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What Actions Cause One to be a Generator in Order to be Exempted from the Resource Conservation and Recovery Act? United States v. Sims Bros. Constr., Inc.

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CASENOTE

WHAT ACTIONS CAUSE ONE TO BE A GENERATOR IN ORDER TO BE EXEMPTED FROM THE RESOURCE CONSERVATION AND RECOVERY ACT?

United States v. Sims Bros. Constr., Inc.[1]

I. Introduction

Congress enacted the Resource Conservation and Recovery Act ("RCRA") because it recognized the fact that hazardous waste and solid waste disposal "without careful planning and management can present a danger to human health and the environment."[2] Under the RCRA, criminal charges can be brought against any person who "knowingly treats, stores, or disposes of any hazardous waste...without a permit."[3] The Environmental Protection Agency, however, has created ways to get around the permit process in certain situations through its regulations.[4] If a person meets the particular requirements of these regulations, the person is exempt from the permit requirement and has an affirmative defense to charges brought under the RCRA.[5]

U.S. v. Sims Bros. Constr., Inc. addressed the question of what actions are sufficient to qualify one as a "generator" under the regulations, and whether the defendant's actions in this case met that threshold.[6] If the defendants acts qualified them as "generators," then they could have argued that they were entitled to the permit exemption.[7] However, the Fifth Circuit found that the defendants were not in fact the generators of the hazardous waste in question.[8]

II. Facts and Holding

The defendants in *U.S. v. Sims Bros. Constr., Inc.* appealed from a decision by the United States District Court for the Middle District of Louisiana.[9] The defendants, Sims Brothers Construction, Inc. ("Sims"), Robert Case ("Case"), Mark Jerkins ("Jerkins"), and Amtek of Louisiana, Inc. ("Amtek") (collectively "defendants") appealed their conviction for illegal storage of hazardous waste in violation of the RCRA[10] to the Fifth Circuit Court of Appeals.[11]

In early 1997, Sims contracted to be the general contractor for Albertson's Inc. ("Albertson's") in the building of a supermarket.[12] Albertson's is a corporation that owns and operates grocery stores throughout the United States.[13] Albertson's newest project in 1997 was to

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[1] 277 F.3d 734 (5th Cir. 2001).
[2] 42 U.S.C. § 6901(b)(2) (2001).
[3] 42 U.S.C. § 6928 (d)(2)(A) (2001).
[4] 40 C.F.R. §§ 262.34, 261.5 (2001).
[5] *Sims*, 277 F.3d at 739-741.
[6] *Id.* at 739.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 736.
[10] 42 U.S.C. § 6928(d)(2)(A).
[11] *Sims*, 277 F.3d at 736-737.
[12] *Id* at 737.
[13] *Id.*

build a supermarket in Baton Rouge, Louisiana, on recently purchased property.[14] As general contractor, Sims subcontracted with Amtek to do the demolition and site preparation work.[15]

After work had commenced, it was discovered on May 20, 1997 that one of the buildings scheduled for demolition contained two yellow canisters designed to hold pressurized gases.[16] Both containers bore a skull and crossbones, the words "poison" and "Property of Reddick Fumigants," and testing showed that one or both of them contained hazardous waste.[17] It was later determined that they contained liquefied methyl bromide.[18]

An employee who immediately notified Case, the president of Amtek, and Jerkins, who was hired by Sims to be the superintendent of the project, discovered the canisters in the building.[19] The canisters were moved from the building to an open on-site area where they remained until around June 13, 1997.[20]

Upon removal of the canisters from the building, Jerkins saw a poison label and Case saw the fumigant stamp, but they were unaware of the exact contents until they tested them.[21] Despite conversations discussing the proper removal of the containers by an environmental company, no further effort was ever made by the defendants to remove the containers.[22] At no time was Albertson's, law enforcement, an environmental agency, or any commercial or industrial entity contacted about the presence of the containers.[23] Both Case and Jerkins knew that Albertson's had had an environmental site assessment that did not reveal the presence of the containers.[24]

Around June 13, 1997, an Amtek employee removed the containers without the defendants' consent or knowledge, and gave them to his cousin Edith Rome who later connected the containers to her propane stove.[25] The canisters leaked methyl bromide causing Ms. Rome and her son initially to become ill, but Ms. Rome later died as a result of methyl bromide poisoning.[26]

