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Supreme Court Justice Sonia Sotomayor: A Champion of Commonsense Adjudication

Ethan Reeves Buttner

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I. Introduction

Sonia Sotomayor was nominated as an Associate Justice to the Supreme Court of the United States by President Barack Obama on May 26, 2009.¹ Justice Sotomayor's subsequent confirmation and assumption of her role as Associate Justice on August 8, 2009 made Supreme Court history as Justice Sotomayor is only the third woman and the first Hispanic to sit on this nation's most prestigious bench.² Justice Sotomayor was well suited to become a Supreme Court Justice as she brought 18 years of federal judgeship experience with her to the Supreme Court as she previously served as a federal district judge in the Southern District of New York, and as a circuit judge serving the Court of Appeals for the Second Circuit.³ Along with her occupational experience, Justice Sotomayor brought with her the many experiences she gained throughout her life growing up in the Bronxdale Housing Projects in the Bronx, New York, her Ivy League undergraduate education at Princeton University, and her Ivy League legal education which was obtained at Yale Law School.⁴ These experiences have influenced and continue to shape her jurisprudence on the Supreme Court as hints of her strong academic résumé, her devotion to careful, commonsense application of the law to the facts, and her diverse roots in the Bronx can be found in her written opinions.

This paper will analyze how Justice Sotomayor's life experiences and her diligence in performing her role as an Associate Justice have led her to apply a no-nonsense approach to her legal jurisprudence. It will be demonstrated that Justice Sotomayor's background and her desire to become a judge strongly influences her legal perspective and analysis. Justice Sotomayor

¹ *Biographies of Current Justices of the Supreme Court*, Supreme Court of the U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 27, 2013).

² *Id.*; Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. Times, May 26, 2009, available at www.nytimes.com/2009/05/27/us/politics/27websotomayor.html.

³ *Id.*

⁴ Sonia Sotomayor, *My Beloved World* 13 (Alfred A. Knopf 2013).

employs a narrow, diligent, and in depth analysis of the law and facts in front of her in order to draw commonsense conclusions that are often technical, incremental, and exhaustive.⁵ The structure of Justice Sotomayor's opinions, concurrences, and dissents are fairly predictable; a thorough analysis of the facts of the case, a description of the case's procedural posture, an in-depth and technical explanation of the current law, an acknowledgment of the oppositions stance, an often narrow, commonsense application of the law to the facts, and a conclusion.

Pundits theorize that Justice Sotomayor is squarely entrenched in the liberal bloc of the Supreme Court.⁶ However, an examination of her jurisprudence indicates that Justice Sotomayor applies a methodical analysis to the cases and controversies on which she is sitting to reach conclusions based soundly on the law and logic. Justice Sotomayor provided insight into her legal analysis in an interview with Scott Pelley for the program, *60 Minutes*, when asked if the constitution is a living document or should be read strictly. Justice Sotomayor stated:

[T]here are provisions that are very general in the constitution. You can't have an unreasonable search and seizure. What does unreasonable mean? What's a search and seizure? On those three words; search, seizure, and unreasonable, law books are filled. Shelves and shelves of them are filled. And so to talk about strict interpretation or living constitution, those are not words I use, and they're not words that I think have much meaning, because what you are doing is interpreting new facts to an established law, that in part has been given meaning in precedent, and that in part has a historical background, and you're drawing from all of that toolbox, of precedence, history (some of my colleagues don't rely on history, others do), and from statutory construction principles. It is not about reading words strictly or about living constitution, it's about giving meaning on the basis of facts that are presented to you.⁷

⁵ Adam Liptak, *Nominee's Rulings are Exhaustive but Often Narrow*, N.Y. Times, May 26, 2009, available at www.nytimes.com/2009/05/27/us/politics/27judge.html.

⁶ Stolberg, *supra* note 2, at 6.

⁷ Interview with Scott Pelley, Correspondent, *60 Minutes* (CBS television broadcast Jan. 13, 2013), available at www.cbsnews.com/news/justice-sotomayor-prefers-sonia-from-the-bronx-09-06-2013/.

Exemplified by Justice Sotomayor's words on *60 Minutes*, she employs all of the tools at her disposal to reach conclusions regarding facts she is presented with that is based on law, logic, and commonsense. Through an analysis of Justice Sotomayor's upbringing, early life, undergraduate and legal education, and Supreme Court case law authored by her, this paper will provide comprehensive analyses on her commonsense application of the law to the specific facts presented to her.⁸

II. Biography

A. Justice Sotomayor's Early Life

Sonia Sotomayor was born in the Bronx, New York on June 25, 1954 to her Puerto Rican parents, Juan and Celina Sotomayor.⁹ Justice Sotomayor's parents immigrated to the United States in 1944.¹⁰ Celina Baez came to the United States with the Women's Army Corps, and Juan Sotomayor and his family came in search of work as part of a large, economic driven migration to the United States from Puerto Rico.¹¹ Sotomayor has a brother, Juan Luis Sotomayor Jr., M.D., whom she called Junior and was born three years after Justice Sotomayor in 1957.¹² The Sotomayor's moved into the Bronxdale Housing Projects in Soundview, a neighborhood in the Bronx, New York, around the time Justice Sotomayor's brother was born.¹³

⁸See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238 (2011); *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011); *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011); *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Dillon v. United States*, 560 U.S. 817 (2010); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010); *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

⁹ *Sonia Sotomayor*, The Oyez Project at IIT Chicago-Kent College of Law, www.oyez.org/justices/sonia_sotomayor (last visited Nov. 28, 2013).

¹⁰ Sotomayor, *supra* note 4, at 12.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

In her book, *My Beloved World*, she described that the move to the Bronxdale Projects isolated their family.¹⁴ This was due in large part to her father's alcoholism.¹⁵ As a result of her father's drinking, the family never had visitors, and whenever Justice Sotomayor played with or had a sleepover with her cousins, it was always away from home.¹⁶ The Sotomayor's developed a routine where her father would cook dinner every night, and then retire to his bedroom leaving Sonia and Junior to do their homework until it was time for bed.¹⁷ Justice Sotomayor stated that her mother's coping mechanism was absenteeism.¹⁸ Celina worked the night shift at a nearby hospital as a practical nurse, allowing her to avoid being home when her husband was.¹⁹

Justice Sotomayor's father's alcoholism caused a great deal of emotional anguish for her. She stated, "My father's neglect made me sad, but I intuitively understood that he could not help himself; my mother's neglect made me ^{at} her."²⁰ Her unique ability to understand context clues and her emotional awareness developed as a result of this situation, as she explained, "However much was said at home, and loudly, much also went unsaid, and in that atmosphere I was a watchful child constantly scanning the adults for cues and listening in on their conversations. My sense of security depended on what information I could glean, any clue dropped inadvertently when they didn't realize a child was paying attention."²¹

Justice Sotomayor's sense of responsibility and independence grew exponentially as a result of her father's drinking and her mother's absence. One occasion that stuck with Justice Sotomayor was when her father was sick, and her mother took him to the hospital. Justice Sotomayor's aunt and uncle came to the Sotomayor's apartment to get the children, and Justice

¹⁴ *Id.* at 12-13.

¹⁵ *Id.*

¹⁶ *Id.* at 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 13-14.

²¹ *Id.* at 14.

Sotomayor overhead them referring to their apartment as a pigsty, and commenting on how there were dishes in the sink and no toilet paper in the bathroom.²² Justice Sotomayor, speaking of that experience, stated, “After that I washed the dishes every night, even the pots and pans, as soon as we finished dinner. I also dusted the living room once a week. Even though no one ever came over, the house was always clean. And when I went shopping with Papi on Fridays, I made sure we bought toilet paper.”²³

An experience that truly evinced Sotomayor’s destiny to become a Justice on the Supreme Court was when she was diagnosed with diabetes. Sotomayor was diagnosed with diabetes before she turned eight years old.²⁴ In describing her diagnosis, Justice Sotomayor stated, “To my family, the disease was a deadly curse. To me, it was more a threat to the already fragile world of my childhood, a state of constant tension punctuated by explosive discord, all of it caused by my father’s alcoholism and my mother’s response to it, whether family fight or emotional flight. But the disease also inspired in me a kind of precocious self-reliance that is not uncommon in children who feel the adults around them to be unreliable.”²⁵

Justice Sotomayor’s independence and desire to settle conflict thrived through her diabetes. Justice Sotomayor described awaking one morning to the sound of her parents arguing about administering Sotomayor’s insulin shot.²⁶ The argument went back and forth between her mother and father; her father explaining that he was afraid he would hurt Sonia because his hands were shaking so much; her mother retorting that she had to work to support the family, explaining she had to do everything and that there would be times when she would not be home

²² *Id.* at 15.

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ *Id.* at 3.

to administer the shots.²⁷ Justice Sotomayor explained, “The needles hurt, but the screaming was worse. It made me feel tired, carrying around the weight of their sadness. It was bad enough when they were fighting about the milk, or the housework, or the money, or the drinking. The last thing I wanted was for them to fight about me.”²⁸ Justice Sotomayor then came to a profound realization for a seven year old, as she stated, “It then dawned on me: if I needed to have these shots every day for the rest of my life, the only way I’d survive was to do it myself.”²⁹ At seven years old, Sonia Sotomayor was not only substantially contributing to her family through cleaning and shopping, but she was also administering her own insulin shots, which, at the time, encompassed lighting the gas stove with a match and boiling water in order to sterilize the needle and syringe.³⁰ Unknowingly, Sonia Sotomayor had already started her path to the Supreme Court. At such an early age, she had learned self-discipline, independence, and how to observe a conflict and artfully resolve it on her own.

Justice Sotomayor would also overcome and persevere through another devastating experience in her early life that further lead to the development of her independence and maturity: the death of her father. Sonia Sotomayor was nine when her father passed away.³¹ On that fateful April day, Justice Sotomayor and Junior were walking directly home from school because their father stayed home sick from work.³²

When the children got home, “I looked into the living room and saw many faces looking back at me with the same teary gaze. Mami was sitting in the chair by the telephone in the hallway, staring into space, her eyes wide and wet. Junior said to her, ‘Where’s Papi?’”³³

²⁷ *Id.*

²⁸ *Id.* at 3-4.

²⁹ *Id.* at 3.

³⁰ *Id.* at 4.

³¹ *Id.* at 40.

³² *Id.*

³³ *Id.* at 41.

Sotomayor's mother then said, "*Dios se lo llevo.*"³⁴ Justice Sotomayor continued, "God took him. I could see that Junior didn't understand. I did. She meant that Papi had died. But what did that mean? I didn't know what I was supposed to feel, or say, or do."³⁵ Sonia ran down the hallway and into a bedroom where she began to cry and pound her fists, when Ana came into the room and told her to be a big girl, and to be strong for her mother.³⁶ Sotomayor, only nine years old, was now a diabetic with an alcoholic father who had just died, and she had to be strong for her mother. Shortly thereafter the Sotomayor's moved into a new apartment in the Bronxdale Projects because her mother could not go back into the one in which Sonia's father passed.³⁷ Sonia's mother was also able to change her schedule to enable her to be home when the children got home from school.³⁸

Justice Sotomayor's life did not get any easier after the passing of her father, but it was another opportunity for growth and perseverance. Justice Sotomayor explained, "In the days and weeks following the funeral, the release and relief I felt from the end of the fighting gave way to anxious puzzlement. At nine, I was equipped to understand loss, even sadness, but not grief, not someone else's and certainly not my own. I couldn't figure out what was wrong with Mami, and it scared me."³⁹ When Sonia and Junior would come home from school every day, even though their mother changed her schedule in order to be home, they would find the apartment dark, with the curtains drawn.⁴⁰ Their mother would come out from her bedroom long enough to cook

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 44.

³⁸ *Id.*

³⁹ *Id.* at 46.

⁴⁰ *Id.*

dinner, to apathetically serve dinner, and retire back to her room, leaving Sonia and Junior to once again do homework and watch television by their lonesome.⁴¹

After an entire summer of incomprehension of her mother's grief, Sonia and Junior went back to school. Justice Sotomayor was unable to tolerate her mother's isolation any longer, and one day upon returning home from school, she expressed her emotion.⁴² Sonia pounded with both hands on her mother's closed door and screamed at her, stating, "Enough! You've got to stop this! You're miserable and you're making us miserable...What's wrong with you? Papi died. Are you going to die too? Then what happens to me and Junior? Stop already, Mami, stop it!"⁴³ Sonia's mother stood in her room, blank faced, as Sonia then ran into her room and cried herself to sleep.⁴⁴

Without realizing it, young Justice Sotomayor had saved her family further anguish once again. The next day, upon returning home from school, the window shades were up and the radio was playing, and their mother was wearing a dress, makeup, and perfume: Sonia felt relief throughout her entire body.⁴⁵ Reflecting on this experience, Sonia explained that the memories of her childhood are bifurcated between the claustrophobia of home, and the expansive joy of the outside world and her family; but the largest contrast was between life before and after her father died.⁴⁶ After Sonia's emotional explosion, home was now a good place to be.⁴⁷

Through her mother's self-imposed exile, Sonia's academic prowess would develop. Justice Sotomayor explained, "My solace and only distraction that summer was reading. I discovered the pleasure of chapter books and devoured a big stack of them. The Parkchester

⁴¹ *Id.*

⁴² *Id.* at 49.

⁴³ *Id.* at 50.

⁴⁴ *Id.*

⁴⁵ *Id.* at 65.

⁴⁶ *Id.*

⁴⁷ *Id.* at 66.

Library was my haven. To thumb through the card catalog was to touch an infinite bounty, more books than I could ever possibly exhaust.”⁴⁸ As a result of her incessant summer reading, Sonia began to thrive at school.⁴⁹ Sonia not only improved because of her love for books however, but also because the Sotomayor’s began speaking English at home.⁵⁰ The switch to English had a profound impact on Sonia’s academic performance and capabilities, and it instilled the importance of education in Sonia.⁵¹ Sonia’s devotion to her own education was inspired by her mother, as Sonia stated, “‘You’ve got to get your education! It’s the only way to get ahead in the world.’ That was her constant refrain, and I could no more get it out of my head than a commercial I’d heard a thousand times.”⁵²

Fifth grade was an extremely important year for Sonia’s intellectual development, as several highly influential events came to pass. The first was when Sonia’s mother had a visitor one afternoon. Sonia overheard her mother and this man speaking of priceless knowledge with reasonable monthly payments that give access to as much information as a library of a thousand books.⁵³ When the complete twenty-four volume *Encyclopedia Britannica* was later delivered, Sotomayor described it as, “‘Christmas come early.’”⁵⁴ Sonia greatly expanded her intellectual prowess and developed a thirst for knowledge as a result.⁵⁵

Justice Sotomayor had been doing well in school; however she wanted to be one of the best in the class.⁵⁶ In order to accomplish this goal, Justice Sotomayor, in an atypical fashion for a fifth grader, decided to approach one of the smartest girls in her class and ask her how to

⁴⁸ *Id.* at 47.

