EIGHTH CIRCUIT BAR ASSOCIATION

Bar Association of the United States Court of Appeals for the Eighth Circuit

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OFFICERS & EDITORS

IN THIS ISSUE

Editor's Note

Welcome to the spring edition of the Eighth Circuit Bar Association Newsletter. In these difficult times of isolation and stress, we hope these articles will help you connect with the greater legal community across the Eighth Circuit.

Timothy Droske returns to discuss how the Eighth Circuit fared in the last Supreme Court term. Tim covers these cases with insightful analysis, while noting the changing make-up of both courts and how the Eighth Circuit's results compare statistically with prior years.

A new author, Kyle Wislocky, attended the ceremony in Minneapolis naming the federal courthouse after the late Judge Diana E. Murphy. We thank Kyle for sharing the proceedings with us, and also thank the U.S. District Court for the District of Minnesota for providing the photographs, including our cover photo unveiling the new courthouse façade.

The Judicial Conference Advisory Committee on Appellate Rules has proposed a major reconstruction of Federal Rule of Appellate Procedure 3(c). While we do not normally cover proposed rule changes, these have elicited public comments from many appellate quarters, both in support and opposition, and uniquely touch on Eighth Circuit case law.

Next, Qian Julie Wang and Ryan Marth give timely, superb, and amusing advice on appellate practice during a pandemic. The title quite nearly says it all: "When the Phone Becomes the Podium."

Finally, I am pleased to introduce our new editor, Mike Goodwin. Mike is an Assistant Attorney General in the Office of the Minnesota Attorney General and has been providing us with valuable editing and layout assistance during the past year. Mike has now agreed to take over as editor. If you have ideas for articles or wish to contribute, please contact Mike at Michael.Goodwin@ag.state.mn.us.

Be well, be safe, and enjoy.

Benjamin J. Wilson

Review of the Eighth Circuit During the Supreme Court's 2018 Term

by Timothy J. Droske

The spotlight on the Supreme Court was particularly high last term following Justice Kennedy's retirement, Justice Kavanaugh's contentious confirmation hearings, and with a number of high-profile cases on the Court's docket. Of the four cases the Eighth Circuit had before the Court last term, however, only one—a death penalty case that had divided the Eighth Circuit—split the Supreme Court along a 5-4 vote on a high-profile issue. The three other cases from the Eighth Circuit decided by the Court were all directed at more discrete issues—the definition of burglary under the Armed Career Criminal Act; what constitutes taxable compensation under the Railroad Retirement Tax Act; and when private-sector commercial or financial information is "confidential" and not subject to Freedom of Information Act disclosure. Nor were any of these three cases particularly contentious before the Eighth Circuit or the Supreme Court. All three of these other cases were decided unanimously by the Eighth Circuit. And even though the Supreme Court reversed or vacated in all three, none resulted in a 5-4 split. A summary of these four decisions, and statistics regarding the Eighth Circuit before the Supreme Court last term, are discussed below.

Eighth Circuit Statistics

Despite changes in both the Supreme Court's and Eighth Circuit's composition, the Eighth Circuit's results at the Supreme Court were largely consistent with other terms over the past decade. Of the 74 cases the Supreme Court decided last term, four were from the Eighth Circuit, placing it at the median among all circuits.[1] These four cases accounted for 5% of the Court's docket, which is close to the Eighth Circuit's 4.6% average over the past decade. Moreover, while the Eighth Circuit's 25% affirmance rate before the Supreme Court was below the 36.49% overall affirmance rate last term, the Eighth Circuit did outperform its 19.5% average affirmance rate from over the past decade. As for the individual justices, only Justice Kagan voted to

[1] The following table reflects the number of Eighth Circuit cases heard by the Court, the percentage of the docket those cases composed, the Court's voting record on those cases, and the affirmance percentage, as reported by SCOTUSblog:

Term	Number of Cases	Docket Percent	Aff'd/ Rev'd / Split	Affirmed Percent
2018	4	5%	1-3	25%
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%
Average	3.4	4.6%		19.5%

SCOTUSblog, Stat Pack Archive, *available at* http://www.scotusblog.com/reference/stat-pack/ (Circuit Scorecard for 2010-2018 Terms). Note that the 4-4 split in 2015, although resulting in a non-precedential affirmance, is not included in the Affirmed Percent. Also, the Average for the Affirmed Percent does not include the 2011 Term in which no cases from the Eighth Circuit were decided by the Court.

reverse or vacate in all four decisions, while the Eighth Circuit received the best voting record from Justice Thomas and Justice Gorsuch, who both voted to affirm in two of the four cases from last term.[2]

Bucklew v. Precythe—The Death Penalty Highlights the Court's Deep Divide

While the Supreme Court generally strives to project an image of collegiality despite the Justices' often sharp legal differences,[3] this proved difficult for the Court to maintain with respect to its death penalty cases. While this tension came to a boil in a series of opinions issued in May 2019,[4] the Supreme Court April decision in a death penalty case from the Eighth Circuit also highlighted the Court's deep 5-4 divide on the issue.

In that case, Russell Bucklew, who was on death row in Missouri, challenged the State's lethal injection protocol as constituting cruel and unusual punishment as applied to him because of a unique medical condition that he claimed could subject him to choking or suffocation if the protocol were applied to him.[5] The Eighth Circuit rejected the challenge in a 2-1 decision, finding Bucklew had failed to establish that his risk of severe pain would be substantially reduced by his proposed use of nitrogen hypoxia lethal gas instead—an authorized method of execution in Missouri, but one that had not been used since 1965 and had no current protocol in place.[6]

The Supreme Court affirmed 5-4, with Justice Gorsuch writing the majority opinion and Justice Breyer writing the chief dissent. The majority opinion described Bucklew as bringing a long series of shifting challenges to his execution, and failing to prove up his arguments with sufficient evidence despite being afforded opportunities to do so.[7] The Court then made clear that its prior test for challenging lethal injection protocols applied not only to facial challenges, but also to as-applied challenges like Bucklew's, requiring that the inmate identify "an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain."[8] The Court found that standard had not been met, concluding it was not "readily implemented," that the State had no obligation to adopt an "untried and untested" method of execution, and that Bucklew had failed to present any evidence his proposed alternative would significantly reduce his risk of pain.[9] Finally, Justice Gorsuch's opinion more generally criticized the delay in this case, emphasizing that "the important interest in the timely enforcement of a sentence" had "been frustrated in this case."[10]

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[2] SCOTUSblog, Final Stat Pack for October Term 2018 at 4, *available at* https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf.

[3] *See e.g.*, Ariane de Vogue, *John Roberts says Supreme Court doesn't work in a 'political manner*,' CNN (Sept. 24, 2019), *available at* https://www.cnn.com/2019/09/24/politics/john-roberts-new-york/index.html.

[4] Adam Liptak, *Tempers Fraying, Justices Continue Debate on Executions*, New York Times (May 13, 2019), *available at* https://www.nytimes.com/2019/05/13/us/politics/supreme-court-death-penalty.html; Nina Totenberg, *Supreme Court's Conservatives Defend Their Handling of Death Penalty Cases*, NPR (May 14, 2019), *available at* https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases.

[5] *Bucklew v. Precythe*, 883 F.3d 1087, 1089 (8th Cir. 2018).

[6] *Id.* at 1094-96 (Loken, J., joined by Wollman, J.); Justice Colloton dissented.

[7] 139 S.Ct. 1112, 1119-22 (2019).

[8] *Id.* at 1121-29 (endorsing test from *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 576 U.S. 135 S.Ct. 2726 (2015)).

[9] *Id.* at 1129-33.

[10] *Id.* at 1133.