An investigation ensued that revealed the history of the canisters. The canisters had originally been filled by Reddick Fumigants, Inc., and were bought in October of 1977 by W.L. Albritton Farms, which operated the property as a peach and vegetable farm.[27] Later apartments were built on the property.[28] Ms. Hallie Box had been the manager of the apartments and claimed that the particular building where the containers were found was used for storage, and that she was unaware of their presence.[29] She explained that if she had known about the containers she would have had them removed by an environmental company.[30] In May and June of 1997 Reddick Fumigants was still operating and would have accepted the return of the containers.[31]

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* "Methyl bromide products and their derivatives are used primarily as agricultural fumigants. As an ozone-depleting chemical, under the Clean Air Act and the Montreal Protocol, use of methyl bromide is being phased out." *In re Bromine Antitrust Litigation*, 203 F.R.D. 403, 405 (S.D. Ind. 2001). For more information on methyl bromide and the phasing out of methyl bromide see <http://www.epa.gov/docs/ozone/mbr/mbrqa.html> (accessed April 16, 2002).
[19] *Sims*, 277 F.3d at 737.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 738.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

On February 9, 1999, a grand jury in the Middle District of Louisiana indicted the defendants, charging them with illegal storage of hazardous waste in violation of RCRA, Title 42 U.S.C. § 6928(d)(2)(A).[32] The defendants filed several motions to dismiss, but when the motions were denied by the district court the defendants accepted a plea agreement, while reserving their right to appeal the decision to deny their motions to dismiss and whether the stipulated facts supported the defendants' guilty pleas.[33] The defendants had argued at their plea agreement hearing that the stipulated facts were insufficient to support a guilty plea, but the district court found that the facts were sufficient and accepted the guilty pleas.[34] On December 1, 2000, the defendants were sentenced and the judgments were entered on December 7, 2000,[35] upon which the defendants filed timely notice of appeal to the Fifth Circuit.[36]

III. LEGAL BACKGROUND

A. Overview of the Resource Conservation and Recovery Act[37]

Congress enacted the RCRA because it recognized the fact that hazardous waste and solid waste disposal "without careful planning and management can present a danger to human health and the environment."[38] Under the RCRA, criminal charges can be brought against any person who "knowingly treats, stores, or disposes of any hazardous waste...without a permit."[39] An exception is granted to "small quantity generators" ("SQGs")[40] and "conditionally exempt small quantity generators" ("CESQGs").[41]

SQGs are generators of hazardous waste that generate between 100 kilograms and 1000 kilograms of hazardous waste in one calendar month, and they are allowed to store the waste on-site for up to 180 days without a permit so long as they meet certain requirements.[42] CESQGs are those generators that generate 100 kilograms or less of hazardous waste in a calendar month and thus, are not subject to regulation.[43] If one is found to be a generator, they must not only meet the quantity conditions to be exempt, but they must also meet several other conditions.[44]

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Sims was sentenced to five years probation, a fine of $100,000, and a special assessment of $400. Amtek was sentenced to five years probation and a special assessment of $400. Jerkins was sentenced to five years probation and a special assessment of $100, and Case was sentenced to five years probation, restitution of $14,628, a fine of $10,000, and a special assessment of $100. *Id.* at 738, n 2.
[36] *Sims*, 277 F.3d at 738.
[37] 42 U.S.C. § 6901 *et seq.*
[38] 42 U.S.C. § 6901(b)(2).
[39] 42 U.S.C. § 6928(d)(2)(A).
[40] 40 C.F.R. § 262.34(d).
[41] 40 C.F.R. at 261.5.
[42] 40 C.F.R. at 262.34(d).
[43] 40 C.F.R. § 261.5(a)-(b). In the present case, the methyl bromide in the two containers was less than 100 kg together, the total hazardous waste on the site was less than 1000kg, and there was less than 100kg on average per calendar month for the calendar year *Sims*, 277 F.3d at 737.
[44] 40 C.F.R. §§ 261.5(f)-(g), (j), 262.34(d)(1)-(5).

B. Due Process Requirements

The defendants in *U.S. v. Sims Bros. Constr., Inc.* argued that they were denied due process because of unconstitutionally vague language and lack of fair warning as to how pertinent statutes and federal regulations would be interpreted.[45]

The defendants had argued that they fell within the exception to the RCRA because they were CESQGs.[46] A generator is defined as "any person, by site, whose act or process produced hazardous waste identified or listed, or whose act first causes hazardous waste to become subject to regulation."[47] The defendants contended that since they could not have known that they would not be considered generators because their actions did not first cause the methyl bromide to become subject to regulations, they lacked knowledge of the facts that rendered their conduct criminal.[48] Thus, the defendants were arguing that they lacked fair warning as to how the regulation's definition of generator would be applied to them.