⁴⁹ *Id.* at 69.

⁵⁰ *Id.*

⁵¹ *Id.* at 70.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 70-71.

⁵⁶ *Id.*

study.⁵⁷ Through the ensuing conversation, Sotomayor learned to underline important facts and take notes while reading to condense information into smaller bits that were easy to remember, and to reread those notes before a test.⁵⁸ Justice Sotomayor stated that, the more important lesson she had learned through that exchange was, “Don’t be shy about making a teacher of any willing party who knows what he or she is doing.”⁵⁹ Even at an early age, Justice Sotomayor was beginning to develop a pattern that would stick with her throughout the remainder of her education and her professional life: seeking out a mentor, asking guidance, and soaking up whatever information she could.⁶⁰

B. Choosing a Career

Justice Sotomayor’s destiny to be a Supreme Court Justice further revealed itself at the astonishing age of ten. While sitting in the waiting room at Albert Einstein College of Medicine where she received tests for her diabetes, she read a pamphlet about choosing a profession suited for diabetics.⁶¹ The pamphlet listed many possibilities: a doctor, a lawyer, an architect, an engineer, a nurse, and a teacher.⁶² The pamphlet then contained a list of professions that were unsuited for a person with diabetes, and among this list was a police officer.⁶³ This devastated Sotomayor, as she had aspirations of becoming a detective, just like those she read about in her Nancy Drew books.⁶⁴

While contemplating that pamphlet, young Justice Sotomayor realized that her solution was available on the television series, *Perry Mason*.⁶⁵ Every Thursday night, Justice Sotomayor

⁵⁷ *Id.* at 72.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 79.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 80.

sat, watching intently as Perry Mason solved his cases and proved his clients' innocence.⁶⁶ While being enamored with Perry Mason, Justice Sotomayor's unwavering goal of finding the truth reared its head, as she was more sympathetic to Burger, the prosecutor.⁶⁷ Burger was more committed to finding the truth than to winning his cases, and when Burger explained that if the defendant was truly innocent and the case was dismissed, he had done his job, because justice had been served.⁶⁸ With that being said however, it was the judge who truly captured Sotomayor's attention.⁶⁹ Justice Sotomayor knew that the end of the episode was the most important, because that was when the judge made his decision on whether or not to dismiss the charges.⁷⁰ Ten year old Sonia Sotomayor, a girl whose decisiveness had already saved her family from confrontations and further fighting, knew she could be a great lawyer, and wanted to be a judge.⁷¹

C. Justice Sotomayor's Education

Once enrolled in Cardinal Spellman High School, Justice Sotomayor's intellectual horizons expanded with the influence of a history teacher, Miss Katz. Miss Katz taught Justice Sotomayor to think abstractly and conceptually, rather than just memorizing facts.⁷² This skill was very important to Justice Sotomayor's development as an excellent student, and later, an excellent attorney and judge. Sonia learned how to analyze facts and how to think critically about history.⁷³

Signing up for the Forensics Club at Cardinal Spellman also played an important role in Justice Sotomayor's development as an excellent examiner of facts. As evidence of Justice

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 80-81.

⁶⁹ *Id.*

⁷⁰ *Id.* at 81.

⁷¹ *Id.*

⁷² *Id.* at 104.

⁷³ *Id.*

Sotomayor's ever persistent self-awareness, she joined the Forensics Club as part of her self-imposed program in public speaking because the Forensics Club was a debate team.⁷⁴ Justice Sotomayor's friend, Kenny Moy, was the student coach of the girl's team of the Forensics Club, and Justice Sotomayor learned from Kenny how to dismantle an opponent's position step by step, how to argue affirmatively and persuasively, and how to be unfazed by emotion.⁷⁵ Justice Sotomayor explained, "Forensics Club was good training for a lawyer in ways that I barely understood at the time. You got handed a topic, as well as the side you had to argue, pro or con. It didn't matter what you believed about the issue; what mattered was how well you argued. You not only had to see both sides; you had to prepare as if you were arguing both in order to anticipate your opponent's moves."⁷⁶

Justice Sotomayor had reached the finals of a speech competition, and her presentation offers insights to not only how well suited she was to be a lawyer and a judge, but also her view on crime and witnesses.⁷⁷ Justice Sotomayor selected the cold-blooded murder of Kitty Genovese in Queens, and the neighbors who witnessed it but did nothing as her topic for her final presentation.⁷⁸ Justice Sotomayor ascended the podium and began to tell the story of Kitty Genovese; a young woman who drove home from her job as a bartender and was savagely stabbed, beaten, and raped.⁷⁹ Justice Sotomayor, noticing the audiences undivided attention, continued; thirty-eight people in their homes witnessed the assault that lasted a half hour, however only one person called the police after it ended, when it was already too late.⁸⁰ Justice Sotomayor explained that the assailant was later caught and is serving life in prison, but she was

⁷⁴ *Id.* at 109.

⁷⁵ *Id.* at 109-10.

⁷⁶ *Id.* at 110-11.

⁷⁷ *Id.* at 111.

⁷⁸ *Id.*

⁷⁹ *Id.* at 112.

⁸⁰ *Id.*

concerned with the witnesses, who sat idly by while this young woman was being raped and murdered.⁸¹ In her presentation, Justice Sotomayor explained, “A crime like what happened to Kitty Genovese may be the act of a deranged individual. Other crimes may be different in their causes, pointing to broader failures of society. But in the moment of opportunity, when a criminal grabs his chance and a victim is suffering, our own responsibility is the same. When the criminal finds his victim in a dark alley, an observer too has a moment of opportunity.”⁸²

Justice Sotomayor then challenged her audience, “Will you see the victim not as a stranger or a statistic but as another human being like yourself? Will you be fully human in that moment and feel the obligation to care, to act, to get involved? Will you be fully a citizen and rise to the responsibility?”⁸³ This exchange offers invaluable insight into Justice Sotomayor’s early capability to capture an audience, and to orate persuasively and argumentatively.

Notwithstanding Justice Sotomayor’s strong self-awareness and career aspirations, it took her friend Kenny Moy to begin her thinking about college. Kenny Moy, who was enrolled in his freshman year at Princeton University, called Sotomayor, and one statement Kenny made stuck with her because she had no idea what it meant: he said to try for the Ivy League.⁸⁴ Justice Sotomayor jotted down the names of the schools that Kenny rattled off, and when she informed her guidance counsellor at school of her aspirations, the guidance counsellor offered no help.⁸⁵ Justice Sotomayor applied to the Ivy League schools that Kenny had recommended all on her own, and soon enough, a postcard from Princeton University arrived.⁸⁶ The post card contained three boxes, with “likely,” “possible,” and “unlikely,” next to each.⁸⁷ Justice Sotomayor’s post

⁸¹ *Id.*

⁸² *Id.* at 113.

⁸³ *Id.*

⁸⁴ *Id.* at 116-17.

⁸⁵ *Id.* at 117.

⁸⁶ *Id.* at 118.

⁸⁷ *Id.*

card was marked “likely.”⁸⁸ Justice Sotomayor, in a visit with a stunned guidance counsellor, had just learned that it was very likely she was going to be accepted to Princeton.⁸⁹

An experience that would prove to be influential and motivational then happened to Justice Sotomayor: her first experience with affirmative action. As she was still trying to wrap her head around the prospect of being admitted to Princeton, the school nurse stopped Justice Sotomayor in the hallway.⁹⁰ The school nurse wanted to know how Justice Sotomayor got a “likely” from Princeton, when two top ranking girls in the school only received a “possible.”⁹¹ Justice Sotomayor stated, “Her question would hang over me not just that day but for the next several years, while I lived the day-to-day reality of affirmative action.”⁹² Justice Sotomayor did not understand affirmative action, as it was a mere decade old.⁹³ However, the question that the nurse asked of her just pushed her to prove herself even more. After visiting Radcliffe, Yale, and Princeton, Justice Sotomayor decided to attend Princeton.⁹⁴

While Justice Sotomayor ultimately thrived at Princeton, graduating *summa cum laude*, her determination and diligence proved itself after she received her first grade. Justice Sotomayor received a C on the first assignment she handed in at Princeton.⁹⁵ Justice Sotomayor was crushed, and did not understand where she had gone wrong.⁹⁶ The Professor gave Justice Sotomayor all too familiar advice; her paper was full of information and facts, however, there was no argumentative structure, and no thesis that her facts were organized to support.⁹⁷ This was discouraging to Justice Sotomayor, and she did not know if she would ever master how to

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 119.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 123.

⁹⁵ *Id.* at 133.

⁹⁶ *Id.*

⁹⁷ *Id.* at 133-34.

write argumentatively, but, in another moment of indelible self-awareness, she realized that all she had to do was to transfer her debate skills onto paper.⁹⁸ Justice Sotomayor realized that she needed to map out a position, anticipate and address objections, and consider how best to persuade her audience.⁹⁹ This simple realization is still present in the opinions she writes for the Supreme Court; efficiently and effectively organized into a well-mapped out argument, specifically tailored to addressing the weaknesses in her position.

While the quality of her writing and her grades improved, Justice Sotomayor still had to solve her general deficiency in written English.¹⁰⁰ Justice Sotomayor's American History Professor pointed out that her sentences were fragments, her tenses were erratic, and her grammar was often incorrect.¹⁰¹ Justice Sotomayor realized that this was, in part, due to the fact that she wrote English using Spanish constructions and usage.¹⁰² Once again, evincing her work ethic, desire to be competitive, and her unending desire to better herself, Justice Sotomayor bought grammar and vocabulary handbooks, and during the summers would devote her lunch hour at work to doing grammar exercises and learning ten new words.¹⁰³

Another challenge that Justice Sotomayor would overcome at Princeton was the self-consciousness that came along with the gaps in knowledge and understanding as a result of the limits of class and cultural background.¹⁰⁴ Princeton was a drastic change to Justice Sotomayor's life, as she had been geographic and cultural experiences had been limited almost exclusively to the Bronx.¹⁰⁵ For the first time, Justice Sotomayor was also exposed to the wide disparity of wealth at Princeton. Justice Sotomayor's mother's income never reached above five thousand

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 135.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

dollars a year, and now, through her work study program, she was exposed to the financial figures of the wealthiest students at Princeton and how they paid for tuition.¹⁰⁶ Justice Sotomayor stated that after seeing those numbers she squarely knew where she stood in relation to some of the people among whom she was living and learning.¹⁰⁷

Justice Sotomayor's persistence eventually paid off at Princeton, as she is the living epitome of the saying, "Hard work pays off." When Justice Sotomayor was a senior, she received a letter in the mail that she quickly disregarded and threw in the garbage.¹⁰⁸ The letter was from Phi Beta Kappa, a national honor society that Justice Sotomayor wrote off as a scam.¹⁰⁹ It took a snooping friend of Justice Sotomayor's to convince her that it was a prestigious honor that she had to accept.¹¹⁰ Another such occasion occurred when the dean of student affairs called Justice Sotomayor to inform her that she had won and would be receiving the Pyne Prize.¹¹¹ Justice Sotomayor expressed her gratitude, but ultimately thought the dean of student affairs was overreacting in her congratulatory tone.¹¹² Justice Sotomayor called the same friend that had informed her of the prestige of Phi Beta Kappa, who explained to her that the award was the highest honor that a graduating senior at Princeton could receive, and obligated her to give a speech at an alumni luncheon.¹¹³

One last surprise would come for Justice Sotomayor at Princeton that she did not understand upon hearing the news. As Justice Sotomayor described, "Graduation brought one last unfamiliar laurel when Peter Winn called me into his office to tell me that I would graduate

¹⁰⁶ *Id.* at 136.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 161.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 162.

¹¹² *Id.*

¹¹³ *Id.*

summa cum laude.”¹¹⁴ When Justice Sotomayor looked up the meaning of *summa cum laude*, not only was the irony not lost on her, however it was a moment of reflection. Justice Sotomayor stated, “It was perhaps then I made a measure of peace with my unease; the uncertainty I’d always felt at Princeton was something I’d never shake entirely. For all the As and honors that could be bestowed, there would still lurk such moments of estrangement to remind me that my being there was not typical but an exception.”¹¹⁵ Justice Sotomayor’s time at Princeton was finished, and she had more than proven herself as being worthy of its education.

Justice Sotomayor enrolled in Yale Law School the fall after graduating from Princeton.¹¹⁶ At Yale Law School, Justice Sotomayor would develop another mentor-mentee relationship that would profoundly influence her life. Notwithstanding the previous guiding forces in Justice Sotomayor’s life, she described Jose Cabranes as her first true mentor.¹¹⁷ Justice Sotomayor described, “I had not yet discovered the benefit of sustained dialogue with someone who epitomized the kind of achievement I aspired to, and much beyond that. It was not the comfort of handholding; rather, it was a style of learning by means of engaging a living example.”¹¹⁸ Justice Sotomayor learned from observing Jose Cabranes and the nuances and complexity of live action.¹¹⁹ Justice Sotomayor described him as, “[T]he complete package of knowledge, experience, and judgment.”¹²⁰

Justice Sotomayor worked for Jose Cabranes as his research assistant, researching the legislative history of U.S. citizenship for Puerto Ricans.¹²¹ Sotomayor described she truly learned from observing Cabranes’ behavior with people, and his knowledge of the law, history,

¹¹⁴ *Id.* at 164.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 170.

¹¹⁷ *Id.* at 176.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 177.

and his ability to warmly engage people in conversation.¹²² Cabranes taught Justice Sotomayor many of the skills that would propel her to the Supreme Court. Sotomayor learned how to be a “citizen-lawyer,” through maintaining community relationships while retaining self-assurance and grace.¹²³ Justice Sotomayor modeled her legal career after the example set by Jose Cabranes, and emphasized, “[A] role model in the flesh provides more than an inspiration; his or her very existence is confirmation of possibilities one may have every reason to doubt, saying, ‘Yes, someone like me can do this.’ By the time I got to Yale, I had met a few successful lawyers, usually in their role as professors. Jose, the first I had the chance to observe up close, not only transcended the academic role but also managed to uphold his identity as a Puerto Rican, serving vigorously in both worlds.”¹²⁴ These lessons have persevered in Justice Sotomayor’s career, and she has become an exemplary model of how to become successful while staying true to one’s roots.

