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Justice Antonin Scalia: Darling of the Criminal Defense Bar?

By Richard Greenberg and Hannah Monroe

> "I ought to be the darling of the criminal defense bar," Scalia once pleaded. "I have defended criminal defendants' rights—because they're there in the original Constitution—to a greater degree than most judges have."[1]

Love him or hate him, Justice Antonin Scalia was widely regarded as one of the most intelligent and influential Supreme Court justices in history. "Reading an Antonin Scalia opinion with which you agreed was like uncorking champagne."[2] Justice Scalia was a controversial figure, especially among liberal circles, and his strict textualist and originalist opinions and dissents were often criticized. However, no one can refute his ability to make a cunning legal argument that cut to the very core of the matter. And although Scalia described himself as a "law and order kind of guy," his strict textualist interpretation of the U.S. Constitution often put him on the side of the criminal defendant.

Scalia was far from a criminal defendant's friend in all areas, however. When it came to the death penalty, for example, his views were more in line with the 18th century he so loved. "Scalia argued [that the Eighth Amendment] should be interpreted by its original understanding, when capital punishment was the norm in American criminal justice. Accordingly, he fiercely opposed most modern restrictions on its scope, including bans on juvenile death sentences and executions of the mentally disturbed . . ."[3]

This article will discuss some cases where Justice Scalia provided ammunition to liberty's, and the Constitution's, last champions, focusing on Scalia's important contributions to Fourth and Sixth Amendment jurisprudence.

Kyllo v. United States, 533 U.S. 27 (2001), presented the question "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment." *Id*. at 29. In a victory for grow house owners everywhere, Scalia, writing for a 5-4 majority which even included Justice Thomas, answered the question "yes."

The champagne flowed in Scalia's *Kyllo* opinion as he discussed the historical basis for the Fourth Amendment and the importance of protecting one's home from unreasonable government intrusion. After discussing the ways in which technology has aided law enforcement over the years, Scalia raised the question of "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Id*. at 34.

When it comes to a search of the interior, as opposed to exterior, of our houses, Scalia left no doubt:

> [I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.

Id. at 34.

Kyllo was decided in 2001 and involved "technology . . . [that] was relatively crude." *Id*. at 36. Yet Scalia made sure that the rule adopted by the court "[took] account of more sophisticated systems that are already in use or in development." *Id*. Scalia went further and provided us with language which should be in our motion to suppress library:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that previously would have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Id. at 40.

Kyllo involved the search of a home by "relatively crude" technology. Eleven years later, in *United States v. Jones*, 132 S. Ct. 945 (2012), Justice Scalia writing for the Court made it clear that the Fourth Amendment protects citizens against unreasonable government intrusions even in their cars. The question in *Jones* was "whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment." *Id*. at 948.

To answer the question, Scalia looked to the language of the Fourth Amendment itself. That Amendment provides that we, the people, are "to be secure in [our] persons, houses, papers, and ***effects***, against unreasonable searches and seizures." U.S. Const. amend. IV. Scalia reasoned that since "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment . . . the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " *Id*. at 949.

Although the decision in *Jones* was unanimous in deciding that a search took place under the Fourth Amendment, the concurring opinion of Justice Alito accused Scalia of applying "the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique . . . based on 18th-century tort law." *Id*. at 957. Disagreeing with Scalia could be dangerous to your ego. As Scalia said, "I attack ideas. I

don't attack people. And some very good people have some very bad ideas. And if you can't separate the two, you gotta get another day job."[4]

Addressing the concurring opinion, Scalia's rapier pen wrote, "The concurrence begins by accusing us of applying '18th-century tort law.' That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted." *Jones*, 132 S. Ct. at 953.

Scalia was especially impassioned about the rights afforded criminal defendants under the Confrontation Clause of the Sixth Amendment, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." When asked about his favorite opinions, Scalia chose his most famous Confrontation Clause opinion from the case *Crawford v. Washington*, 541 U.S. 36 (2004). No other opinion so perfectly captures his jurisprudence. The opinion features Scalia's adherence to a strict textualist interpretation of the Constitution, his concern with the proper judicial role and disdain for judicial advocacy, and his remarkable ability to summarize the common sense of his decision in an infamous line or two: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62.

The background of Scalia's favorite opinion was a factual scenario involving Michael Crawford stabbing a man who allegedly tried to rape his wife, Sylvia. *Id*. at 38. The state charged Crawford with assault and attempted murder. At trial he claimed self-defense. *Id*. at 40. His wife, Sylvia, did not testify because of the state marital privilege, which generally bars a spouse from testifying against the other spouse without the other spouse's consent. *See* Wash. Rev. Code § 5.60.060(1) (1994). In Washington, the spousal privilege did not extend to a spouse's out-of-court statement admissible under a hearsay exception. So the state sought to play a recorded statement Sylvia made to the police, claiming the hearsay exception for statements against penal interest. *Crawford*, 541 U.S. at 40. At Crawford's trial, the state played the recorded statement for the jury, even though Crawford had no opportunity for cross examination. The statement was admitted over the defense's objection because the trial court found the evidence had "particularized guarantees of trustworthiness," based on the standard laid out in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Id*. The jury convicted Crawford of assault.