The defendants also argued that the definition of "storage" is unconstitutionally vague because it fails to define how one goes about storing gaseous materials since gas is contained from inception.[49] Under the RCRA, hazardous waste must be solid waste,[50] and for gaseous materials to be considered solid waste, it must be contained.[51] "Storage" is defined as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste."[52] The defendants argued that the RCRA's definition of storing gas gave them no fair warning that "merely finding the cylinders on a jobsite or placing them on the ground without further containment constituted a felony."[53] They argued that vagueness and lack of fair warning violated their Fifth Amendment due process rights.[54]

First, the United States Supreme Court has held that unless the challenge of vagueness involves a First Amendment right, the challenge "must be examined in the light of the facts of the case at hand."[55] In interpreting a statute for vagueness, the Supreme Court has said that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."[56] Thus, if the facts of the case and the defendant's conduct clearly fall within the statute then it is not vague even if it could be interpreted as vague under a different set of facts; in other words, it must be demonstrated to be "impermissibly vague in all of its applications."[57]

The fair warning requirement of the Due Process Clause provides that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[58] One way the fair warning requirement is violated is when a statute is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."[59] The warning requirement is also violated when "although clarity at the requisite level may be supplied by judicial

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[45] *Sims*, 277 F.3d at 740.
[46] *Id.* at 739.
[47] 40 C.F.R. § 260.10 (2001).
[48] *Sims*, 277 F.3d at 740.
[49] *Id.*
[50] 42 U.S.C. § 6903(5) (2001).
[51] 42 U.S.C. § 6903(27).
[52] *Id.*
[53] *Sims*, 277 F.3d at 740.
[54] *Id.* at 739.
[55] *U.S. v. Mazurie*, 419 U.S. 544, 550 (1975).
[56] *Parker v. Levy*, 417 U.S. 733, 756 (1974).
[57] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1981).
[58] *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *U.S. v. Harriss*, 347 U.S. 612, 617 (1954)).
[59] *U.S. v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within scope."[60] The Supreme Court has held that in order to show no fair warning, the judicial construction must have been unforeseeable in the way it would be applied.[61]

The defendants argued that they had no fair warning that they could have known the facts that would cause them not to be considered a generator. "To act 'knowingly' is to act with 'knowledge *of the facts* that constitute the offense' but not necessarily with knowledge that the facts amount to *illegal* conduct, unless the statute indicates otherwise."[62] The question in the instant decision becomes whether the defendants' lack of knowledge means that they did not know all the surrounding facts, or that they did not know and understand the law and regulations. If the latter is true, then the defendants have a mistake of law argument rather than a mistake of fact argument.

It is a well established principle that mistake of law or ignorance of law is not a defense to criminal conduct.[63] In *U.S. v. Intl. Minerals & Chemical Corp.* the sole question on appeal was whether this principle applied to regulations as well as statutes.[64] The United States Supreme Court held that the principle is applicable to a "duly promulgated and published regulation."[65] In this case, the defendant had failed to comply with regulations set forth by the Interstate Commerce Commission in its transportation of sulfuric acid and hydrofluosilicic acid.[66] The Supreme Court found that "where...dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[67]

IV. INSTANT DECISION

The defendants' motions to dismiss had alleged that (1) they were denied due process because the statute was unconstitutionally vague or because the government had failed to show the necessary mens rea requirement; (2) the indictment was defective; and (3) the district court lacked jurisdiction because the government was trying to enforce state law.[68] The defendants also appealed on the issue of whether the facts stipulated to by the parties were sufficient to support their guilty pleas.[69]

A. Due Process Analysis

The Fifth Circuit first looked at the defendants' four due process claims: (1) that there was no notice or fair warning that they would not be considered "generators" for the small quantity generators exemption that allows for on-site storage; (2) that they had no knowledge of the facts supporting the denial of the on-site storage permit exception which rendered their conduct criminal; (3) they had no notice that Chapter 21 of Louisiana's Hazardous Waste Regulations applied to them

[60] *Id.* at 266.
[61] *Marks v. U.S.*, 430 U.S. 188, 192 (1977).
[62] *U.S. v. Fuller*, 162 F.3d 256, 260 (4th Cir. 1998) (quoting *Bryan v. U.S.*, 524 U.S. 184, 193 (1998)).
[63] *U.S. v. Intl. Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971).
[64] *Id.* at 560.
[65] *Id.* at 563.
[66] *Id.* at 559.
[67] *Id.* at 565.
[68] *Sims*, 277 F 3d at 739-741
[69] *Id.* at 742

since the state legislature had repealed the law; and (4) that the definition of "storage" is unconstitutionally vague.[70]