Another experience that would stick with Justice Sotomayor and impact her career was her summer associate position with the law firm Paul, Weiss, Rifkind, Wharton & Garrison.¹²⁵ Justice Sotomayor struggled in this position, as she was assigned to contribute to a large brief being prepared for an antitrust case.¹²⁶ Justice Sotomayor stated that she knew her writing was subpar, but it was confirmed when her work was not included in what the associate she was working under prepared and passed on to the next level.¹²⁷ At the end of the summer, Justice Sotomayor was not offered a position with the firm, which shook Justice Sotomayor.¹²⁸ She was concerned that she was not yet thinking like a lawyer, and that the hard work she had put in was

¹²² *Id.*

¹²³ *Id.* at 177-78.

¹²⁴ *Id.* at 178.

¹²⁵ *Id.* at 182.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 182-83.

not enough.¹²⁹ Once again, Justice Sotomayor viewed her writing as her weakness; an inability to persuasively advocate.¹³⁰ In pure Justice Sotomayor fashion however, she faced the challenge head on, and broke the problem up into smaller parts that were easier to tackle in a methodical fashion.¹³¹ This same methodical analysis and her ability to break down a problem have stuck with her, and are evident in every judicial opinion, concurrence, or dissent that Justice Sotomayor pens. Justice Sotomayor, even though she eventually overcame this obstacle, stated, “The memory of this trauma, which I was determined not to repeat, while not suffocating my ambitions, would overhang my every career choice until I became a judge.”¹³²

Notwithstanding Justice Sotomayor’s success at Princeton and at Yale Law School, people still doubted her and attributed her success to affirmative action. One such occasion that would stick with Justice Sotomayor was a dinner party hosted by the law firm Shaw, Pittman, Potts & Throwbridge.¹³³ Justice Sotomayor met the partner who held the event, and they immediately engaged in a discussion about affirmative action.¹³⁴ The partner asked Justice Sotomayor if she believed in affirmative action, and if Yale and Princeton had an affirmative action program.¹³⁵ He then asked Justice Sotomayor, “Do you believe law firms should practice affirmative action? Don’t you think it’s a disservice to minorities, hiring them without the necessary credentials, knowing you’ll have to fire them a few years later?”¹³⁶ Justice Sotomayor was taken aback by this question, and responded by stating that she thought even someone who got admitted by affirmative action could prove they were qualified by their subsequent accomplishments; to which the Partner from Shaw, Pittman responded that was the

¹²⁹ *Id.*

¹³⁰ *Id.* at 183.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 188.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

problem with affirmative action, and proceeded to ask Justice Sotomayor if she thought she would have been admitted to Yale Law School if she was not Puerto Rican.¹³⁷

Justice Sotomayor decided to go ahead with the formal recruiting process the following day, and had an interview with the partner from the night before.¹³⁸ Sotomayor went to the interview, and before she knew what was happening, the partner encouraged her to travel to Washington for the next step in the formal hiring process.¹³⁹ Justice Sotomayor, however, instead of accepting the invitation, challenged the partner on the preceding evening.¹⁴⁰ She confronted his insulting manner of speaking to her, and about his views of affirmative action.¹⁴¹ This is a great example of Justice Sotomayor's eagerness to stand up for herself and what she believes in, while doing so cordially and respectfully.

As a result of this exchange, Justice Sotomayor came to a realization about affirmative action. She stated, "When the anger, the upset, and the agitation had passed, a certainty remained: I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run."¹⁴² Justice Sotomayor was starting to make peace with her affirmative action beginnings, and knew that she proved herself through her relentless hard work.¹⁴³ Affirmative action itself and its role in society has changed, but as Justice Sotomayor stated, "But one thing has not changed: to doubt the worth of minority students' achievements when they succeed is really only to present another face of the prejudice

¹³⁷ *Id.* at 189.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 190.

¹⁴² *Id.* at 191.

¹⁴³ *Id.*

that would deny them a chance even to try. It is the same prejudice that insists all those destined for success must be cast from the same mold as those who have succeeded before them, a view that experience has already proven a fallacy.”¹⁴⁴ Justice Sotomayor is a living example of that fallacy.

One day at Yale, a desire for cheddar cheese cubes would dramatically affect Justice Sotomayor’s career path. Justice Sotomayor, taking a break from studying one evening, passed the open door of a conference room where she observed a table of cheese, crackers, and cheap wine.¹⁴⁵ Inside the conference room was a panel on public service career paths.¹⁴⁶ The last speaker was a district attorney from New York who promised to be brief, so she decided to stay in order to reap the benefits of the cheese table.¹⁴⁷ When the district attorney began to speak, he immediately captured Justice Sotomayor’s attention, as he stated that within the first year of employment with the district attorney, the new assistant’s would be going to trial, with full responsibility for how they would develop and present their cases.¹⁴⁸ After the district attorney was done speaking, Justice Sotomayor lined up to speak to him, and their conversation led to a meeting the next day.¹⁴⁹ During this meeting, Justice Sotomayor was thoroughly impressed by what the district attorney was saying, and Perry Mason popped into her head.¹⁵⁰ Justice Sotomayor stated, “Perhaps Bob Morgenthau’s job stirred a memory of what had first intrigued me about being a lawyer: the chance to seek justice in a courtroom. Despite my success in the trial advocacy program and reaching the semifinals of the Barrister’s Union mock trials, Perry Mason was a vision that had been eclipsed at Yale amid the immersion in case law and theory

¹⁴⁴ *Id.* at 192.

¹⁴⁵ *Id.* at 193.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 194.

¹⁵⁰ *Id.* at 195.

and self-doubt. Now, it seemed that untold fantasy was beckoning me again, conspiring with a bit of free cheddar to decide my fate.”¹⁵¹ Just like that, Justice Sotomayor accepted a position with the district attorney’s office in New York, and began her climb to the Supreme Court of the United States.

III. Opinions, Concurrences, and Dissents on the Supreme Court of the United States

Justice Sotomayor has a distinctive style of legal writing. She employs a no-nonsense, common sense approach to legal writing in which she engages in broad research of the relevant law, precedent, statutory history, and factual details in order to reach a narrow conclusion. Utilizing the same techniques she developed at an early age, Justice Sotomayor breaks down the issue into smaller problems and methodically works her way through it to reach a well thought out conclusion, applying the law to the facts in a narrow, yet commonsense fashion. Justice Sotomayor’s legal opinions all follow a similar overall structure: a thorough analysis of the facts of the case, a description of the case’s procedural posture, an in-depth and technical explanation of the current law, an acknowledgment of the opposition’s stance, an often narrow, commonsense application of the law to the facts, and a conclusion. The following cases were selected as they are excellent examples of Justice Sotomayor’s technical, incremental, and exhaustive application of the law to the facts in front of her.

A. Majority Opinions

1. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011)

This case, exemplifies Justice Sotomayor’s commonsense approach to the application of law to the specific facts presented to her. The issue in this case is whether or not the age of a child subjected to police questioning is relevant to the custody analysis identified in *Miranda v.*

¹⁵¹ *Id.*

Arizona, 384 U.S. 436 (1966).¹⁵² Justice Sotomayor, in writing for the majority, held that, so long as the child’s age was known to the police officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is proper.¹⁵³

J.D.B. was a thirteen year old, seventh grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from class by a uniformed police officer, taken to a conference room, and questioned.¹⁵⁴ J.D.B. was being questioned because he was seen behind a residence in a neighborhood where two home break-ins had occurred, and he was seen at school possessing a digital camera that was stolen from one of those homes.¹⁵⁵ A police investigator, Investigator DiCostanzo, was assigned to the case and went to J.D.B.’s school to question him.¹⁵⁶ Investigator DiCostanzo instructed the school resource officer to remove J.D.B. from class and to take him to a conference room.¹⁵⁷ J.D.B. was then questioned by Investigator DiCostanzo in the presence of the school resource officer, the assistant principal, and the administrative intern about the home break-ins, without ever receiving *Miranda* warnings, without being given a chance to speak with his legal guardian (his grandmother), and without being informed that he could terminate the questioning and leave at any time.¹⁵⁸

Upon questioning, J.D.B. originally denied any wrongdoing, stating that he was in the neighborhood seeking work mowing lawns.¹⁵⁹ The assistant principal then urged J.D.B. to “do the right thing,” because, “the truth always comes out in the end.”¹⁶⁰ Eventually, J.D.B. asked

¹⁵² *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398 (2011).

¹⁵³ *Id.* at 2399, 2406.

¹⁵⁴ *Id.* at 2399.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Investigator DiCostanzo if he would “still be in trouble” if he returned the “stuff.”¹⁶¹

Investigator DiCostanzo then explained to J.D.B. that the return of the stolen goods would bode well for J.D.B., however, the case was going to be litigated regardless.¹⁶² DiCostanzo then warned J.D.B. that he may have to go to juvenile detention before court if DiCostanzo believed that J.D.B. would continue to break into other homes.¹⁶³ After learning this information, J.D.B. confessed to the home break-ins and only then was J.D.B. told that he could refuse to answer the Investigator’s answers, and that he was free to leave.¹⁶⁴ J.D.B. then wrote a statement, and at the end of the school day he was allowed to get on the bus and go home.¹⁶⁵

J.D.B. was charged with two counts of breaking and entering and larceny in the juvenile petitions filed against him.¹⁶⁶ The public defender moved to suppress the statements J.D.B. had made to Investigator DiCostanzo, arguing that J.D.B. had been interrogated by police in a custodial setting without being read his *Miranda* rights.¹⁶⁷ The trial court denied the motion, determining that J.D.B. was not in custody at the time of the interrogation, and that his statements were voluntary.¹⁶⁸ J.D.B. appealed to the North Carolina Court of Appeals, which affirmed, holding that J.D.B. was not in custody when he confessed and declining to consider the age of the individual subjected to questioning by police.¹⁶⁹

Justice Sotomayor then began her incremental, methodical breakdown of the relevant law and precedent to which she would make her decision. Justice Sotomayor stated, “Any police

¹⁶¹ *Id.*

¹⁶² *Id.* at 2399-400.

¹⁶³ *Id.* at 2400.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

interview of an individual suspected of a crime has ‘coercive aspects to it.’”¹⁷⁰ Justice Sotomayor noted, however, that only police interrogations that occur in custody present the heightened risk that the statements obtained from a suspect are not the product of free will.¹⁷¹ Justice Sotomayor pointed out that custodial interrogation entails inherently compelling pressures, and that even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual’s will to resist and compel speech where he or she would not do so otherwise.¹⁷² As a result of custodial interrogation by police, many people confess to crimes they did not commit, and Justice Sotomayor explained that this risk is all the more present and troubling when the subject of custodial interrogation is a child.¹⁷³

The Court then explained that, in response to this inherently coercive environment, it adopted *Miranda* in order to safeguard the constitutional guarantee against self-incrimination.¹⁷⁴ As a result, prior to questioning, a suspect must be informed that he or she has the right to remain silent, that any statement he or she does make may be used against him or her in a court of law, and that he or she has the right to an attorney, whether retained or appointed.¹⁷⁵ *Miranda* further placed the burden on the government to establish that, if a suspect does make a statement, he or she did so knowingly, voluntarily, and intelligently.¹⁷⁶

Justice Sotomayor then described the necessity of determining whether the suspect was in custody in order to determine if he or she was entitled to his or her *Miranda* rights. She stated, “Because these measures protect the individual against the coercive nature of custodial interrogation, they are required ‘only where there had been such a restriction on a person’s

¹⁷⁰ *Id.* at 2401, (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)(*per curiam*)).

¹⁷¹ *Id.*, (citing *Dickerson v. United States*, 530 U.S. 428, 435 (2000)).

¹⁷² *Id.*, (citing *Miranda*, 384 U.S. at 467).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

freedom as to render him in custody.”¹⁷⁷ Justice Sotomayor then stated the test for determining whether a suspect is in custody is twofold: what were the circumstances surrounding the interrogation, and given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.¹⁷⁸ The objective nature of the test means that the subjective views of the interrogating officer or the person being questioned are irrelevant in the custody analysis.¹⁷⁹ The objective nature of the inquiry is meant to give police clear guidance as to when *Miranda* warnings are required.¹⁸⁰ Because police need to make split second decisions regarding whether or not to read a suspect his or her *Miranda* rights, limiting the analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of making a subjective state of mind inquiry with every suspect.¹⁸¹

Justice Sotomayor then began to apply *Miranda* and its progeny regarding the custody analysis to J.D.B.’s situation. Justice Sotomayor began by stating:

The state and *amici* contend that a child’s age has no place in the custody analysis no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child’s age ‘would have affected how a reasonable person’ in the suspect’s position ‘would perceive his or her freedom to leave. That is, a reasonable child subject to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.’¹⁸²

Justice Sotomayor reasoned that the Court believed that courts can account for the reality that children think, act, and are influenced differently than adults, without damaging the objective

¹⁷⁷ *Id.* at 2402, (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)).