Justice Breyer wrote the primary dissent, and was joined by Justices Ginsburg, Sotomayor, and Kagan. The dissent disagreed with the majority's conclusion Bucklew had not established genuine issues of material fact regarding whether he would experience excessive suffering, and that Bucklew needed to identify an alternative method by which he could be executed.[11] The three other justices, however, did not join Justice Breyer's "agree[ment] with the majority that these delays are excessive."[12]

The justices' sharp disagreement shows that this is an area where a deep 5-4 split along traditional conservative and liberal lines remains firmly entrenched.[13]

United States v. Sims—A Unanimous Reversal on the Armed Career Criminal Act

Like the death penalty, the Armed Career Criminal Act ("ACCA") has frequently been before the Supreme Court. But in contrast with the deep divide in *Bucklew*, the Supreme Court unanimously reversed the ACCA case from the Eighth Circuit. The question in this case was whether Sims' prior Arkansas conviction for residential burglary fell within the generic definition of "burglary" in the ACCA context, such that it was a qualifying prior conviction that could trigger the ACCA's 15-year mandatory minimum sentence. In a short, unanimous opinion, the Eighth Circuit clearly framed the issue. As it explained, the Supreme Court has defined "generic" burglary in the ACCA-context as "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[14] And under the Supreme Court's "categorical approach," Sims' Arkansas convictions qualify as ACCA predicates "only if the statute's elements are the same as, or narrower than, those of the generic offense."[15] The problem, as the Eighth Circuit saw it, is that "[t]he Supreme Court has clearly stated that '[t]he [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), *not in a boat or motor vehicle*,'"[16] while burglary under Arkansas law applies to a "residential occupiable structure," which "'means a vehicle, building, or other structure: (i) [i]n which any person lives; or (ii) [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present.'"[17] The Eighth Circuit found that it was bound to find that Arkansas' burglary law did not qualify as a predicate offense because it reached vehicles, which was the same holding it reached when analyzing Wisconsin's similar burglary statute in an earlier case.[18] But it also acknowledged a circuit split, with other courts following the Government's distinction that Arkansas's statute is narrower than generic burglary because it specifically applies only to vehicles "in which the per-

[11] *Id.* at 1136 (Breyer, J., dissenting).
[12] *Id.* at 1136, 1144-45. Justice Sotomayor wrote a separate dissent to address this timeliness issue, *id.* at 1145-48.
[13] Bucklew was executed by lethal injection on October 1, 2019. His attorney reported steps were taken to ensure he didn't suffer, and believed those steps "were beneficial." *Missouri executes Russell Bucklew despite concerns over rare medical condition*, CBS NEWS (Oct. 1, 2019), *available at* https://www.cbsnews.com/news/missouri-execution-today-russell-bucklew-executed-crime-spree-despite-rare-medical-condition-concerns-2019-10-01.

[14] *United States v. Sims*, 854 F.3d 1037, 1038 (8th Cir. 2017) (quoting *Taylor v. United States*, 495 U.S. 575, 598-99 (1990)).
[15] *Id.* at 1039 (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).
[16] *Id.* (quoting *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (emphasis by Eighth Circuit).
[17] *Id.* (quoting Ark. Code Ann. §5-39-101(4)(A)
[18] *Id.* at 1040 (citing *United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017).

son lives" or "that are customarily used for overnight accommodation."[19]

The Supreme Court granted review and consolidated the Eighth Circuit's case with *United States v. Stitt*, a Sixth Circuit case raising the same issue. Those consolidated cases—as well as a separate ACCA case—were argued on the first day Justice Kavanaugh sat for oral argument after his confirmation.[20] In a unanimous opinion by Justice Breyer, the Court held that there is a critical difference between state statutes that define burglary as extending to any ordinary vehicle and are outside the ACCA's scope, and those that narrow burglary to "vehicles designed or adapted for overnight use" and fall within the generic burglary definition.[21] The Court noted that the latter was consistent with the generic sense in which the term was used in most State codes in 1986 when the ACCA was enacted.[22] The latter was also consistent with Congress's view of burglary as an inherently dangerous crime, since there is a greater risk of violent confrontation when breaking into a structure adapted or customarily used for lodging.[23] The Court, however—perhaps to avoid a fractured 5-4 opinion like the one that issued in the other ACCA case heard the same day[24]—remanded rather than addressed Sims' argument that the Arkansas law was still too broad because it covers burglary of "a vehicle … [i]n which any person lives," and thus could include a car in which a homeless person occasionally sleeps.[25]

