilla* did more than just apply *Strickland*'s general standard to yet another factual situation. Before deciding if failing to inform a client about the risk of deportation "fell below [*Strickland*'s] objective standard of reasonableness," 466 U. S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *Padilla* first considered the threshold question whether advice about deportation was "categorically removed" from the scope of the Sixth Amendment right to counsel because it involved only a "collateral consequence" of a conviction, rather than a component of a criminal sentence, 559 U. S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284. That is, prior to asking *how* the *Strickland* test applied, *Padilla* asked *whether* that test applied at all.

That preliminary question came to the Court unsettled. *Hill* v. *Lockhart*, 474 U. S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203, had explicitly left open whether the Sixth Amendment right extends to collateral consequences. That left the issue to the state and lower federal courts, and they almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation. *Padilla*'s contrary ruling thus answered an open question about the Sixth Amendment's reach, in a way that altered the law of most jurisdictions. In so doing, *Padilla* broke new ground and imposed a new obligation. Pp. 3-11.

(b) Chaidez argues that *Padilla* did no more than apply *Strickland* to a new set of facts. But she ignores that *Padilla* had to develop new law to determine that *Strickland* applied at all. The few lower court decisions she cites held only that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead

his client as to any important matter. Those rulings do not apply to her case, and they do not show that all reasonable judges thought that lawyers had to advise their clients about deportation risks. Neither does *INS* v. *St. Cyr*, 533 U. S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347, have any relevance here. In saying that a reasonably competent lawyer would tell a non-citizen client about a guilty plea's deportation consequences, *St. Cyr* did not determine that the Sixth Amendment requires a lawyer to provide such information. It took *Padilla* to decide that question. Pp. 11-15.

***Evans v. Michigan*, No. 11-1327, 2013 U.S. LEXIS 1613, 568 U.S. ___ (2013)**

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-1327_7648.pdf

Directed Verdict: Double Jeopardy

The trial court granted the defendant's motion for a directed verdict in an arson trial after the State of Michigan rested because it believed the state had failed to prove an "element" of the offense that was not actually an element. The U.S. Supreme Court held that granting a directed verdict is an acquittal, and therefore double jeopardy bars retrial even in a case like this where the court's decision was based on an erroneous foundation. (*See also Fong Foo v. United States*, 369 U.S. 141, 143)

Syllabus from the U.S. Supreme Court:

After the State of Michigan rested its case at petitioner Evans' arson trial, the court granted Evans' motion for a directed verdict of acquittal, concluding that the State had failed to prove that the burned building was not a dwelling, a fact the court mistakenly believed was an "element" of the statutory offense. The State Court of Appeals reversed and remanded for retrial. In affirming, the State Supreme Court held that a directed verdict based on an error of law that did not resolve a factual element of the charged offense was not an acquittal for double jeopardy purposes.

***Held*:** The Double Jeopardy Clause bars retrial for Evans' offense. Pp. 4-17.

(a) Retrial following a court-decreed acquittal is barred, even if the acquittal is "based upon an egregiously erroneous foundation," *Fong Foo* v. *United States*, 369 U. S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629, such as an erroneous decision to exclude evidence, *Sanabria* v. *United States*, 437 U. S. 54, 68-69, 98 S. Ct. 2170, 57 L. Ed. 2d 43; a mistaken understanding of what evidence would suffice to sustain a conviction, *Smith* v.*Massachusetts*, 543 U. S. 462, 473, 125 S. Ct. 1129, 160 L. Ed. 2d 914; or a "misconstruction of the statute" defining the requirements to convict, *Arizona* v. *Rumsey*, 467 U. S. 203, 211, 104 S. Ct. 2305, 81 L. Ed. 2d 164. Most relevant here, an acquittal encompasses any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 98, 98 S. Ct. 2187, 57 L. Ed. 2d 65; *Burks* v. *United States*, 437 U. S. 1, 10, 98 S. Ct. 2141, 57 L. Ed. 2d 1. In contrast to procedural rulings, which lead to dismissals