¹⁷⁸ *Id.*, (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 2402-403, (quoting *Stansbury*, 511 U.S. at 325).

nature of the custody analysis.¹⁸³ Justice Sotomayor then pointed to the commonsense notion that a child's age is more than a chronological fact: it is a fact that generates commonsense conclusions about behavior and perception.¹⁸⁴ Justice Sotomayor continued, "Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge."¹⁸⁵

Justice Sotomayor then pointed to the court's own history to demonstrate her point that the law treats children differently. She stated that the Court has observed that children are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, and that they are more vulnerable to outside pressures than adults.¹⁸⁶ Justice Sotomayor further pointed out that the Court, in *Haley v. Ohio*, 332 U.S. 596, 599 (1948), stated that events that would leave a man in police interrogation cold and unimpressed could overcome, overawe, and overwhelm a child.¹⁸⁷

Justice Sotomayor then pointed out that a multitude of other areas of the law recognize children's' limited capacity to make decisions and understand the world around them.¹⁸⁸ She described how the universal differentiating characteristics of children are universal, pointing to the limitations on children's ability to alienate property, enter a binding contract, and marry without parent consent.¹⁸⁹ More Strikingly, Justice Sotomayor pointed out that, "[E]ven where a 'reasonable person' standard otherwise applies, the common law has reflect the reality that children are not adults. In negligence suits, for instances, where liability turns on what an

¹⁸³ *Id.* at 2403.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*, (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)), (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)), (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2403-404.

objectively reasonable person would do in the circumstances, ‘[a]ll American jurisdictions accept the idea that a person’s childhood is a relevant circumstance’ to be considered.”¹⁹⁰ Accordingly, recognizing that there is an abundance of legal precedent that does not treat children as miniature adults, Justice Sotomayor announced her standard, “So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances unknown to them, nor to anticipate the frailties or idiosyncrasies of the particular suspect whom they question.”¹⁹¹

Justice Sotomayor’s application of the law governing *Miranda*’s custody determination of children is commonsense, because childhood and age yields objective conclusions similar to those identified in this opinion, and considering age in the custody analysis does not involve a determination of how a child’s age subjectively affects the mindset of a particular child.¹⁹² Justice Sotomayor provided that this case was a prime example of how an application of the custody analysis without considering age as a factor would lead to absurd results. Justice Sotomayor stated:

Were the court precluded from taking J.D.B.’s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to ‘do the right thing’; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without

¹⁹⁰ *Id.* at 2404, (quoting Restatement (Third) of Torts §10, Comment *b*, p. 117 (2005)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 2405.

accounting for the age of the child subjected to those circumstances.¹⁹³

As Justice Sotomayor pointed out, deciding whether a child's age influenced whether or not he or she felt free to terminate an interrogation and leave does not involve a detailed subjective inquiry into each child's state of mind.¹⁹⁴ Accordingly, Justice Sotomayor held that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.¹⁹⁵

This case demonstrates Justice Sotomayor's commonsense approach to the application of law to a specific set of facts. While some of her colleagues dissented, believing that the Court's decision cannot be reconciled with *Miranda's* attempt at establishing a clear rule that can be applied in all cases, this case is a demonstration that strict adherence to a precedent can lead to absurd results, if not for the application of commonsense. Justice Sotomayor, in determining that it is proper to account for a child's age in *Miranda's* objective custody test, applied commonsense to existing precedent in order to reach a logical, well-rounded conclusion.

2. *Dillon v. United States*, 130 S. Ct. 2683 (2010)

This case presented the Court with the question of whether its decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines promulgated by Congress as advisory, requires reading the Sentencing Guidelines as nonbinding.¹⁹⁶ Justice Sotomayor, writing for the majority, held that, given the limited scope and purpose of the statute at issue, the proceedings at issue under that section do not implicate the interests identified in

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 2406.

¹⁹⁶ *Dillon v. United States*, 130 S. Ct. 2683, 2687 (2010).

Booker, and that the sentencing modification proceedings authorized by the statute are not constitutionally compelled.¹⁹⁷

In 1993, Percy Dillon was convicted by a jury of conspiracy to distribute and to possess with the intent to distribute more than 500 grams of powder cocaine and more than 50 grams of crack cocaine in violation of 21 U.S.C. § 846, possession with the intent to distribute more than 500 grams of powder cocaine in violation of § 841(a)(1), and use of a firearm during and in relation to a drug trafficking offense.¹⁹⁸ These convictions exposed Dillon to ten years to life imprisonment for the conspiracy charges, five to forty years imprisonment for the cocaine possession, and a mandatory minimum sentence of 5 years for the firearm offense to be served consecutively to the sentence for the drug offenses.¹⁹⁹

While being sentenced, the District Court found that Dillon was responsible 1.5 kilograms of crack cocaine and 1.6 kilograms of powder cocaine.²⁰⁰ These offenses, coupled with other aggravating and mitigating factors exposed Dillon to a mandatory sentence range of two hundred sixty two to three hundred twenty seven months imprisonment.²⁰¹ The Court sentenced Dillon at the bottom of the Guidelines range, followed by a mandatory sixty month sentence for the firearm count, for a total sentence of three hundred twenty two months.²⁰² At sentencing, the District Court explained that it viewed the length of the term to be entirely too high for the crime committed, but was constrained to impose the sentence the Guidelines set out.²⁰³ The Third Circuit Court of Appeals affirmed Dillon's conviction and sentence on appeal.²⁰⁴

¹⁹⁷ *Id.* at 2692.

¹⁹⁸ *Id.* at 2689.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Justice Sotomayor began her majority opinion describing the statutory history of the 18 U.S.C. § 3582(c), the statute at issue in this case. Justice Sotomayor stated that, under § 3582(c), a federal court generally may not modify a term of imprisonment once it has been imposed.²⁰⁵ However, Congress enacted § 3582(c)(2), which states that, in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission, a court may reduce the sentence if it is consistent with applicable Commission policy statements.²⁰⁶ The policy statement that proceeds § 3582(c)(2) instructs courts not to reduce a term of imprisonment below the minimum number of an amended sentencing range except to the extent the original term of imprisonment was below the range then acceptable.²⁰⁷

Justice Sotomayor explained that the Sentencing Reform Act of 1984 established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements regarding the Guidelines' application.²⁰⁸ Under the Act, the Commission must periodically review and revise the Guidelines and determine under what circumstances and by what amount the sentences for certain offenses can be reduced.²⁰⁹ Justice Sotomayor stated that, as enacted, the Act made the Sentencing Guidelines binding, and that except in limited circumstances, district courts lacked discretion to depart from the Guidelines.²¹⁰ Justice Sotomayor stated, "Under that regime, facts found by a judge by a preponderance of the evidence often increased the mandatory Guidelines range and permitted the judge to impose a sentence greater than that supported by the facts established by the jury verdict or guilty plea.

²⁰⁵ *Id.* at 2687.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

We held in *Booker* that treating the Guidelines as mandatory in these circumstances violated the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt.”²¹¹

In order to remedy that constitutional problem, the Court rendered the Guidelines advisory by invalidating two provisions of the Act: § 3553(b)(1), which required a sentencing court to impose a sentence within the applicable Guidelines range, and § 3742(e), which prescribed the standard of review on appeal, including *de novo* review of Guidelines departures.²¹² The Court concluded that, with those two sections excised, the rest of the Act satisfied the constitution. Justice Sotomayor then stated that *Booker* thus left intact other provisions of the Act, including those giving the Commission authority to revise the Guidelines and to determine when and to what extent a revision would be retroactive.²¹³

The Sentencing Guidelines, with respect to drug trafficking offenses, establish a defendant’s base offense level by the type and weight of the drug.²¹⁴ The Sentencing Commission amended the Guidelines in 2007 to reduce by two levels the base offense level associated with each quantity of crack cocaine, and in 2008 the Commission made the revision retroactive.²¹⁵ According to the Act, when the Commission makes a Guidelines amendment retroactive, § 3582(c)(2) authorizes a district court to reduce an otherwise final sentence that is based on the amended provision, and any reduction must be consistent with applicable policy statements issued by the Sentencing Commission.²¹⁶ The relevant policy statement to drug trafficking offenses is USSG § 1B1.10, which instructs courts proceeding under § 3582(c)(2) to

²¹¹ *Id.* at 2687-688.

²¹² *Id.* at 2688.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

substitute the amended Guidelines range while leaving intact all other Guidelines application decisions.²¹⁷ Justice Sotomayor then stated, that, “Under § 3582(c)(2), a court may then grant a reduction within the amended Guidelines range if it determines that one is warranted ‘after considering the factors set forth in section 3553(a) to the extent they are applicable.’ Except in limited circumstances, however, § 1B1.10(b)(2)(A) forecloses a court acting under § 3582(c)(2) from reducing a sentence ‘to a term that is less than the minimum of the amended guidelines ranges.’”²¹⁸

Percy Dillon filed a *pro se* motion for a sentence reduction pursuant to § 3582(c)(2) after learning that the Sentencing Commission made an amendment to the crack cocaine Guidelines retroactive.²¹⁹ Dillon asked the District Court to reduce his sentence further than the two level reduction authorized by the amendment.²²⁰ Dillon argued that the Court should reduce his sentence pursuant to the sentencing factors found in § 3553(a), specifically based on his post-conviction pursuit of educational and community outreach opportunities.²²¹ Such factors, Dillon argued, justified the Court in varying from the Guidelines.²²² Dillon further argued that the Court’s decision in *Booker* authorized courts to grant such a variance because the amended Guidelines range was advisory, notwithstanding any contrary statement § 1B1.10 in the Commission’s policy statements.

The District Court reduced Dillon’s sentence to two hundred seventy months, but declined to go further, concluding that *Booker* was not binding and accordingly holding that it lacked authority to impose a sentence inconsistent with § 1B1.10’s two level reduction.²²³ The

²¹⁷ *Id.*

²¹⁸ *Id.* at 2688-689.

²¹⁹ *Id.* at 2689.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 2689-690.

Third Circuit affirmed the District Court, stating that § 3582(c)(2) is codified in a different section than the provisions invalidated in *Booker* and contains no cross-reference to those provisions.²²⁴ The Third Circuit concluded that the District Court was correct in holding it lacked authority to reduce Dillon’s sentence below the amended Guidelines range, stating *Booker* did not obviate Congress’ directive in § 3582(c)(2) that a sentence reduction should be consistent with the Sentencing Commission’s policy statements.²²⁵

Dillon argued that *Booker* should preclude the Commission from issuing a policy statement that generally forecloses below Guidelines sentences at § 3582(c)(2) proceedings, which § 1B1.10 does.²²⁶ Dillon thus argued that the mandatory language in the Commission’s policy statement in § 1B1.10(b)(2)(A) should be excised, and treated as advisory, just as the provisions deemed unconstitutional in *Booker*.

Justice Sotomayor, writing for the majority, stated that the language of § 3582(c)(2) foreclosed Dillon’s argument, because it speaks of sentence modification by giving courts the power to reduce an otherwise final sentence in circumstances specified by the Commission, and not a sentencing or resentencing proceeding like the one outlawed in *Booker*.²²⁷ Justice Sotomayor pointed out that, “It is also notable that the provision applies only to a limited class of prisoners – namely those whose sentence was based on a sentencing range subsequently lowered by the Commission. Section 3582(c)(2)’s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a

²²⁴ *Id.* at 2690.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

plenary resentencing proceeding.”²²⁸ As a result, the sentence modification for crack cocaine offenses did not implicate defendants’ Sixth Amendment rights.

Justice Sotomayor also stated that the substantial role that Congress gave the Commission in sentence modification proceedings further supports that conclusion.²²⁹ The Act gives the Commission the authority to decide whether to amend the Guidelines and to decide whether to make the amendments retroactive.²³⁰ Accordingly, a court’s power under § 3582(c)(2) depends on the Commission’s decision not just to amend the Guidelines but to make the amendment retroactive.²³¹ Courts are further constrained by the Commission’s policy statements dictating by what amount the sentence affected by the amendment may be reduced.²³² Further, § 3582(c)(2) instructs a district court to consider the sentencing factors set out in § 3553(a) only to the extent applicable, but it authorizes a reduction only on the basis that the reduction is consistent with the applicable policy statements issued by the Commission, which, in this case is § 1B1.10.²³³ Accordingly, a court must first determine that a reduction is consistent with § 1B1.10 before it can consider whether a sentence reduction is warranted according to the factors set out in § 3553(a).²³⁴ As a result, a district court does not have the authority to issue a new sentence in the usual sense, but only a sentence modification consistent with the Commission’s instructions set out in § 1B1.10.²³⁵ Furthermore, Justice Sotomayor pointed out that the Federal Rules of Criminal Procedure requires a defendant be present at sentencing, but excludes from that

²²⁸ *Id.* at 2691.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

requirement proceedings that involve the correction or reduction of a sentence under Rule 35 or 18 U.S.C. 3582(c).²³⁶

As a result of the foregoing, Justice Sotomayor found that proceedings under § 3582(c)(2) do not implicate the interests identified in *Booker*.²³⁷ Justice Sotomayor pointed out that the sentence modification proceedings at issue are not constitutionally compelled, and that the Court is not aware of any constitutional requirement of retroactivity that entitles defendants to the benefit of subsequent Guidelines amendments.²³⁸ As a result, Justice Sotomayor concluded that § 3582(c)(2) proceedings do no implicate a defendants Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.²³⁹ Any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment, but only affect the judge's exercise in discretion in reducing the original sentence within the Guidelines range.²⁴⁰ As a result, there is no encroachment by judges upon facts historically found by the jury, nor any threat to the jury's domain at trial.²⁴¹

This case exemplifies that Justice Sotomayor does not decide her cases on ideological grounds. The stereotypical liberal judge tends to side with criminal defendant's rights, and are more sympathetic to their position. Here, however, Justice Sotomayor evinces her dedication to the application of the law, and is not influenced by any perceived unfairness to the defendant. This opinion also sheds light on Justice Sotomayor's interpretation of legislative history and precedent. Her opinion works methodically through the legislative history of the Sentencing Reform Act, beginning with its adoption, and working her way to the current state of the law.

²³⁶ Fed. R. Crim. P. 43(b)(4).

²³⁷ *Dillon*, 130 S. Ct. at 2692.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

Justice Sotomayor then applies the language of the statute in light of its history and relevant case law to come to a narrow, competent application of the law to the facts. This is a reflection of Justice Sotomayor's dedication to the legal profession and her devotion to finding the truth.

3. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011)

In this case, Richard Bryant was convicted by a jury of second degree murder when the trial court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a gas station parking lot.²⁴² The Michigan Supreme Court held on appeal that the Sixth Amendment's Confrontation Clause, as explained in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 57 U.S. 813 (2006), made Covington's statements inadmissible testimonial hearsay, reversing Bryant's conviction.²⁴³ The Supreme Court granted certiorari in order to determine whether the Confrontation Clause barred Covington's statements admission at trial.²⁴⁴ Justice Sotomayor, writing for the majority, held that Covington's statements were admissible because the primary purpose of the police's questioning of Covington was to enable police assistance to meet an ongoing emergency.²⁴⁵ As a result, the Court held that Covington's statements regarding the identification and location of the shooting were not testimonial, and their admission at Bryant's trial did not violate the Confrontation Clause.²⁴⁶

Anthony Covington was found by the police lying on the ground at a Detroit gas station at 3:25 a.m. with a gunshot wound to his abdomen.²⁴⁷ Upon finding Covington, the police asked him what had happened, who had shot him, and where the shooting occurred.²⁴⁸ Covington

²⁴² *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

stated that someone named “Rick” shot him about twenty minutes earlier, and that he had a conversation with Bryant through the back door of Bryant’s house, and when he turned to leave, he was shot through the back door and then drove to the gas station.²⁴⁹ The police’s conversation with Covington ended only lasted between five and ten minutes, when emergency medical services arrived.²⁵⁰ Covington was then transported to a nearby hospital where he died several hours later.²⁵¹ The police traveled to Bryant’s residence, where they found blood, a bullet, a bullet hole in the back door, and Covington’s wallet and identifying information.²⁵²

At trial, Bryant was convicted of second degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony.²⁵³ Bryant appealed his conviction up to the Michigan Supreme Court, arguing that Covington’s statements to the police were testimonial, and thus should not have been admitted at trial in contravention of his Confrontation Clause rights.²⁵⁴ The Michigan Supreme Court ultimately concluded that the primary purpose of the police’s interrogation of Covington was to establish the facts of an event that had already occurred, and thus were not to enable the police to meet an ongoing emergency.²⁵⁵

Justice Sotomayor began by stating, “The Confrontation Clause of the Sixth Amendment states: ‘In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.’ The Fourteenth Amendment renders the Confrontation Clause binding on the States.”²⁵⁶ The Court, in *Crawford*, examined the history of the Confrontation Clause and determined that the principal evil at which the Confrontation Clause was meant to eradicate was

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 1150-151.