***BNSF R. Co. v. Loos*—The Supreme Court Reverses on a Discrete Railroad Taxation Issue**

The Supreme Court also agreed to hear a discrete issue arising from a personal injury suit brought by a railway worker against BNSF Railway Company under the Federal Employers' Liability Act ("FELA"): "Is a railroad's payment to an employee for working time lost due to an on-the-job injury taxable 'compensation' under the [Railroad Retirement Tax Act] RRTA."[26] BNSF maintained that the $30,000 the jury awarded its employee, Mr. Loos, in lost wages was "compensation" "for services rendered as an employee" and accordingly taxable income as defined under the RRTA, such that BNSF needed to withhold and remit to the Government the $3,765 in taxes owed on that amount.[27] The district court disagreed, and the Eighth Circuit unanimously affirmed.[28] BNSF petitioned the Supreme Court, which agreed to hear the case, citing to a "division of opinion" between the Eighth Circuit and Sixth Circuit, and three state Supreme Courts.[29] By a 7-2 vote the Supreme Court reversed, and in an opinion by Justice Ginsburg, "h[e]ld that an award compensating for lost wages is subject to taxation under the RRTA."[30] The Court looked to the text of the statute, what it

[19] *Id.* at 1040.
[20] Rory Little, *Argument analysis: Trying to define "robbery" and "burglary," justices confront the jurisprudential "mess" of the ACCA*, SCOTUSblog (Oct. 10, 2018, https://www.scotusblog.com/2018/10/argument-analysis-trying-to-define-robbery-and-burglary-justices-confront-the-jurisprudential-mess-of-the-acca.
[21] *United States v. Stitt*, 139 S.Ct. 399, 407 (2018).
[22] *Id.* at 406.
[23] *Id.*
[24] *See Stokeling v. United States*, 139 S.Ct. 544 (2019).
[25] *Stitt*, 139 S.Ct. at 407-08. On remand, the Eighth Circuit found the Court's emphasis on the potential for violent confrontation likewise brought a vehicle in which any person lives within the ambit of generic burglary for ACCA purposes. 933 F.3d 1009 (8th Cir. 2019).
[26] *BNSF Ry.. v. Loos*, 139 S.Ct. 893, 897 (2019).
[27] *Id.*; *see also id.* at 904 (Gorsuch, J., *dissenting*).
[28] *See Loos v. BNSF Ry.*, 865 F.3d 1106 (8th Cir. 2017).
[29] *BNSF Ry.*, 139 S.Ct. at 897.
[30] *Id.*

deemed analogous decisions interpreting the meaning of Social Security "wages," and consistent with "the IRS's long held construction," concluded that "'compensation' under the RRTA encompasses not simply pay for active service but, in addition, pay for periods of absence from active service—provided that the remuneration in question stems from the 'employer-employee relationship.'"[31]

Justice Gorsuch in dissent, joined by Justice Thomas, came to Mr. Loos's defense that no taxes were owed, explaining that "[w]hen an employee suffers a physical injury due to his employer's negligence and has to sue in court to recover damages, it seems more natural to me to describe the final judgment as compensation for his injury than for services (never) rendered."[32] Justice Gorsuch also mused out loud as to why BNSF was going "to the trouble of seeking review in this Court to win the right to pay the IRS," opining that it was perhaps so that railroads could "sweeten their settlement offers while offering less money" by minimizing the amount designated as taxable lost wages.[33] Although the dissent viewed the statute's text, history, and surrounding statutes as compelling a contrary construction, the dissent nonetheless commended the majority for not simply resting on *Chevron* deference for its decision.[34] It is this last point regarding the Court's unwillingness to rest on *Chevron* deference that may be the most notable part of an otherwise discrete and obscure opinion.[35]

