



## ESSAY

## Restraint and the Rights of Criminal Defendants: Judge Gorsuch on the Sixth Amendment

Abbee Cox\* & Katherine Moy\*\*

### Introduction

Whatever openness to the claims of criminal defendants Supreme Court nominee Judge Neil Gorsuch may have displayed in his Fourth Amendment decisions<sup>1</sup> finds no counterpart in his opinions touching on Sixth Amendment rights. In each of the four cases in which Judge Gorsuch has dissented on Sixth Amendment grounds, his desired holding would have been more favorable for the government.<sup>2</sup> Defendants who find him writing for the majority are no better off—out of fifty-two opinions the Judge has authored that discuss the Sixth Amendment,<sup>3</sup> only two granted relief on this basis.<sup>4</sup> This Essay offers an overview of Judge Gorsuch's interpretive approach to the Sixth Amendment in Part I, followed in Part II by an assessment of his likely future holdings in two specific areas: ineffective assistance of counsel and the Confrontation Clause.

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\* J.D. Candidate, Stanford Law School, 2017.

\*\* J.D. Candidate, Stanford Law School, 2018.

1. *See, e.g.*, *United States v. Ackerman*, 831 F.3d 1292, 1307-08 (10th Cir. 2016); *United States v. Carloss*, 818 F.3d 988, 1003, 1005-06 (10th Cir. 2016) (Gorsuch, J., dissenting).

2. *See* *Hooks v. Workman*, 689 F.3d 1148, 1208, 1211 (10th Cir. 2012) (Gorsuch, J., concurring in part and dissenting in part); *Williams v. Jones*, 583 F.3d 1254, 1260 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc); *Wilson v. Workman*, 577 F.3d 1284, 1316-17 (10th Cir. 2009) (en banc) (Gorsuch, J., dissenting); *Williams v. Jones*, 571 F.3d 1086, 1110 (10th Cir. 2009) (Gorsuch, J., dissenting).

3. Searches of Tenth Circuit cases on the Sixth Amendment in which Judge Gorsuch wrote an opinion yielded fifty-five results in Westlaw and fifty-eight in Lexis. Reconciling the two searches revealed fifty-two unique majority opinions.

4. *United States v. Farr*, 536 F.3d 1174, 1176 (10th Cir. 2008) (granting relief on a claim based on the constructive amendment of the indictment); *United States v. Golden*, 255 F. App'x 319, 320 (10th Cir. 2007) (ruling for a defendant who claimed her counsel was ineffective).

## I. General Interpretive Approach

### A. Judicial Restraint

The hallmark of Judge Gorsuch’s writings on the Sixth Amendment has been a restrained approach to adjudication. Granted, Sixth Amendment claims are generally raised on federal habeas, where the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) entitles the decision below to “doubly deferential” review.<sup>5</sup> But even on top of this baseline deference, Judge Gorsuch has urged judicial restraint in several ways, including by invoking the constitutional avoidance canon<sup>6</sup> and exhorting deference to state courts.<sup>7</sup> In one dissent, the Judge criticized the majority for reaching an unnecessary constitutional question, emphasizing that “nothing turns on it” and “its answer does not matter.”<sup>8</sup> In another, he expressed frustration with the majority for treating the state court’s decision as less than “the *real thing*”<sup>9</sup>—suggesting that a confirmed Justice Gorsuch would be similarly reluctant to aggrandize the role of federal courts vis-à-vis the states.<sup>10</sup>

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5. See *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); see also Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). AEDPA permits federal courts to provide habeas relief to prisoners in state custody if, among other narrow circumstances, the state court decision under review was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d) (2015).
  6. See, e.g., *Hooks*, 689 F.3d at 1208 (Gorsuch, J., concurring in part and dissenting in part) (counseling courts to “avoid reaching constitutional questions in advance of the necessity of deciding them” (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988))); *Williams*, 583 F.3d at 1256 (Gorsuch, J., dissenting from the denial of rehearing en banc) (“It’s not every day we exacerbate a split of authority over the recognition of a new constitutional right . . .”).
  7. See, e.g., *Williams*, 583 F.3d at 1258 (Gorsuch, J., dissenting from the denial of rehearing en banc) (“[W]e are not here to grade state court opinions . . .”); *Wilson*, 577 F.3d at 1316 (Gorsuch, J., dissenting) (“We could and should have just asked the [Oklahoma Court of Criminal Appeals (OCCA)] what its Rule means. After all, the OCCA, not this court, is the authoritative expositor of its own rules.”).
  8. See *Hooks*, 689 F.3d at 1208, 1211 (Gorsuch, J., dissenting).
  9. See *Wilson*, 577 F.3d at 1315 (Gorsuch, J., dissenting).
  10. It is not clear, however, that this reluctance reflects special reverence for state court findings. In at least one case, Judge Gorsuch’s preference for deferring to the state court’s remedy would have simultaneously undermined that court’s rationale. See *Williams*, 583 F.3d at 1255 (Kelly, J., concurring in the denial of rehearing en banc) (pointing out that Judge Gorsuch’s “suggestion that the ‘OCCA’s decision deserved more deference from us’ is strange given that [his] approach is totally at odds with the OCCA’s finding of prejudice,” particularly when Judge Gorsuch’s desired holding would have deemed the state court finding “contrary to federal law” (quoting *id.* at 1258 (Gorsuch, J., dissenting from the denial of rehearing en banc))).