The Washington Court of Appeals reversed the conviction, applying the nine-factor reasonableness test laid out in *Ohio v. Roberts*, but reaching the opposite conclusion reached by the trial court. *Id*. The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore sufficient guarantees of trustworthiness. *Id*. at 41. The United States Supreme Court granted certiorari to determine whether the state's use of Sylvia's statement violated the Confrontation Clause.

In his now well-known opinion, Scalia first stated that he could not rely solely on the text of the Constitution for the answer to the case. *Id*. at 42. He thus turned to the

historical background of the Clause to understand its meaning. Scalia took a thorough look at the right to affront one's accusers dating back to Roman times and going from the trial of Sir Walter Scott Raleigh (who was infamously not permitted to affront his accusers) all the way to colonial times and then to present-day state-court decisions. *Id*. at 43-50. Scalia wrote that the history of the Clause supports two inferences about the meaning of the Sixth Amendment:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. . . . Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.

Id. at 50, 53-54.

Scalia noted that the Supreme Court's case law had been mostly consistent with these two principles and gave examples of when the Supreme Court had properly applied the guarantees of the Confrontation Clause. *Id*. at 57-59. Scalia concluded that the Supreme Court's cases had "thus [far] remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id*. at 59. But Scalia noted that the Court had gone too far in its decision in *Ohio v. Roberts*, which conditioned the admissibility of all hearsay evidence on whether it "falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' " *Id*. at 60 (quoting *Roberts*, 448 U.S. at 66).

Scalia's problem with the test announced in *Roberts* was two-fold: it applied the "same mode of analysis whether or not the hearsay consists of ex parte testimony," and it admitted statements that consist of ex parte testimony merely upon a finding of reliability. *Id.* Scalia wrote, "This malleable standard often fails to protect against paradigmatic confrontation violations." *Id*. As Scalia pointed out, "reliability" is a subjective, amorphous standard. Indeed, in *Crawford* the trial court used the same nine-part test that the appellate court used but reached the entirely opposite conclusion and admitted the evidence as reliable. As Scalia saw it, "[t]he unpardonable vice of the *Roberts* test . . . is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id*. at 63.

Scalia emphasized that reliability was, of course, the Clause's ultimate goal, but "it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 61. In classic Scalia jurisprudence, he returned to the text of the Constitution and what it mandated—being "confronted with the witness"—to support his ultimate conclusion. Scalia summarized his ruling as such: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy

constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68-69.

Justice Scalia took his Confrontation Clause jurisprudence a step further in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), where the Court held that the guarantees of the Confrontation Clause applied even to documents that were testimonial in nature. In that case, the Massachusetts trial court admitted into evidence affidavits reporting the results of forensic drug tests showing that the material taken from the defendant by the police was cocaine. The Supreme Court granted certiorari to determine whether the affidavits were "testimonial," rendering the affiant witnesses subject to confrontation under the Sixth Amendment. *Melendez-Diaz*, 557 U.S. at 307.

In *Melendez-Diaz*, an informant reported that a Kmart employee would suspiciously receive many calls at work, after each of which he would be picked up by a car in front of the store and then return to work a short time later. After a time of surveillance, police detained and searched the Kmart employee after he got out of the car, finding four clear bags of a white powdery substance. Officers then arrested the other men in the car, one of whom was Luis Melendez-Diaz. *Id*. at 307-08. After leaving the men at the police station, officers found more bags of what appeared to be cocaine in the police cruiser and submitted the evidence to a state laboratory for testing. Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. *Id*. at 308. At trial, the prosecution placed the seized bags into evidence and submitted three "certificates of analysis" showing the results of the forensic analysis performed on the substance. *Id*. The certificates reported the weight of the seized bags and stated that the bags have "been examined with the following results: The substance was found to contain: Cocaine." *Id*. (quotations omitted).

Melendez-Diaz objected to the admission of the certificates, arguing that the Confrontation Clause required the analysts to testify in person. The objection was overruled and the certificates admitted. Melendez-Diaz was found guilty and appealed, arguing that admission of the certificates violated his Sixth Amendment right to confront the witnesses against him. The appeals court rejected the claim and affirmed the trial court order, relying on a state case that held that the authors of forensic analysis are not subject to confrontation under the Sixth Amendment. The Massachusetts Supreme Judicial Court denied review.