²⁵⁵²⁵⁵ *Id.* at 1151.

²⁵⁶ *Id.* at 1152.

using *ex parte* communications as evidence against the accused.²⁵⁷ The Court in that case limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment demands unavailability of the witness and a prior opportunity to cross-examine him or her.²⁵⁸ Furthermore, Justice Sotomayor explained that, at a minimum, *Crawford* defined testimonial statements as those given during preliminary hearings, before a grand jury, at a former trial, and police interrogations.²⁵⁹

The Court, in *Davis* in 2006, elaborated that, “[I]nterrogation by law enforcement officer fall squarely within the class’ of testimonial hearsay, we had immediately in mind interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.”²⁶⁰ Justice Sotomayor then explained that the Court in *Davis*, thus made clear that not all those questioned by the police are witnesses and not all interrogations by police are subject to the Confrontation Clause.²⁶¹ Justice Sotomayor elaborated that, in *Davis*, the court explained, “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”²⁶² Thus, the Confrontation Clause restricts the introduction of out of

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1153.

²⁵⁹ *Id.*

²⁶⁰ *Id.*, (quoting *Davis*, 547 U.S. at 826).

²⁶¹ *Id.*

²⁶² *Id.* at 1154, (quoting *Davis*, 547 U.S. at 822).

court statements where state actors are involved in a formal, out of court interrogation of a witness to obtain evidence for trial.²⁶³

Justice Sotomayor then explained that in order to determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, the Court objectively evaluates the circumstances in which the encounter occurs and the statements and actions of the parties.²⁶⁴ Justice Sotomayor then elaborated:

As we suggested in *Davis*, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the “primary purpose of the interrogation” by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties’ perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.²⁶⁵

Justice Sotomayor stated that in this case, the circumstances surrounding the interrogation pointed to the occurrence of an ongoing threat because Covington, nor the police, knew the whereabouts of the shooter.²⁶⁶ Justice Sotomayor stated, “At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.”²⁶⁷

²⁶³ *Id.* at 1155.

²⁶⁴ *Id.* at 1156.

²⁶⁵ *Id.* at 1162.

²⁶⁶ *Id.* at 1164.

²⁶⁷ *Id.*

Justice Sotomayor then described that the mere existence of an ongoing emergency was not enough to establish whether Covington's statements were testimonial, but the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency.²⁶⁸ When the police arrived at the gas station and began questioning Covington, he was lying on the ground, mortally wounded from a gunshot that struck him in the abdomen, causing him great pain and limiting his ability to speak.²⁶⁹ According to the police officers, Covington's statements were often punctuated with questions about when emergency medical services would arrive.²⁷⁰ Justice Sotomayor concluded that, from the description of his condition and report of his statements, a person in Covington's situation would not have a primary purpose to establish or prove past events potentially relevant to later criminal prosecution.²⁷¹

Similarly, Justice Sotomayor reiterated that the police responded to a call that a man was shot, without knowing why, where, or when the shooting occurred: neither were the police aware of the location of the shooter nor anything else regarding the circumstances in which the crime occurred.²⁷² Justice Sotomayor, in concluding that the police's primary purpose was not to establish incriminating evidence for later use at trial, stated that their questions were the kind necessary to allow them to assess the situation, the threat to their own safety, and the possible danger to the victim and the public. As a result, Justice Sotomayor determined that these circumstances pointed to the primary purpose of assessing and assisting in an ongoing emergency.

²⁶⁸ *Id.* at 1165.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

Finally, Justice Sotomayor considered the informal setting in which the interrogation took place.²⁷³ Justice Sotomayor concluded that the informality of the situation suggests that the police officer's primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused his attention on the possible future prosecution of Bryant.²⁷⁴ Justice Sotomayor then concluded that, because the circumstances of the encounter objectively indicate that the primary purpose of the interrogation was to enable police assistance to an ongoing emergency, Covington's statements regarding the identification of Bryant and the location of the shooting were not testimonial, and the Confrontation Clause did not bar their admittance at trial.²⁷⁵

This opinion effectively demonstrates Justice Sotomayor's ability to reconcile complicated facts with precedent in order to reach a no-nonsense, commonsense conclusion. Here, Covington was bleeding out in the parking lot of a gas station, and when the police arrived, there was no indication of the location of Bryant and whether or not he posed a continuing threat to Covington, the police, and the public. Justice Sotomayor relied on her instincts, diligent legal research, and the fluidity of the situation in order to determine that Covington's statements were not made in comprehension of future litigation. Furthermore, this opinion evinces the notion that Justice Sotomayor decides cases not by her ideological standpoint, but by coming to a commonsense conclusion in light of the facts of each case presented to her.

4. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238 (2011)

This case presents the issue of whether or not a defendant to a patent infringement claim is required to prove the patent's invalidity by clear and convincing evidence.²⁷⁶ Respondents i4i

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1167.

²⁷⁶ *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011).

Limited Partnership hold a patent for an improved method for editing computer documents, which stores a document's content separately from the metacodes associated with the document's structure.²⁷⁷ i4i sued Microsoft for infringement of this patent, claiming that Microsoft used their patent in its Microsoft Word program.²⁷⁸ Microsoft denied infringement and counterclaimed, stating that i4i's patent was invalid and unenforceable.²⁷⁹ Microsoft claimed that i4i's patent was bared by § 102(b) of the Patent Act, which forbids issuing a patent for an invention that was previously on sale.²⁸⁰ A jury found that Microsoft had willingly infringed i4i's patent and that Microsoft failed to prove the patent's invalidity.²⁸¹ The District Court denied Microsoft's motion for post-judgment relief.²⁸² The Court of Appeals for the Federal Circuit affirmed, and the Supreme Court granted certiorari to determine whether a patent invalidity defense must be proven by clear and convincing evidence.²⁸³

Justice Sotomayor explained that, pursuant to its authority under the Patent Clause of the constitution, Congress charged the United States Patent and Trademark Office with examining patent applications and issuing patents if it appears that the applicant is entitled to a patent under the law.²⁸⁴ To receive patent protection, a claimed invention must be patentable subject matter, novel, and nonobvious.²⁸⁵ There are statutory bars to patent approval under § 102(b): the relevant bar in this case precludes patent protection for any invention that was on sale in this country more than one year prior to the filing of a patent application.²⁸⁶ If issued, a patent grants its holder exclusive use of the patent for a period of 20 years from the filing date of the

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2244.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 2242, (citing U.S. Const. Art. I, § 8, cl. 8); (citing 35 U.S.C. § 2(a)(1)); (citing 35 U.S.C. § 131).

²⁸⁵ *Id.*, (citing 35 U.S.C. § 101, 102, 103).

²⁸⁶ *Id.*

application.²⁸⁷ In order to enforce that right, the patent holder can bring an infringement action against one who, without permission, makes, uses, offers to sell, or sells the patented invention.²⁸⁸ The alleged infringer may assert under § 282 of the Patent Act that the patent is invalid and should have not been issued.²⁸⁹ Under § 282, the patent is presumed to be valid and imposes the burden of proving its invalidity on the attacker.²⁹⁰

The dispute in this case arose out of Microsoft's contention that i4i's invention was on sale more than a year earlier in the United States.²⁹¹ The District Court instructed the jury that Microsoft must have proved i4i's patent invalid by clear and convincing evidence.²⁹² Microsoft's post-judgment motion argued that it only had to prove invalidity by a preponderance of the evidence.²⁹³ Justice Sotomayor began her analysis by stating that, "Where Congress has prescribed the governing standard of proof, its choice controls absent countervailing constitutional constraints. The question, then, is whether Congress has made such a choice here."²⁹⁴

Justice Sotomayor held that Congress had made such a choice, by finding that, in adopting § 282 of the Patent Act, Congress adopted the clear and convincing evidence standard by codifying the common law meaning of "presumed valid."²⁹⁵ Justice Sotomayor reached this conclusion by a methodical analysis of the Patent Act and the common law meaning associated with the presumption of validity. Justice Sotomayor asserted that, by § 282's express terms, it establishes a presumption of patent validity, and it provides that a challenger must overcome that

²⁸⁷ *Id.*

²⁸⁸ *Id.*, (citing 35 U.S.C. § 271(a)).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 2243.

²⁹¹ *Id.* at 2243-244.

²⁹² *Id.* at 2244.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 2252.

presumption to prevail on an invalidity defense.²⁹⁶ The problem is that the statute does not expressly articulate the standard of proof.²⁹⁷ Justice Sotomayor then stated, “We begin, of course, with the assumption that the ordinary meaning of the language chosen by Congress accurately expresses the legislative purpose. But where Congress uses a common-law term in a statute, we assume the term...comes with a common law meaning, absent anything pointing another way.”²⁹⁸ Justice Sotomayor then emphasized that Congress, by stating that a patent is presumed valid, used a term with a settled meaning in common law.²⁹⁹

Justice Sotomayor found that the common law recognized that in patent law, there is a presumption of validity which is not to be overthrown except by clear and cogent evidence, and that an infringer attacking the validity of a patent bears a heavy burden of persuasion, and fails unless its evidence has more than a dubious preponderance.³⁰⁰ As a result, Justice Sotomayor found that the common law recognized that a preponderance of the evidence was too light of a standard of proof ^{to} deem a patent invalid.³⁰¹ Thus, by the time Congress enacted § 282, the presumption of patent validity had an established meaning in the common law, notably requiring clear and convincing evidence to overcome.³⁰² Justice Sotomayor concluded, that, “Under the general rule that a common law term comes with its common law meaning, we cannot conclude that Congress intended to drop the heightened standard proof from the presumption simply because § 282 fails to reiterate it expressly.”³⁰³ Justice Sotomayor continued, “On the contrary, we must presume that Congress intended to incorporate the heightened standard of proof, unless

²⁹⁶ *Id.* at 2245.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*, (citing *RCA v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 8 (1934)).

³⁰¹ *Id.* at 2246.

³⁰² *Id.*

³⁰³ *Id.*

the statute otherwise dictates.”³⁰⁴ Finding that Congress did not otherwise dictate a different standard of proof in § 282, it codified the common law presumption of patent validity, and the heightened standard of proof attached to it.³⁰⁵ As a result, Justice Sotomayor concluded that an alleged infringer seeking to prove a patent’s invalidity must do so by clear and convincing evidence.³⁰⁶

This decision enforces Justice Sotomayor’s dedication to the law, and her belief that judge’s apply the law, and do not make it. This is supported by the fact that Justice Sotomayor rejected Microsoft’s contention that a lower standard of proof was warranted when an attacker presents evidence that was not considered by the PTO. Justice Sotomayor found no evidentiary or common law policy supporting that contention, and declined to adopt such a rule that had no basis in the law. This decision also evinces Justice Sotomayor’s ability to utilize all of the statutory interpretation resources that are in the “toolbox” she referenced in her interview with *60 Minutes*. Justice Sotomayor utilizes any relevant statutory or common law history that will help her determine the ultimate truth of the matter.

5. *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485 (2010)

In this case, the Supreme Court determined that Rule 15(c) of the Federal Rules of Civil Procedure, which governs when a claim that has past the statute of limitations relates back to the timely filing of a previous complaint, depends on what the party to be added to the suit knew or should have known, not on the amending party’s knowledge or timeliness in seeking to amend the pleading.³⁰⁷

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 2247, 2249-250.

³⁰⁶ *Id.* at 2252.

³⁰⁷ *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2490 (2010).

Wanda Krupski was injured on February 21, 2007, when she tripped over a cable and fractured her femur on board a cruise ship owned by Costa Crociere.³⁰⁸ Krupski retained an attorney and began a personal injury suit upon returning home, using her admission ticket as the sole contract between her and the Costa Crociere.³⁰⁹ The ticket stated that Costa Crociere was an Italian corporation that owned all of the vessels and other ships owned and operated by Costa Crociere.³¹⁰ The ticket further provided that an injured party submit written notice of their claim to the carrier or its duly authorized agent within 185 days after the injury and required any lawsuit to be filed within one year after the date of the injury and to be served upon the carrier within 120 days of filing.³¹¹ The ticket further extended the defenses, limitations, and exceptions that may be invoked by the carrier to all persons and organizations who may act on behalf of the carrier, including Costa Cruise Lines, the carrier's sales and marketing agent.³¹² The ticket also listed Costa Cruise Lines' Florida address and stated that an entity called Costa Cruises was the first cruise company in the world to obtain a certain certification of quality.³¹³

*Costa
Cruise
Company*

Krupski's attorney notified Costa Cruise Lines of Krupski's claims, and Costa Cruise Lines' claims administrator requested additional information in order to facilitate settlement discussions.³¹⁴ Settlement discussions broke down, and Krupski filed a negligence suit against Costa Cruise Lines three weeks before the one year limitations period ended in the Federal District Court for the Southern District of Florida.³¹⁵ Krupski alleged that Costa Cruise owned, operated, managed, supervised and controlled the ship on which Krupski was injured, that Costa

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

Cruise owed a duty to its passengers, which was subsequently breached by its failure to take steps to prevent her injury.³¹⁶

After the limitations period had expired, Costa Cruise brought the existence of Costa Crociere to Krupski's attention on three occasions, and on May 6, 2008, Costa Cruise moved for summary judgment, stating that Costa Crociere was the proper defendant.³¹⁷ Krupski responded by arguing for limited discovery to determine whether Costa Cruise should be dismissed.³¹⁸ According to Krupski, she believed Costa Cruise Lines to be the proper party to file a claim against because the travel documents prominently identified and displayed Costa Cruise Lines and its address, Costa Cruise's website listed its address as the United States office for the Italian company Costa Crociere, and the Florida Department of State listed Costa Cruise as the only "Costa" company registered to do business in that state.³¹⁹ Krupski also relied on the fact that Costa Cruise's claims administrator responded to her without indicating that it was not a responsible party.³²⁰ With her response, Krupski moved to amend her complaint to add Costa Crociere as a defendant.³²¹ The District Court then denied Costa Cruise's motion for summary judgment and granted Krupski's motion for leave to amend her claim, and ordered Krupski effect service on Costa Crociere.³²²

Krupski filed an amended claim on July 11, 2008, and served Costa Crociere on August 21, 2008.³²³ Costa Crociere, represented by the same counsel that represented Costa Cruise, moved to dismiss the complaint against it, arguing that the claim did not relate back under

³¹⁶ *Id.* at 2490-491.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

Federal Rules of Civil Procedure 15(c), and was therefore untimely.³²⁴ The District Court agreed.³²⁵ The Eleventh Circuit Court of Appeals affirmed the District Court, stating that because Krupski's admissions ticket identified the proper party to be sued, Krupski knew or should have known of Costa Crociere's identity as a proper party.³²⁶

Justice Sotomayor, writing for the majority, held that the District Court and the Eleventh Circuit's dismissal of the claim was improper, as the question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Justice Sotomayor reached this conclusion by stating that information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity.³²⁷ Justice Sotomayor continued to state that the reasonableness of the mistake is not itself an issue.³²⁸ Justice Sotomayor explained that, "A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose."³²⁹

³²⁴ *Id.*

³²⁵ *Id.* at 2492.