The Judge's preference for judicial restraint also seems tied to preserving the finality of criminal proceedings.<sup>11</sup> For example, his dissent from a decision recognizing a right to counsel in *Atkins* proceedings rested, in part, on the fact that the petitioner's *Atkins* hearing would occur after his conviction.<sup>12</sup> When the petitioner pointed out that *Atkins* was decided after he had already been convicted—making collateral review his first opportunity to pursue an *Atkins* claim—Judge Gorsuch scoffed at what he considered an attempt to “transmogrify a habeas proceeding back into a pre-conviction criminal proceeding.”<sup>13</sup>

## B. Judicial Pragmatism

Judge Gorsuch's Sixth Amendment decisions also reveal a tendency toward judicial pragmatism, taking into account the scope and severity of potential constitutional violations to assess the likely practical consequences of the court's holding.

When asked to grant relief to criminal defendants, the Judge is sensitive to the floodgates principle, and is thus hesitant to open wide the courthouse doors. Dissenting from a decision about ineffective assistance in plea bargaining, he complained that “defendants in our circuit who are offered pre-trial plea agreements (*and surely that's most of them*) can now take a shot at trial knowing . . . they will still have a chance at reviving the forgone plea offer.”<sup>14</sup> Likewise, he rested his *Hooks* dissent in part on the fear that fashioning an *Atkins* proceeding as “part of [the petitioner's] original criminal prosecution” would extend the right to counsel to a large number of substantive claims that, like Mr. Hooks's *Atkins* claim, could only be brought after conviction for reasons beyond the petitioner's control.<sup>15</sup> Yet in the same case, the Judge also emphasized the *small* number of potential litigants who stood to gain from the majority's holding

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11. *See, e.g., id.* at 1256 (Gorsuch, J., dissenting from the denial of rehearing en banc) (“It’s not every day we overturn a state jury verdict for first-degree murder when the defendant admits he received a fair trial and no one questions that his conviction is supported by overwhelming evidence.”).

12. *See Hooks*, 689 F.3d at 1209 (Gorsuch, J., concurring in part and dissenting in part) (“[W]hen it comes to *post*-conviction habeas proceedings, the Supreme Court’s teachings have been consistent, clear, and categorical—holding that a constitutional right to counsel does *not* exist.”); *see also Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of intellectually disabled individuals is unconstitutional).

13. *Hooks*, 689 F.3d at 1210 (Gorsuch, J., concurring in part and dissenting in part).

14. *Williams*, 583 F.3d at 1257 (Gorsuch, J., dissenting from the denial of rehearing en banc) (emphasis added).

15. *See Hooks*, 689 F.3d at 1210 (“[H]abeas petitioners would have a constitutional right to post-conviction counsel not just for *Atkins* claims but also for *Strickland* claims aimed at appellate counsel or for *Brady* claims based on newly discovered evidence. . . . [T]hat, of course, is not the law.”).

given the limited scope of *Atkins* retroactivity.<sup>16</sup> Rather than concluding that little would be lost by ensuring the right to counsel for this small group, he cited the fact that only a few defendants would benefit as a reason to reject it.<sup>17</sup>

Judge Gorsuch's pragmatism also incorporates his sense of the severity of the underlying Sixth Amendment violation; in at least one case, he has minimized the practical impact of the infringement while denying the petitioner's requested relief.<sup>18</sup> That defendant sought to prevent a prior uncounseled misdemeanor conviction from affecting his sentence for a new crime.<sup>19</sup> He argued that because he had been sentenced without counsel to a suspended jail term, the prior conviction could not be used to enhance his new sentence.<sup>20</sup> While Judge Gorsuch acknowledged that the prior jail sentence violated the Sixth Amendment, he struck down only that portion of the sentence involving incarceration—affirming the conviction itself and leaving the defendant ineligible for leniency.<sup>21</sup> In so doing, he outlined the relatively minor role prior misdemeanor convictions play in the U.S. Sentencing Guidelines and the ways federal judges may circumvent the guidelines altogether—suggesting that a confirmed Justice Gorsuch may look to real-world practices when weighing constitutional harms.<sup>22</sup>

## II. Specific Doctrinal Views

With a sense of how Judge Gorsuch has approached the Sixth Amendment thus far, we can consider what he might say about its substantive guarantees if confirmed. The Judge has written extensively on ineffective assistance of counsel claims, with only periodic explication of his views on other Sixth Amendment topics. And he has been relatively silent on the area of Sixth Amendment jurisprudence in the most acute state of flux: the Confrontation Clause.

### A. On Ineffective Assistance of Counsel

To prove his counsel constitutionally ineffective under *Strickland v. Washington*, a defendant must show not only that counsel's performance was

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16. *See id.* at 1209 (“[T]he number of cases like Mr. Hooks’s—applying *Atkins* in collateral proceedings and still working their way through the federal courts a decade later—surely isn’t overwhelming.”).