Of these issues, the Fifth Circuit first addressed the issue of whether the defendants were "generators." Under Federal regulations there is an exemption for small quantity generators of hazardous waste that allows for producers of less than an average of 1000kg of hazardous waste per month to be exempt from 42 U.S.C. § 6928.[71] Furthermore those that produce no more than 100kg of hazardous waste are considered "conditionally exempt small quantity generators," and the permit requirements for them are less stringent.[72] The defendants argued that they were small quantity generators because the methyl bromide in the containers weighed less than 100kg, and the total hazardous waste on the site was less than 1000kg in any one calendar month and less than an average of 100kg per calendar month for the calendar year.[73] The district court and Fifth Circuit found that the definition of "generator" is "any person, by site, whose act or process produces hazardous waste identified or listed, or whose act first causes hazardous waste to become subject to regulation."[74] The Fifth Circuit found that because the containers were already waste at the time Albertson's bought the property, neither Albertson's nor the defendants could be considered the producer of the waste or the person "whose act first causes hazardous waste to become subject to regulation."[75]

The second due process issue was whether the defendants lacked knowledge of facts that would have rendered their otherwise lawful conduct criminal.[76] The defendants contended that they could not have known that they would not be considered "generators" and thus exempt under the small generators exemption.[77] The Fifth Circuit found that this argument failed because even if they had been considered generators, they had failed to meet federal regulations for the storage of hazardous waste.[78]

The next due process issue addressed by the court was whether the word "storage" was unconstitutionally vague. Storage is defined by 42 U.S.C. § 6903(33) to be the "containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste."[79] Also for waste to be hazardous, it must be "solid waste," and for gaseous material to be "solid waste" it must be "contained."[80] The defendants contended that this is vague because by its nature gaseous material is contained from inception.[81]

The Court found that the defendants' argument that storage involved putting the containers inside an additional container rather than putting them out in the open was invalid.[82] The Court found that allowing these containers to sit out in the open for three weeks without making any effort to provide for their proper removal was in fact storage and subject to 42 U.S.C. § 6928(d)(2)(A).[83]

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[70] *Id.* at 739.
[71] 40 C.F.R. § 260.10.
[72] 40 C.F.R. § 261.5(a)
[73] *Sims*, 277 F.3d at 737-38.
[74] *Id.* at 739 (quoting 40 C.F.R § 260.10; 1 A.A.C. 33:V.109 (1997)).
[75] *Sims*, 277 F.3d at 739.
[76] *Id.* at 740.
[77] *Id.*
[78] *Id.*
[79] (2001)
[80] 42 U.S.C. §§ 6903(5),(27).
[81] *Sims*, 277 F.3d at 740.
[82] *Id.* at 741.
[83] *Id.*

B. Deficiency of the Indictment

The defendants argued that the indictment was deficient because the government failed to show in the indictment that the defendants were not entitled to the exemptions allowed for in the statute.[84] The Court found this argument invalid because the permit exemption is an affirmative defense rather than an element of the crime to be proven by the government.[85]

C. Jurisdiction of the District Court

The defendants' next argument was that the government was attempting to enforce state regulations against them, and thus, the district court lacked jurisdiction.[86] The Fifth Circuit found that this argument was invalid because the state regulations applied to small quantity generators and the defendants had already been found not to be generators.[87]

D. Sufficiency of the Stipulated Factual Basis

Finally the defendants argued that the stipulated facts of the case did not support their guilty pleas and that the district court should not have accepted them as having supported the pleas.[88] The Fifth Circuit first noted that the standard of review for insufficiency of the evidence is the clearly erroneous standard, and then went on to review the evidence in support of the district court's decision.[89] The Fifth Circuit found that methyl bromide is a hazardous waste once discarded, and the canisters had been intentionally abandoned or discarded, thus making them waste.[90] The court also found that the defendants had the necessary knowledge that the containers were in fact waste and had been discarded because the defendants had discussed the removal of the canisters themselves.[91]

Thus the Fifth Circuit found none of the defendants' due process arguments to be persuasive and that there was sufficient evidence to support their guilty pleas. Accordingly, the Fifth Circuit affirmed the defendant's guilty pleas and convictions.