³²⁶ *Id.*

³²⁷ *Id.* at 2493-494.

³²⁸ *Id.* at 2494.

³²⁹ *Id.*

Justice Sotomayor further stated that the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. In light of that fact, Justice Sotomayor held that Costa Crociere had notice that Krupski meant to sue it, and not Costa Cruise.³³⁰ The complaint makes clear that Krupski meant to sue the company that owned, operated, managed, supervised and controlled the ship on which she was injured, and because it mistakenly identified Costa Cruise Lines as performing those roles, Costa Crociere should have known that it was not named as a defendant in the complaint only because of Krupski's misunderstanding about which company was in charge of the ship.³³¹ Costa Crociere and Costa Cruise are also closely related companies with similar names, and were represented by the same counsel, further evincing the fact that Costa Crociere knew or should have known that it would have been named as a defendant but for Krupski's mistake.³³² As a result, Justice Sotomayor found that Krupski's claim against Costa Crociere did relate back to her original claim against Costa Cruise Lines, and was thus not time barred.

This case demonstrates Justice Sotomayor's desire to ultimately find the truth and have a matter litigated. Justice Sotomayor is dedicated to resolving claims on their merits, which can be traced back to her afternoons spent watching *Perry Mason*. Throughout her career, Justice Sotomayor has been focused on the pursuit of the truth, and Rule 15(c) of the Federal Rules of Civil Procedure is a means in which an otherwise time barred complaint can be heard and adjudicated on its merits. Justice Sotomayor's ultimate goal is achieving justice through the application of the law to the facts in front of her, and this case squarely demonstrates her commonsense application of the law. Rule 15(C) expressly states, "[I]f Rule 15(c)(1)(B) is

³³⁰ *Id.* at 2497.

³³¹ *Id.*

³³² *Id.* at 2498.

satisfied and if...the party to be brought in by amendment received such notice of the action that it will not be prejudiced in defending on the merits, and knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."³³³ As a result, the commonsense solution to this case was to apply the plain language of Rule 15(c) to Krupski's complaint, thus allowing her to have her claim adjudicated on the merits.

B. Concurrences

6. *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011)

In this case, the Tohono O'Odham Nation, an Indian Tribe with federal recognition, brought two actions against the U.S. government, alleging a breach of fiduciary duty with respect to the Nation's lands and other assets.³³⁴ The Tohono Nation brought an action against federal officials in the United States District Court for the District of Columbia alleging that the officials responsible for managing the tribal assets held by the federal government breached their fiduciary duty.³³⁵ The complaint in the District Court requested equitable relief, including an accounting of the Nation's assets.³³⁶ The Nation also filed a claim in the United States Court of Federal Claims describing the same assets and fiduciary duties alleged in the District Court complaint for which it request money damages.³³⁷ The Court of Federal Claims dismissed the claim under 28 U.S.C. § 1500 for want of jurisdiction.³³⁸ The Court of Appeals for the Federal Circuit reversed, stating that the claims were not for or in respect to the same claim, as there was no overlap in the relief requested in each court.

³³³ Fed. R. Civ. P. 15(c).

³³⁴ *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1726-727 (2011).

³³⁵ *Id.* at 1727.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

Justice Kennedy, writing for the majority, began by evaluating the law in which the Court of Federal Claims dismissed the Nation's suit.³³⁹ Justice Kennedy pointed out that Congress has restricted the Court of Federal Claims jurisdiction under 28 U.S.C. § 1500 over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents.³⁴⁰ Justice Kennedy pointed out that the question to be resolved is what it means for two suits to be "for or in respect to" the same claim.³⁴¹ According to *Keene Corp. v. U.S.*, 508 U.S. 200 (1993), two suits are for or in respect to the same claim when they are based on substantially the same operative facts, and at least if there is some overlap in the relief requested.³⁴² According to Justice Kennedy, the *Keene* case left open whether the jurisdictional bar also operates if the suits are based on the same operative facts but do not seek overlapping relief.³⁴³ Justice Kennedy pointed to the *Keene* decision to state that the possible construction of § 1500 was limited to situations that require substantive factual and some remedial overlap, or substantial factual overlap without more.³⁴⁴

Justice Kennedy concluded by holding that the jurisdictional bar at issue in § 1500 refers to situations where the two actions have substantial factual overlap without regard to any remedial overlap.³⁴⁵ Justice Kennedy came to this conclusion by stating that § 1500 bars jurisdiction in the Court of Federal Claims not only if the sues on an identical claim elsewhere, but also if the plaintiff's other action is related although not identical to the other claim.³⁴⁶ Pointing to § 1500's broad language, Justice Kennedy stated that it makes clear Congress did not intend the statute to be rendered useless by a narrow concept of identity, but suggests a board

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 1727-728.

³⁴⁴ *Id.* at 1728.

³⁴⁵ *Id.* at 1731.

³⁴⁶ *Id.* at 1728.

prohibition.³⁴⁷ Justice Kennedy stated that, because the statute used similar language elsewhere, the jurisdictional bar's application to overlapping facts is the more reasonable interpretation.³⁴⁸ In light of the other passage cited by Justice Kennedy, he explained that, "Although the two phrases are not identical—one is in respect to a claim, the other a cause of action—they are almost so, and there is reason to think that both phrases refer to facts alone and not to relief."³⁴⁹

Justice Kennedy also stated that reading § 1500 to require only factual and not also remedial overlap makes sense in light of the unique remedial powers of the Court of Federal Claims.³⁵⁰ Justice Kennedy pointed out that the Court of Federal Claims is the only jurisdiction for non-tort requests for significant money damages in the United States, and it has no general power to provide equitable relief against the government or its officers.³⁵¹ As a result, Justice Kennedy stated that the distinct jurisdiction of the Court of Federal Claims makes overlapping relief the exception and distinct relief the norm, and, for that reason, a statute aimed at precluding suits in the Court of Federal Claims that duplicate suits elsewhere would be unlikely to require remedial overlap.³⁵² Finally, Justice Kennedy pointed out that the statute's purpose is to save the government from the burdens of redundant litigation, and that the conclusion that two suits are for or in respect to the same claim when they are based on substantially the same operative facts allows the statute to achieve its aim.³⁵³ Thus, Justice Kennedy concluded that, in order for a claim to be barred under the jurisdictional limitation of § 1500, the two cases need only share substantially similar facts and not some overlapping relief.³⁵⁴

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 1729.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 1730.

³⁵⁴ *Id.* at 1731.

Justice Sotomayor concurred in the judgment, but wrote separately to state her belief that, while she agreed that § 1500 barred the Nation's action in the Court of Federal Claims, the Court should not have decided whether § 1500 bars an action when the plaintiff's actions share a common factual basis but seek different forms of relief.³⁵⁵ Justice Sotomayor stated that § 1500 bars jurisdiction in the Court of Federal Claims over any claim that is for or in respect to which the plaintiff has pending in any other court any suit or process against the United States.³⁵⁶ Justice Sotomayor pointed out that the Court, in *Keene*, constructed the statute to turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.³⁵⁷ The Court in *Keene* found it unnecessary to consider whether § 1500 barred a Court of Federal Claims claim that was based on substantially the same operative facts as another suit but that sought different relief.³⁵⁸

Justice Sotomayor believed that, in this case, the Nation sought overlapping relief in the District Court and the Court of Federal Claims based on identical facts.³⁵⁹ Because, in Justice Sotomayor's view, the Nation sought overlapping relief in both complaints that were based on substantially the same operative facts, § 1500 would have barred its action in the Court of Federal Claims and there was no need to reach the broader holding that a claim is barred under § 1500 if it only shares substantial facts without overlapping relief.³⁶⁰ As a result, Justice Sotomayor would have affirmed the District Court's opinion that the Nation's Court of Federal Claims claim was barred by § 1500, but would have gone no further.

³⁵⁵ *Id.* at 1732 (Sotomayor, J., concurring in judgment).

³⁵⁶ *Id.*, (quoting § 1500).

³⁵⁷ *Id.* at 1732.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 1733.

Justice Sotomayor took issue with the majority's eager dismissal of the judicial restraint evidenced in *Keene*.³⁶¹ Justice Sotomayor felt the Court unnecessarily chose to hold that § 1500 bars jurisdiction in the Court of Federal Claims whenever a plaintiff's Court of Federal Claims action is based on substantially the same facts as a suit pending elsewhere.³⁶² Especially irksome, Justice Sotomayor pointed out that on numerous occasions Congress has chosen to require plaintiffs to file actions in two different courts to obtain complete relief relating to a single set of operative facts.³⁶³ As an example, Justice Sotomayor pointed to the fact that the Court of Federal Claims has no power to issue equitable relief, thus a plaintiff seeking both money damages and injunctive relief to remedy distinct harms arising from the same set of facts may be forced to file actions in both the Court of Federal Claims and federal district court.³⁶⁴ However, as Justice Sotomayor explained, "Under the Court's construction of § 1500, plaintiffs whom Congress has forced to file parallel action in the CFC and a district court to obtain complete relief must now choose either to forgo relief in the district court or to file first in the district court and risk the expiration of the statute of limitations on their claims in the CFC."³⁶⁵

In this case, Justice Sotomayor displays much of the same jurisprudence evidenced in *Krupski*. Justice Sotomayor favors judicial restraint in favor of an activist court. This decision exemplifies that point. Justice Sotomayor saw no reason to upset the Court's precedent relating to § 1500, as the issue that the Court decided here was not central to the court's conclusion that the Nation's action was barred in the Court of Federal Claims. Justice Sotomayor believes that the role of the judge is to apply law, not to make law, and the Court's opinion here can be said to create law through its own interpretation of § 1500. Justice Sotomayor concurred only in the

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 1734.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 1738.

judgment of this case because the Court's disposition of the case does not comport with Justice Sotomayor's jurisprudence of narrowly construing the law to fit the facts presented.

7. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011)

Justice Sotomayor's jurisprudential philosophy that the Court shall not decide questions that will have no effect on the outcome of the case is also prevalent in this case. Justice Sotomayor concurred in the Court's judgment, however she did not join the Court's majority opinion because she believed it decided a question that held no bearing on the narrow issue at hand.

This case arose out of the alleged material witness arrest of al-Kidd, an American citizen, as he was checked in for a flight to Saudi Arabia.³⁶⁶ Al-Kidd was arrested as a material witness two days after federal authorities notified a Magistrate Judge that, if al-Kidd boarded the flight to Saudi Arabia, they believed information crucial to the prosecution of Sami Omar al-Hussayen would be lost.³⁶⁷ As a result, the Magistrate Judge issued an arrest warrant for al-Kidd, and he was held in federal custody for the following sixteen days and on federal supervised release until al-Hussayen's trial concluded fourteen months later.³⁶⁸ However, the prosecution never called al-Kidd as a witness against al-Hussayen.³⁶⁹

Al-Kidd alleged that, following the terrorist attacks on September 11, 2001, Attorney General John Ashcroft authorized federal prosecutors to use the material witness statute to detain individuals with suspected ties to terrorists.³⁷⁰ Al-Kidd alleges that the federal officials had no intention of calling many of these individuals as witnesses, and that they were detained at Ashcroft's direction because they were suspected of ties to terrorist organization, but there was

³⁶⁶ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

not sufficient evidence to charge them with a crime.³⁷¹ It was further alleged that this pretextual detention led to the material witness arrest of al-Kidd.³⁷² As a result, al-Kidd filed a *Bivens* suit against Ashcroft, challenging the constitutionality of his alleged policy.³⁷³ Ashcroft filed a motion to dismiss based on absolute and qualified immunity, which was denied by the District Court, and affirmed by the Ninth Circuit, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity.³⁷⁴

Justice Scalia, writing for the majority, held that al-Kidd's Fourth Amendment rights were not violated because an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.³⁷⁵ The Court also held that Ashcroft enjoyed qualified immunity because he did not violate clearly established law.³⁷⁶

Justice Scalia held that al-Kidd's Fourth Amendment rights were not violated because his arrest was objectively reasonable, and that a validly obtained arrest warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.³⁷⁷ In reaching this conclusion, Justice Scalia reasoned that under the Fourth Amendment, an arrest must be reasonable under the circumstances, and that this reasonableness is predominantly an objective inquiry.³⁷⁸ In determining the reasonableness of an arrest, Justice Scalia stated that the Court examines whether the circumstances, viewed objectively, justify the

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 2085.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 2080.

challenged action, and if so, that action was reasonable whatever the subjective intent motivating the relevant officials.³⁷⁹

The two exceptions to objective inquiry of reasonableness are the Court's special needs and administrative search cases, where actual motivations do matter.³⁸⁰ Under these circumstances, a judicial warrant and probable cause are not needed where the search or seizure is justified by special needs.³⁸¹ Justice Scalia quickly reasoned, however, that these cases do not apply to situations, as *al-Kidd's*, where the arrest is based on a properly issued judicial warrant.³⁸² As such, Justice Scalia found that *al-Kidd's* arrest was based on a properly issued material witness warrant, thus foregoing any investigation as to Attorney General Ashcroft's subjective intent in having *al-Kidd* detained.³⁸³

Justice Scalia then also held that Attorney General Ashcroft enjoyed qualified immunity because he did not act in violation of clearly established law.³⁸⁴ Justice Scalia reasoned that qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing that the official violated a statutory or constitutional right, and that the right was clearly established at the time of the challenged conduct.³⁸⁵ Justice Scalia continued to explain that a government official's conduct violates a clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable officer would have understood that what he is doing violates that right.³⁸⁶ Justice Scalia then pointed out that, at the time of *al-Kidd's* arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material witness warrant

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.* at 2081.