or mistrials on a basis unrelated to factual guilt or innocence, acquittals are substantive rulings that conclude proceedings absolutely, and thus raise significant double jeopardy concerns. *Scott,* 437 U. S., at 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65. Here, the trial court clearly "evaluated the [State's] evidence and determined that it was legally insufficient to sustain a conviction." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572, 97 S. Ct. 1349, 51 L. Ed. 2d 642. Evans' acquittal was the product of an erroneous interpretation of governing legal principles, but that error affects only the accuracy of the determination to acquit, not its essential character. See *Scott*, 437 U. S., at 98, 98 S. Ct. 2187, 57 L. Ed. 2d 65. Pp. 4-6.

(b) The State Supreme Court attempted to distinguish this Court's cases on the ground that they involved "the sufficiency of the factual elements of the charged offense," while Evans' case concerned "an error of law unrelated to [his] guilt or innocence," but this Court perceives no such difference. This case, like the Court's previous ones, involves an antecedent legal error that led to an acquittal because the State failed to prove a fact it was not actually required to prove. The State and the United States claim that only when an actual element of the offense is resolved can there be an acquittal of the offense, but Evans' verdict was based on something that was concededly not an element. Their argument reads *Martin Linen* too narrowly and is inconsistent with this Court's decisions since then. *Martin Linen* focused on the significance of the District Court's acquittal based on a nonculpability determination, and its result did not depend on defining the "elements" of the offense. Culpability is the touchstone, not whether any particular elements were resolved or whether the nonculpability determination was legally correct. *Scott*, 437 U. S., at 98, 98 S. Ct. 2187, 57 L. Ed. 2d 65. Pp. 7-11.

(c) Additional arguments the State and the United States raise in support of the lower court's distinction are unpersuasive. The State claims that unless an actual element of the offense is resolved by the trial court, the only way to know whether the court's ruling was an "acquittal" is to rely upon the court's label, which would wrongly allow the form of the trial court's action to control. However, the instant decision turns not on the form of the trial court's action but on whether that action serves substantive or procedural purposes. The State and the United States argue that if the grounds for an acquittal are untethered from the actual elements of the offense, a trial court could issue an unreviewable order finding insufficient evidence to convict for any reason at all. But this Court presumes that courts exercise their duties in good faith. The State also suggests that Evans should not be heard to complain when a trial-court error that he induced is corrected and the State wishes to retry him, but most midtrial acquittals result from defense motions. The United States claims that, under *Lee* v. *United States*, 432 U. S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80, Evans was required to ask the court to resolve whether nondwelling status was an element of the offense before jeopardy attached. However, *Lee* involved a midtrial dismissal that was akin to a mistrial, while this case involves a ruling on the sufficiency of the State's proof. Pp. 11-14.

(d) This Court declines to revisit decisions such as *Fong Foo*, *Smith*, *Rumsey*, and *Smalis* v. *Pennsylvania*, 476 U. S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116. There is no reason to believe that the existing rules have become so "unworkable" as to justify overruling precedent. *Payne* v. *Tennessee*, 501 U. S. 808, 827, 111 S. Ct. 2597, 115 L. Ed.

2d 720. And the logic of those cases still holds. As for the objection that the rule denies the prosecution a full and fair opportunity to present its evidence to the jury while the defendant reaps a "windfall" from the trial court's unreviewable error, sovereigns have power to prevent such situations by disallowing the practice of midtrial acquittals, encouraging courts to defer consideration of a motion to acquit until after the jury renders a verdict, or providing for mandatory continuances or expedited interlocutory appeals. Pp. 14-16.

There are two more decisions from the U.S. Supreme Court this week that deal with criminal law issues, but I believe they both deal with federal issues only. Nevertheless, here are the links to the decisions if you want to read them:

***Johnson v. Williams*: http://www.supremecourt.gov/opinions/12pdf/11-465_g314.pdf**

Henderson v. United States:
http://www.supremecourt.gov/opinions/12pdf/11-9307_jhek.pdf