V. COMMENT

One of the issues the Fifth Circuit had to deal with in *U.S. v. Sims Bros. Constr.* was whether the defendants were generators.[92] If they were generators, then they might have been able to qualify for the small quantity or conditionally exempt small quantity generators exceptions to the RCRA.[93]

First, the defendants argued that they should be considered generators under the definition. A generator is defined as "any person, by site, whose act or process produces hazardous waste identified or listed...or whose act first causes hazardous waste to become subject to regulation."[94]

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 742.
[89] *Id.* at 741-42.
[90] *Id.*
[91] *Id.*
[92] *Id* at 739.
[93] *Id.*
[94] 40 C.F.R. § 260.10.

They argued that because they did not know the history of the canisters containing the methyl bromide, as far as they knew, they were the first to decide to dispose of the canisters.[95] Thus, they would be generators in the sense that they would have been the ones to first consider the canisters waste causing them to become subject to regulation.[96]

The court correctly did not accept this argument. The canisters had been on the property, which had had two different prior owners, for twenty years.[97] It seems clear that the canisters had been abandoned well before Albertson's bought the property. So whoever actually abandoned them would be the one to qualify as a generator because that would be the person who originally caused them to become subject to regulation.

Furthermore, even if the defendants could be considered the generators of this hazardous waste, they would not qualify for any of the small quantity generator exceptions. Both the small quantity generator exception and the conditionally exempt small quantity generator exception list several requirements that must be fulfilled for the exceptions to apply to the generator.[98] For example, "at all times there must be at least one employee either on the premises or on call with the responsibility for coordinating all emergency response measures...[and] this employee is the emergency coordinator."[99] Although the facts of the case do not specifically say whether the defendants established someone to act as an emergency coordinator for their hazardous waste, the court found that the defendants could not meet the conditions for the exceptions.[100]

Second, the defendants argued that they lacked knowledge of the facts that rendered their actions criminal.[101] The problem with this argument is that when one argues the defense of mistake of facts, it is because there is a fact outside of their knowledge. "To act 'knowingly' is to act with 'knowledge *of the facts* that constitute the offense' but not necessarily with knowledge that the facts amount to *illegal* conduct, unless the statute indicates otherwise."[102]

The facts that constitute this particular crime are that the person knowingly stored hazardous waste without a permit.[103] The facts that the defendants stipulated to clearly show that they were aware that the contents of the canisters were hazardous, that they knowingly stored the canisters on their property, and that they did not have a permit to store such hazardous materials.[104] In order to meet the small quantity generator exceptions, one would have to show that he was in fact a generator and that he had met the qualifying conditions specified in the regulations.[105] The defendants were aware of the facts that would keep them from qualifying under these exceptions in that they definitely did not take measures to meet the safety conditions in the regulations, and that a reading of the definition of "generator" clearly showed that their actions did not fall within the definition. Thus, the defendants did know the facts, but it is not necessary to show that they knew that this set of facts constituted illegal behavior.

It seems that the defendants' real argument was that they were unaware of how the definition of "generator" would be applied and that it would be given a narrow construction. This would be a mistake of law and fair warning argument. The defendants were arguing that they had no fair

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[95] *Sims*, 277 F.3d at 740.
[96] *Id.*
[97] *Id.* at 738-38.
[98] 40 C.F.R. §§ 261.5(f)-(g),(j), 262.34(d)(1)-(5).
[99] 40 C.F.R. §262.34(d)(5)(i).
[100] *Sims*, 277 F.3d at 740.
[101] *Id.*
[102] *Fuller*, 162 F.3d at 260 (quoting *Bryan v. U.S.*, 524 U.S. 184, 193 (1998)).
[103] 42 U.S.C. § 6928(d)(2)(A).
[104] *Sims*, 277 F.3d at 737.
[105] 40 C.F.R. §§ 261.5(f)-(g),(j), 262.34(d)(1)-(5).

warning of how their conduct would be treated under the regulations. This argument cannot hold up either.

The fair warning requirement says that "although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within scope."[106] There is absolutely nothing "novel" about the court's interpretation of "generator." The Fifth Circuit clearly applied the definition of generator as it was meant to be applied. They did not alter the definition or give it some narrower or broader meaning. They just applied it as it was written.

Thus the Fifth Circuit was correct in finding that the small quantity generator exceptions did not apply to the defendants. The defendants did not fall within the definition of generator. Even if they had, they did not meet the other qualifying conditions of the regulations. Finally, they were aware of all the necessary surrounding facts that rendered their actions criminal.

VI. Conclusion

Despite the defendants' arguments that the small generator exceptions should have been applied to their actions, the fact of the matter is that their actions clearly fell outside of the plain meaning of the regulations' texts. The Fifth Circuit's decision was based on interpreting what was seemingly an obvious and unambiguous definition of "generator."

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[106] *Lanier*, 520 U.S. at 266.