³⁸² *Id.*

³⁸³ *Id.* at 2082-83.

³⁸⁴ *Id.* at 2085.

³⁸⁵ *Id.* at 2080.

³⁸⁶ *Id.* at 2083.

unconstitutional.³⁸⁷ As a result of that observation, Justice Scalia held that Attorney General Ashcroft deserves qualified immunity because his conduct did not violate any clearly established law.³⁸⁸

Justice Sotomayor, in another display of her committal ^{ment} to judicial restraint and deciding only the narrow question in front of her, concurred in the majority's judgment alone, because she believed that Attorney General Ashcroft enjoyed qualified immunity for the reasons stated in the majority's opinion.³⁸⁹ Justice Sotomayor reasoned, however, "I cannot join the majority's opinion, however, because it unnecessarily 'resolves a difficult and novel question of constitutional interpretation that will have no effect on the outcome of the case.'³⁹⁰

Justice Sotomayor believed that whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventative detention of an individual whom the government has no indication of using at trial is a question not needing an answer in this case.³⁹¹ Justice Sotomayor reasoned that the Court has never determined whether an official's subjective intent matters for purposes of the Fourth Amendment in that context, and the Court need not and should not resolve that question in this case.³⁹² Justice Sotomayor further explained that the Court's holding is premised on the existence of a validly issued ^{of} material witness warrant, which she points out, is questionable, given the al-Kidd's allegations.³⁹³ Justice Sotomayor further states that, based on the al-Kidd's allegations, it is not clear that it would have been impractical to secure his presence by subpoena or that his testimony could be adequately secured by

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 2085.

³⁸⁹ *Id.* at 2089-90 (Sotomayor, J., concurring in judgment).

³⁹⁰ *Id.* at 2090 (quoting *Pearson v. Callahan*, 555 U.S. 223, 237 (2009)).

³⁹¹ *Id.* at 2090.

³⁹² *Id.*

³⁹³ *Id.*

deposition.³⁹⁴ In Justice Sotomayor's mind, it was also not clear whether the warrant issued to secure al-Kidd's arrest was sufficient, as the government failed to disclose that it had no intention of utilizing al-Kidd at trial.³⁹⁵ As a result, Justice Sotomayor would have limited the Court's holding to which all of its members agreed, that Attorney General Ashcroft enjoyed qualified immunity because he did not violate clearly established law.³⁹⁶

Justice Sotomayor firmly believes in judicial restraint. This jurisprudential philosophy is evident in her concurrence to the Majority's opinion in this case. The search for truth here does not involve resolving a question of constitutional right upon assuming away factual details that would be crucial to the matters ultimate adjudication. The Court's holding that the Fourth Amendment had not been violated was completely dispensable to its ultimate conclusion that Attorney General Ashcroft enjoyed qualified immunity because he did not violate clearly established law. This case is a prime example of Justice Sotomayor's view that the role of a judge is to apply the law, and not to make it.

8. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)

In this case the Court was faced with the question of whether the Confrontation Clause permits the prosecution from introducing a forensic report containing testimonial certification made for the purpose of establishing a particular fact, through the testimony of a scientist who did not sign the certification, and did not perform or observe the test reported in the certification.³⁹⁷ Justice Ginsburg, writing for the majority, held that surrogate testimony regarding the certification at issue did not comport with the Confrontation Clause, and that accused's right is to be confronted with the analyst who made the certification, unless that

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

analyst is unavailable at trial, and the accused had an opportunity to cross-examine that particular analyst pre-trial.³⁹⁸

Donald Bullcoming was arrested for driving while intoxicated when the vehicle he was driving rear-ended a pick-up truck.³⁹⁹ Bullcoming fled the scene of the accident before the police arrived, however, he was shortly thereafter apprehended, and subsequently failed the field sobriety tests.⁴⁰⁰ Bullcoming refused to ~~the~~ ^{take} the Breathalyzer examination, and as a result, the police obtained a warrant authorizing a blood-alcohol analysis.⁴⁰¹ Pursuant thereto, Bullcoming was taken to a hospital where his blood was taken.⁴⁰² The police then sent the sample to the New Mexico Department of Health, Scientific Laboratory Division (SLD), in order to be evaluated.⁴⁰³ Curtis Caylor, completed and signed the SLD forensic report, which stated that Bullcoming had a blood alcohol content (BAC) of 0.21 grams, an inordinately high level.⁴⁰⁴

Caylor, on the report, certified that he had received the sample with an unbroken seal, that the information in the report was correct, and that he followed the procedures set out on the opposite side of the report.⁴⁰⁵ The SLD examiner then certified that Caylor was qualified to conduct the BAC test, and that the established procedure for handling and analyzing Bullcoming's sample had been followed.⁴⁰⁶ According to Justice Ginsburg, the SLD analysts utilize a gas chromatograph machine to determine BAC levels, and that the operation of the

³⁹⁸ *Id.*
³⁹⁹ *Id.*
⁴⁰⁰ *Id.*
⁴⁰¹ *Id.*
⁴⁰² *Id.*
⁴⁰³ *Id.*
⁴⁰⁴ *Id.*
⁴⁰⁵ *Id.*
⁴⁰⁶ *Id.* at 2711.

machine requires specialized knowledge and training.⁴⁰⁷ It was also recognized that several steps are involved in the gas chromatograph process, and human error can occur at each step.⁴⁰⁸

As a result of the BAC analysis, Bullcoming became subject to New Mexico's aggravated DWI charge.⁴⁰⁹ At trial, the SLD announced that it would not produce Caylor to testify as to the analysis' authenticity, because Caylor had subsequently been placed on unpaid leave for an unspecified reason.⁴¹⁰ The State then proposed to introduce the report as a business record during the testimony of Gerasimos Razatos, an SLD scientist who neither observed nor reviewed Caylor's report.⁴¹¹ Bullcoming's counsel opposed that proposal, stating that the prosecution had not disclosed the unavailability of Caylor until trial, and that her entire defense may have been different if this information was previously disclosed.⁴¹² The trial court overruled the objection, and Razatos' testimony regarding the report was admitted.⁴¹³ The jury found Bullcoming guilty of DWI, which the Court of Appeals and the New Mexico Supreme Court affirmed, stating that the BAC report was non-testimonial.⁴¹⁴

Justice Ginsburg held that if an out of court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused had a prior opportunity to confront the witness.⁴¹⁵ Justice Ginsburg reasoned that the Confrontation Clause confers upon the accused in all criminal prosecutions, the right to be confronted with the witness against him.⁴¹⁶ The Court further noted that in order to comport with the Confrontation Clause, testimonial evidence is only admissible at trial if the

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 2711-12.

⁴¹¹ *Id.* at 2712.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 2713.

⁴¹⁶ *Id.*

witness who made the statement is unavailable and the opposition had a prior opportunity to cross-examine him or her.⁴¹⁷ Justice Ginsburg also noted that, while Bullcoming's appeal was pending, the Court decided *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).⁴¹⁸ The Court in *Melendez-Diaz* held that affidavits reporting forensic analysis submitted to the Court qualify as testimonial evidence, rendering the affiant's subject to the Confrontation Clause.⁴¹⁹ As a result, Justice Ginsburg held that an analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial, thus subjecting Caylor's report to the Confrontation Clause.⁴²⁰

As a result of the foregoing analysis, Razatos' testimony regarding the BAC report must have comported with the Confrontation Clause. The New Mexico Supreme Court ruled that Razatos' surrogate testimony regarding Caylor's report was adequate to satisfy the Confrontation Clause because Caylor simply transcribed the results generated by the gas chromatograph.⁴²¹ Justice Ginsburg held, however, that Caylor's report was more than a mere report of a machine generated number because Caylor certified that he followed all the relevant procedures and that no circumstance or condition affected the validity of the analysis.⁴²² Such certification rendered Caylor's report and Caylor open to cross-examination.⁴²³ As a result, because Caylor's report was testimonial, and because the state never asserted Caylor's unavailability, the prosecution never had a chance at cross examining him regarding the report he submitted.⁴²⁴ Accordingly,

⁴¹⁷ *Id.*, (citing *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

⁴¹⁸ *Id.* at 2712.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 2714.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* at 2715.

Caylor became a witness that Bullcoming had the right to confront, and Razatos' surrogate testimony regarding the report did not satisfy the Confrontation Clause.⁴²⁵

Justice Sotomayor concurred in part to the opinion in order to state her opinion as to why the report was testimonial, and also to emphasize the limited reach of the Court's opinion.⁴²⁶

This concurrence further demonstrates Justice Sotomayor's jurisprudential philosophy that the Court's opinions should be narrowly construed to the issue presented, and her belief that the role of the judge is to apply the law is clearly displayed in this case, as she wrote separately to specifically point out what the Court's opinion did not hold.

Justice Sotomayor emphasized that she agrees with the Majority that the trial court erred in admitting the BAC report at trial because its primary purpose was to create an out-of-court substitute for testimony.⁴²⁷ Justice Sotomayor further reasoned that the report at issue in this case was testimonial because its primary purpose was to incontrovertibly establish or prove some fact.⁴²⁸ Justice Sotomayor then concluded that the BAC report at issue had as its primary purpose establishing evidence that Bullcoming was driving while intoxicated, rendering it testimonial.⁴²⁹

Justice Sotomayor's concurrence demonstrates her jurisprudence, however, because she wrote separately to identify the factual circumstances that this case does not represent.⁴³⁰ Justice Sotomayor observed that:

First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose...Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the

⁴²⁵ *Id.* at 2715-16.

⁴²⁶ *Id.* at 2719 (Sotomayor, J., concurring in part).

⁴²⁷ *Id.* at 2720.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 2721.

⁴³⁰ *Id.*

scientific test at issue... Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial report that were not themselves admitted into evidence... Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph.⁴³¹

In addressing these factual circumstances in which the Court's opinion does not address, Justice Sotomayor points out that this is not a case in which the Court decided whether a purely machine generated printout could be introduced at trial with the testimony of an expert witness.⁴³² In pointing out these circumstances, Justice Sotomayor limited the Court's finding to the specific reports at issue in this case. Thus, Justice Sotomayor left open the question as to whether one, or any, of these circumstances would be influence the testimonial nature of such a report.

Justice Sotomayor displayed her goal of applying the law to the specific facts presented, and reinforced her philosophy that judges do not make law. By limiting her concurrence to only the specific factual circumstances presented in this case, Justice Sotomayor affirmed that her name would not be associated with an opinion that created law and foreclosed future arguments that can be made for the admittance of evidence where the factual circumstances are different than those presented here.

C. Dissents

9. *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

This case further presents Justice Sotomayor's committal to only resolving the specific issue presented to the Court. In this case, Justice Sotomayor dissented, primarily on the basis that she viewed the court as creating law, and not merely applying it.

⁴³¹ *Id.* at 2722.

⁴³² *Id.*

On January 10, 2000, a shooting occurred outside of a mall in Michigan, injuring two people, leaving one of them dead from multiple gun shots.⁴³³ The suspect, Thompkins, fled to Ohio where he was found and arrested about one year later.⁴³⁴ Thompkins was interrogated by two police officers for almost three hours in an eight by ten foot room.⁴³⁵ At the beginning of the interrogation Thompkins was presented with a form that informed him of his *Miranda* rights, which Thompkins read aloud, but refused to sign in order to demonstrate he understood those rights.⁴³⁶ The officers then began the interrogation, in which Thompkins remained predominantly silent for the entire three hours.⁴³⁷ Thompkins did not state that he wanted to remain silent, but his only verbal responses were an occasional “yeah,” “no,” or “I don’t know.”⁴³⁸ The only affirmative statements Thompkins made were stating that he did not want a peppermint, and that the chair he was sitting in was hard.⁴³⁹

Two hours and forty-five minutes into the interrogation, one of the officers asked Thompkins, “Do you believe in God?”⁴⁴⁰ Thompkins responded by stating, “Yes.”⁴⁴¹ The officer then asked Thompkins, “Do you pray to God?”⁴⁴² Thompkins again responded by saying, “Yes.”⁴⁴³ Then, the officer asked Thompkins, “Do you pray to God to forgive you for shooting that boy down?”⁴⁴⁴ Thompkins then answered, “Yes,” and looked away from the

⁴³³ *Berghuis v. Thompkins*, 560 U.S. 370, 374 (2010).

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 375.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 376.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

officer.⁴⁴⁵ Shortly thereafter, Thompkins refused to sign a written confession, and the interrogation ended.⁴⁴⁶

Thompkins was charged with first-degree murder, assault with intent to commit murder, and other firearms related offenses.⁴⁴⁷ Thompkins moved to suppress the statements concerning his belief in God during the interrogation, arguing that he invoked his right to remain silent under *Miranda*, therefore requiring the officer's to end the interrogation.⁴⁴⁸ The trial court denied Thompkins' motion, and the jury subsequently found him guilty on all counts.⁴⁴⁹ On appeal, the Michigan Court of Appeals upheld Thompkins' guilty verdict and stated that Thompkins did not invoke his right to remain silent and that he subsequently waived that right.⁴⁵⁰ The Michigan Supreme Court denied discretionary review, and Thompkins subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, in which the District Court rejected Thompkins' argument that he invoked his right to remain silent.⁴⁵¹ On appeal, the Sixth Circuit Court of Appeals reversed, ruling that Thompkins invoked his right to remain to silent by holding that an invocation of that right need not be express, and because Thompkins remained almost entirely silent for the first two hours and forty-five minutes of the interrogation.⁴⁵²

Justice Kennedy, writing for the majority of the Court, held that Thompkins did not invoke his right to remain silent under *Miranda*, because one who wishes to invoke that right must do so unambiguously.⁴⁵³ In rejecting Thompkins' argument that he invoked his right to

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 377-78.