Justice Scalia viewed this case as a straight-forward one that violated the Constitution "[a]bsent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them." *Id*. at 311. Scalia made short shrift of the Government's argument that the analysts were not subject to confrontation because they were not "accusatory" witnesses. *Id*. at 313. Scalia found that because the testimony provided by the analysts (the substance possessed was cocaine) was necessary for conviction, the analysts certainly provided testimony against the defendant. *Id*. Scalia contrasted the text of the Confrontation Clause with the adjacent Compulsory Process Clause to iterate that the text of the Amendment contemplates two types of witnesses—those against the defendant and those in favor. *Id*. Scalia bluntly wrote, "Contrary to respondent's assertion, there is not a third category of witnesses,

helpful to the prosecution, but somehow immune from confrontation." *Id*. at 314. Scalia showed his dedication to the protections guaranteed by the Constitution, above convenience or expediency, when he wrote:

> Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Id. at 318.

Scalia also rejected the argument that the analysts' affidavits were admissible under the business record exception to the hearsay rule, finding that the exception did not apply when the regularly conducted business activity was the production of evidence for use at trial. *Id*. at 321. He also rejected the argument that there is no Confrontation Clause violation where the defendant also had the ability to subpoena the witness, in this case, the analysts. *Id*. at 324. Scalia found that the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. *Id*. In summary, Scalia again rejected the idea of negating a fundamental right for the sake of expediency and emphasized how seriously he took the Confrontation Clause:

> The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

Id. at 325.

Scalia realized that, on a practical level, defense counsel and their clients will often stipulate to the nature of the substance in an ordinary drug case. *Id*. at 328. "It is unlikely that defense counsel will insist on live testimony whose effect will merely be to highlight rather than cast doubt upon the forensic analysis." *Id*. He also pointed out that defense counsel may often have very little in the way of rebuttal for these witnesses and would not wish to waste the court's time with the appearance of a witness who the defense does not plan to cross-examine. That may seem like a strange concession at the end of an opinion grounded upon the need for such a cross-examination, but that is part of the greatness of this opinion. Scalia desired to preserve the constitutional right to confrontation absolutely, even if it would not be exercised or may make little practical difference. He did not concern himself with the outcome but was extremely rigorous in his concern for the process, making him an important jurist for criminal defendants and their advocates.

Justice Scalia's passion for the Confrontation Clause is perfectly summed up in his dissenting opinion in *Maryland v. Craig*, 497 U.S. 836 (1990), and because Scalia was as

famous (or infamous) for his scathing dissents as he was for his opinions, this article would be remiss if it did not touch on at least one dissent.

In *Maryland v. Craig*, the defendant was convicted of sexual offenses involving her conduct with a minor child. *Id*. at 840. The child victim was permitted to testify against the defendant at trial by use of a one-way closed circuit television, and the Court found that the lack of physical face-to-face confrontation did not violate the Confrontation Clause. *Id*. at 860. While the child was subject to "the crucible of cross examination" and her testimony was viewed by the jury, Scalia opined that the defendant's lack of ability for a face-to-face confrontation was in violation of the Sixth Amendment. As he wrote, "The purpose of enshrining the protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Id*. at 861 (Scalia, J., dissenting). A summary of his biting dissent shows some of the key markers of his jurisprudence: his strict adherence to Constitutional textualism; his abhorrence of judicial legislating and overreaching; his abiding convictions of the importance of the process of a criminal trial; and his strong, sure writing style:

> I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact disservice the Confrontation Clause's truth-seeking goal." If so, that is a defect in the Constitution – which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added).

Id. at 869-70 (internal citation omitted).

Criminal defendants owe many thanks to Justice Scalia for his important contributions to Confrontation Clause and search-and-seizure jurisprudence. The holdings in Scalia's opinions and the emphatic language used to reach them preserve the right to confrontation and the right to be free from unreasonable searches in our criminal justice system. Criminal defendants and their advocates lost a strong but unlikely ally in the passing of Justice Antonin Scalia.

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[1]Robert Smith, *Antonin Scalia's Other Legacy*, Slate, (Feb. 15, 2016) http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html

[2] Matt Ford, *The Remarkable Life of Antonin Scalia,* The Atlantic, (Feb. 14, 2016) http://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-death-legacy/462753/

[3] Matt Ford, *The Remarkable Life of Antonin Scalia,* The Atlantic, (Feb. 14, 2016) http://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-death-legacy/462753/

[4] Charlie Spiering, *31 of Supreme Court Justice Antonin Scalia's Greatest Quotes,* Breitbart, (Feb. 13, 2016) http://www.breitbart.com/big-government/2016/02/13/supereme-court-justice-antonin-scalias-greatest-quotes/