[31] *Id.* at 899-900.
[32] *Id.* at 904 (Gorsuch, J., *dissenting*).
[33] *Id.* at 905.
[34] *Id.* at 908-09.
[35] *See* Daniel Hemel, *Opinion analysis: The doctrine that dare not speak its name,* SCOTUSblog (Mar. 4, 2019), https://www.scotusblog.com/2019/03/opinion-analysis-the-doctrine-that-dare-not-speak-its-name.

***Food Marketing Institute v. Argue Leader Media*—The Circuits' FOIA-Related Test Is Rejected**

Finally, the Supreme Court granted review from an Eighth Circuit decision concerning a Freedom of Information Act ("FOIA") request in which the Government sought to prevent disclosure under FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[36] The Argus Leader, a South Dakota newspaper, had submitted a FOIA request for store-level data regarding participation in the Supplemental Nutrition Assistance Program, to which the Government invoked Exemption 4. The Eighth Circuit applied its own precedent, which like most circuits had adopted the standard established by the D.C. Circuit decades earlier, and required that in order to be "confidential," the Government had to show that disclosure was likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."[37] While recognizing the highly competitive nature of the grocery industry, that market data is used to model competitors' sales, and "that releasing the contested data is likely to make these statistical models marginally more accurate," the Eighth Circuit affirmed that "the evidence does not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm."[38]

[36] *Food Mktg. Ins. v. Argus Leader Media*, 139 S.Ct. 2356, 2361 (2019) (quoting 5 U.S.C. §552(b)(4)); *Argus Leader Media v. United States Dep't of Agric.*, 889 F.3d 914 (8th Cir. 2018).
[37] 889 F.3d at 915 (citing *Pub. Citizen Health Research Grp v. FDA*, 704 F.2d 1280, 1291) (D.C. Cir. 1983)); 139 S.Ct. at 2364 (citing *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)).
[38] 889 F.3d at 916 (emphasis in original).

The petition to the Supreme Court was not primarily focused on a split among the circuits (since almost all had adopted some form of the D.C. Circuit's test), but rather argued that the "substantial competitive harm" test departed from Exemption 4's plain language.[39] In a 6-3 opinion, the Court agreed. Justice Gorsuch's majority opinion found that a "substantial competitive harm" requirement had no grounding in "dictionary definitions, early case law, or any other usual source that might shed light on the statute's ordinary meaning" of "confidential."[40] And it criticized that test's creation by the D.C. Circuit and adoption by other circuits as "a relic from a bygone era of statutory construction."[41] Instead, the Court adopted the standard that, "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."[42] The Court then found that standard met in this case and reversed the Eighth Circuit.[43]

Justice Breyer concurred in part and dissented in part, joined by Justice Ginsburg and Justice Sotomayor. While agreeing with the two standards established by the majority, as well as that the D.C. Circuit's "harm requirement goes too far," Justice Breyer still would have maintained a third requirement that "[r]elease of such information must also cause genuine harm to the owner's economic or business interest."[44] The dissent's primary focus on FOIA's purpose and the Act's past interpretations over a strict dictionary definition of the term "confidential," shows that modes of interpretation the majority may call a "relic" still have vitality among certain members of the Court.

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[39] *See* Petition for a Writ of Certiorari at i, *available at* https://www.supremecourt.gov/DocketPDF/18/18-481/66553/20181011132925092_FMI%20Cert%20Petition.pdf.

[40] 139 S.Ct. at 2363.

[41] *Id.* at 2364 (internal quotation omitted).

[42] *Id.* at 2366.

[43] *Id.*

[44] *Id.* at 2367 (Breyer, J, *concurring in part and dissenting in part*).