⁴⁵⁰ *Id.* at 378.

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 379.

⁴⁵³ *Id.* at 381.

remain silent by not saying anything for a sufficient amount of time, Justice Kennedy relied on the Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), which held that a defendant wishing to invoke his or her right to counsel, must do so unambiguously.⁴⁵⁴ Justice Kennedy reasoned, the Court had yet to state whether an invocation of the right to remain silent can be ambiguous or equivocal, but stated that there was no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*.⁴⁵⁵

Justifying this holding, Justice Kennedy stated that, requiring a suspect to unambiguously invoke the right to remain silent avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity.⁴⁵⁶ Justice Kennedy continued that, if an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guessed wrong.⁴⁵⁷ Accordingly, because Thompkins did not unambiguously state that he wanted to remain silent or that he did not want to speak to the police, the Court held that he had not invoked his right to remain silent.⁴⁵⁸

Justice Sotomayor wrote a dissenting opinion which evinces her jurisprudential commonsense and her philosophy on judicial restraint. Justice Sotomayor began her dissent by stating, "The Court also concludes that a suspect who wishes to guard his right to remain silent against such a finding of 'waiver' must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police... The broad rules the Court announces today are also troubling because they are

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 382.

⁴⁵⁸ *Id.*

unnecessary to decide this case, which is governed by the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996.”⁴⁵⁹

Justice Sotomayor began her dissent by chastising the majority’s downplay of the factual circumstances surrounding Thompkins’ investigation.⁴⁶⁰ Justice Sotomayor emphasized that Thompkins remained almost completely silent and unresponsive throughout the entirety of the interrogation, pointing to the interrogating officer’s categorization of the interrogation as “nearly a monologue.”⁴⁶¹ Justice Sotomayor also pointed out that, other than the statements made at the end of the interrogation, the only other statements the interrogating officer could remember that Thompkins’ made were that he did not want a peppermint, and that the chair he was sitting in was hard.⁴⁶²

Justice Sotomayor, addressing Thompkins’ argument that his conduct during the interrogation invoked his right to remain silent, stated that she, like the Sixth Circuit, would not have reached this question because she believes Thompkins was entitled to relief under waiver.⁴⁶³ Justice Sotomayor dissented here because she could not agree with the Court’s broad ruling that a suspect must clearly invoke his right to silence by speaking.⁴⁶⁴ According to Justice Sotomayor, “[T]oday’s novel clear-statement rule for invocation invites police to question a suspect at length—notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights.”⁴⁶⁵

⁴⁵⁹ *Id.* at 391-92 (Sotomayor, J., dissenting).

⁴⁶⁰ *Id.* at 392-93.

⁴⁶¹ *Id.* at 393.

⁴⁶² *Id.* at 394.

⁴⁶³ *Id.* at 404.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

Justice Sotomayor pointed to several sources for her conclusion that the Majority was wrong in its holding. First, Justice Sotomayor stated that *Miranda* itself concluded that if an individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease, and that any statement taken after the person invokes this privilege cannot be other than the product of compulsion.⁴⁶⁶ Thus, Justice Sotomayor believes that the admissibility of statements obtained after the person in custody has decided to remain silent depends on whether the right to cut off questioning was scrupulously honored.⁴⁶⁷

Secondly, Justice Sotomayor stated that the Court was incorrect in extending the ruling in *Davis* to the right to remain silent.⁴⁶⁸ As Justice Sotomayor provided, the Court mistakenly applied *Davis* because it involved the right to counsel, not the right to remain silent, and that *Miranda* had recognized the difference between the procedural safeguards triggered by a request to remain silent and a request for an attorney.⁴⁶⁹ Justice Sotomayor, in stating the standard she believed to be appropriate, reasoned that, after an ambiguous invocation of the right to remain silent, the inquiry should be limited to whether the suspect's right to cut off questioning was scrupulously honored by the police.⁴⁷⁰ According to Justice Sotomayor, this standard is precautionary and fact specific, with an ability to acknowledge that some statements or conduct are so equivocal that police may scrupulously honor a suspect's rights without terminating questioning, and that others, in particular, when a suspect sits silent throughout prolonged interrogation, cannot reasonably be understood other than as an invocation of the right to remain silent.⁴⁷¹

⁴⁶⁶ *Id.* at 404-5

⁴⁶⁷ *Id.* at 405.

⁴⁶⁸ *Id.* at 407.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 408.

⁴⁷¹ *Id.*

Justice Sotomayor further stated that the *Davis* rule does not comport with the right to remain silent because advising a suspect that he has a right to remain silent is unlikely to convey that he must speak in order to ensure the right will be protected.⁴⁷² By contrast, Justice Sotomayor reasoned that advising a suspect that he has the right to the presence of an attorney implies the need for speech to exercise that right.⁴⁷³ As a result, Justice Sotomayor believes that the Court's decision in this case turned *Miranda* upside down because criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak.⁴⁷⁴

This dissent perfectly embodies two of Justice Sotomayor's major jurisprudential tenets. First, Justice Sotomayor's advocacy of judicial restraint is on display. Once again, Justice Sotomayor would not have reached the conclusion regarding a criminal suspect's invocation of his or her right to remain silent, because she believes that decision was not mandated by the factual circumstances in front of the court. Justice Sotomayor firmly believes that the role of the judge is to apply law, and not to make law. Because Justice Sotomayor believed the AEDPA adequately resolved the issue in front of the Court, she believed it unnecessary to reach such a broad ruling concerning the *Miranda* right to silence. Justice Sotomayor thus believes that this decision unnecessarily decides a question that, not only was not in front of the Court, but also has wide implications for constitutional rights.

Second, this opinion fits squarely within Justice Sotomayor's jurisprudential commonsense application of the law. As Justice Sotomayor sees it, *Davis*' holding, that an unambiguous statement is needed in order to invoke the right to counsel does not parallel Thompkins' invocation of his right to remain silent. Furthermore, a rule respecting the right of a

⁴⁷² *Id.* at 409.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 412.

criminal suspect to remain silent does not imply that he or she must do the opposite—speak—in order to invoke that right. As a result, Justice Sotomayor does not believe the Court’s holding to be a commonsense application of its precedent, or a commonsense application of human nature.

10. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011)

This case, in which Justice Sotomayor dissented, involves Congress’ enactment of the Immigration Reform and Control Act (IRCA), and whether Arizona’s Legal Arizona Workers Act, which provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be suspended or revoked, is expressly and impliedly preempted by federal immigration law.⁴⁷⁵ The Majority opinion, written by Chief Justice Roberts, concluded that Arizona’s licensing law is not expressly preempted, and that Arizona’s E-verify mandate is not impliedly preempted.⁴⁷⁶

The Immigration Reform and Control Act (IRCA) makes it unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing ~~the knowing~~ the alien is an unauthorized alien.⁴⁷⁷ Employers that violate that prohibition may be subjected to federal civil and criminal sanctions, and IRCA also expressly preempts any state or local law imposing civil or criminal sanctions, other than through licensing and similar laws, upon those who employ, or recruit or refer for a fee for employment unauthorized aliens.⁴⁷⁸

Under Arizona’s Legal Arizona Workers Act, the state allows Arizona courts to suspend or revoke the licenses necessary to do business in the state if an employer knowingly or

⁴⁷⁵ *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1970 (2011).

⁴⁷⁶ *Id.* at 1970-71.

⁴⁷⁷ *Id.* at 1970 (citing 8 U.S.C. § 1324a(a)(1)(A)).

⁴⁷⁸ *Id.*, (citing 8 U.S.C. § 1324a(h)(2)).

intentionally employs an unauthorized alien.⁴⁷⁹ Under the Arizona law, if an employer is found to have knowingly employed an unauthorized alien, the court must order the employer to terminate the employment of all unauthorized aliens and file quarterly reports on all new hires for a probationary period of three years.⁴⁸⁰ The court may also order the appropriate agencies to suspend all licenses that are held by the employer for a period not to exceed ten business days.⁴⁸¹ A second knowing violation requires that the court permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work.⁴⁸²

Chief Justice and the Majority concluded that Arizona's law is not expressly preempted by IRCA because the law falls within the confines of the authority Congress chose to leave to the states.⁴⁸³ Chief Justice Roberts reasoned that, while IRCA prohibits states from imposing civil or criminal sanctions on those who employ unauthorized aliens, it preserves the state's authority to impose sanctions through licensing and similar laws.⁴⁸⁴ According to Chief Justice Roberts, the Arizona law is not preempted because it merely instructs courts to suspend or revoke the business licenses of in-state employers that employ unauthorized aliens.⁴⁸⁵ Also, because Arizona's definition of "license" in its law is substantially similar to the definition of "license" that Congress codified in the Administrative Procedure Act, the Court held that Arizona's law does precisely what IRCA authorizes the states to do.⁴⁸⁶ Accordingly, because Chief Justice

⁴⁷⁹ *Id.* at 1976.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.* at 1970.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 1971.

Roberts believes that Arizona's law falls within the plain text of the preemption exception of IRCA, Arizona's law is not preempted.⁴⁸⁷

Unlike many of Justice Sotomayor's dissents and concurrences, in this case, her dissent focuses entirely on a differing view of the legislative history of IRCA. Justice Sotomayor, in opening her dissent, states, "In enacting the Immigration Reform and Control Act of 1986 (IRCA), Congress created a comprehensive scheme prohibiting the employment of illegal aliens in the United States. The Court reads IRCA's saving clause—which preserves from preemption state 'licensing and similar laws'—to permit states ~~to states~~ to determine for themselves whether someone has employed an unauthorized alien so long as they do so in conjunction with licensing sanctions. This reading of the saving clause cannot be reconciled with the rest of IRCA's comprehensive scheme."⁴⁸⁸ This dissent thus points to Justice Sotomayor's jurisprudential view that when determining the meaning of a term within a statute, it is necessary to look past its plain meaning. As a result of looking at the comprehensive scheme enacted by Congress in IRCA, Justice Sotomayor concludes that the saving clause can only be understood to preserve a state's authority to impose licensing sanctions after a final federal determination that a person has violated IRCA.⁴⁸⁹

Justice Sotomayor reached this conclusion by reasoning that the plain text of IRCA expressly preempts states from imposing civil or criminal sanctions, other than through licensing and similar laws, upon those who employ unauthorized aliens.⁴⁹⁰ Justice Sotomayor emphasized that Arizona's law imposes civil sanctions on employers, thus allowing the act to escape IRCA

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at 1998 (Sotomayor, J., dissenting).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

express preemption only if it falls within the licensing saving clause.⁴⁹¹ As Justice Sotomayor explains, because the plain text of the saving clause is not clear, in that it does not define “licensing,” nor does it use the term “licensing” in any other provision.⁴⁹² As a result, Justice Sotomayor reasons that it is necessary to look to the text of IRCA as a whole in order to illuminate Congress’ intent.⁴⁹³

Justice Sotomayor then goes into an in depth analysis of the history of IRCA, and an analysis of the evils in which it was enacted to counteract.⁴⁹⁴ Through examining this history, and analyzing IRCA’s text in whole, Justice Sotomayor reasons that Arizona’s law is expressly preempted because: 1) Congress expressly displaced the myriad state laws that imposed civil and criminal sanctions on employers, thus making it clear that Congress could not have made its intention to preempt state and local law imposing civil or criminal sanctions any more clear; 2) Congress centralized in the federal government enforcement of IRCA’s prohibition on the knowing employment of unauthorized aliens; 3) Congress provided persons adversely affected by an agency order with a right of review in the federal courts of appeals; 4) Congress created a uniquely federal system by which employers must verify the work authorization status of new hires; and 5) Congress created no mechanism for states to access information regarding an alien’s work authorization status for purposes of enforcing state prohibitions on the employment of unauthorized aliens.⁴⁹⁵ Justice Sotomayor thus concluded that these provisions collectively demonstrate Congress’ intent to build a centralized, exclusively federal scheme for determining whether a person has employed an unauthorized alien.⁴⁹⁶

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 1999.

⁴⁹⁵ *Id.* at 2000-01.

⁴⁹⁶ *Id.* at 2002.

Justice Sotomayor then reasoned that IRCA's saving clause must be construed against that backdrop. Concluding that the statutory scheme as a whole defeat's Arizona's and the majority's reading of the saving clause, Justice Sotomayor stated that Congress would not sensibly have permitted states to determine for themselves whether a person has employed an unauthorized alien, while at the same time creating a specialized federal scheme for making such a determination, withholding from the states the information necessary to make such a determination.⁴⁹⁷ As a result, Justice Sotomayor concluded that, she believes, the proper reading of the saving clause to mean that states may impose licensing sanctions following a final federal determination that a person has violated IRCA.⁴⁹⁸

This dissent demonstrates Justice Sotomayor's philosophy on statutory construction, and how to determine Congressional intent. Justice Sotomayor believes that the correct course of action is to determine what the comprehensive scheme of the entire statute is when the plain meaning of the clause or term at issue is not crystal clear. Such an investigation more clearly indicates what Congress intended in enacting the statute, clause, or term at issue. This demonstrates Justice Sotomayor's never-ending search for the truth, believing that a cursory determination of plain meaning is not enough to determine Congressional intent in all but the most unambiguous cases.

IV. Conclusion

The cases reviewed here, read in light of Justice Sotomayor's upbringing and early life, shed valuable light on her jurisprudence. Namely, in each opinion, concurrence, or dissent written by Justice Sotomayor, she engages in a thorough analysis of the facts of the case, a description of the case's procedural posture, an in-depth and technical explanation of the current

⁴⁹⁷ *Id.* at 2004.

⁴⁹⁸ *Id.*

law, an acknowledgment of the opposition's stance, an often narrow, commonsense application of the law to the facts, and a conclusion. The cases analyzed here also establish Justice Sotomayor's belief that statutory interpretation and the determination of Congressional intent must be made in light of the complete, comprehensive history and scheme of the legislation. This belief can be traced back to her childhood, and her fascination with *Perry Mason* and the pursuit of the truth that led her to a career in law. These cases also reveal perhaps the most prevalent jurisprudential philosophy held by Justice Sotomayor: that she believes the role of the judge is to apply law, and not to make it. Justice Sotomayor firmly believes in judicial restraint. As evidenced through her case law, her opinions often construe the law to a narrow application of the facts of the case, and most of her dissents and concurrences emphasize the fact that she does not think the Court narrowed its disposition sufficiently. As a result of the foregoing analysis, Justice Sotomayor can be said to apply a commonsense application of the law to the facts in front of her.