17. *See id.* (“Adding caution to caution to my mind is the fact it’s not obvious an opinion on the question Mr. Hooks poses will *ever* be necessary.”).

18. *United States v. Jackson*, 493 F.3d 1179, 1180, 1185 (10th Cir. 2007).

19. *Id.* at 1179-80.

20. *See id.* at 1182-83 (citing *Alabama v. Shelton*, 535 U.S. 654, 662 (2002)).

21. *See id.* at 1180, 1185.

22. *See id.* at 1185.

deficient but also that this deficiency prejudiced his defense.<sup>23</sup> Prejudice exists where there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>24</sup> Judge Gorsuch has advocated a restrictive approach to ineffectiveness claims, narrowing this definition of prejudice in two ways. First, he has insisted that a defendant cannot establish *Strickland* prejudice unless his attorney’s deficient performance has deprived him of some legal entitlement.<sup>25</sup> Second, he has vividly recounted the gruesome details of a defendant’s crime as support for his conclusion that counsel’s ineffectiveness was not prejudicial.<sup>26</sup>

Judge Gorsuch articulated his stance on ineffectiveness relatively early in his tenure in *Williams v. Jones*. He wrote twice in the case, dissenting from both the panel decision and the denial of rehearing en banc.<sup>27</sup> Judge Gorsuch agreed with the majority that the petitioner was entitled to effective representation during plea negotiations and assumed for argument’s sake that petitioner’s counsel had performed deficiently by threatening to withdraw unless the client rejected the prosecution’s plea offer.<sup>28</sup> But unlike the majority, Judge Gorsuch did not believe that the loss of a plea bargain could prejudice a defendant who was subsequently convicted at trial.<sup>29</sup>

The Supreme Court has long held that a defendant who pleads guilty based on bad advice can show prejudice by demonstrating “a reasonable probability that, but for counsel’s errors, he . . . would have insisted on going to trial.”<sup>30</sup> Although other members of the panel believed *Williams* “merely present[ed] the converse of *Hill*,”<sup>31</sup> Judge Gorsuch was unwilling to accept that the loss of a pretrial plea offer could constitute prejudice.<sup>32</sup> Such an offer is merely a matter of “executive grace” in Judge Gorsuch’s view, and “a defendant has no legal entitlement to” it<sup>33</sup>—hence the Judge’s unwillingness to extend *Hill*. While he

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23. See 466 U.S. 668, 687 (1984).

24. *Id.* at 694.

25. See *Williams v. Jones*, 583 F.3d 1254, 1259 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc).

26. See *Hooks v. Workman*, 689 F.3d 1148, 1212 (10th Cir. 2012) (Gorsuch, J., concurring in part and dissenting in part).

27. *Williams*, 583 F.3d at 1256 (Gorsuch, J., dissenting from the denial of rehearing en banc); *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009) (Gorsuch, J., dissenting).

28. *Williams*, 571 F.3d at 1095 (Gorsuch, J., dissenting). Mr. Williams’s counsel, apparently acting on a good faith belief in his client’s innocence, erroneously advised him that entering the plea would be perjury. *Id.* at 1096; *id.* at 1091 (majority opinion).

29. *Id.* at 1099 (Gorsuch, J., dissenting).

30. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

31. *Williams*, 583 F.3d at 1255 (Kelly, J., concurring in the denial of rehearing en banc).

32. See *Williams*, 571 F.3d at 1098 (Gorsuch, J., dissenting).

33. *Williams*, 583 F.3d at 1259 (Gorsuch, J., dissenting from the denial of rehearing en banc); see also *Williams*, 571 F.3d at 1103 (Gorsuch, J., dissenting).

admitted that counsel can be ineffective at the plea bargaining phase, Judge Gorsuch would only find a Sixth Amendment infringement where that ineffectiveness denied the defendant “his constitutional entitlement to a trial.”<sup>34</sup>

Judge Gorsuch has also denied that a defendant suffered *Strickland* prejudice by dwelling on the bad facts of his crime. In *Hooks*, the majority held that a defense attorney was constitutionally ineffective for failing to present sufficient mitigating evidence at the sentencing phase of his client’s capital trial.<sup>35</sup> But Judge Gorsuch was unconvinced that this behavior, even if deficient, had actually prejudiced the petitioner.<sup>36</sup> In his view, there was no reasonable probability that a more developed mitigation presentation would have convinced the jury not to recommend a death sentence.<sup>37</sup>

Judge Gorsuch expressed particular doubt that the jury would have considered evidence of childhood trauma mitigating given that the petitioner “brutally beat his pregnant wife to death over the course of approximately two hours, leaving her body barely recognizable and his unborn child dead.”<sup>38</sup> In light of this charged description, it appears that if the details of a crime are highly disturbing, a confirmed Justice Gorsuch will likely be reluctant to find prejudice in counsel’s failure to offer mitigation at sentencing. At the very least, litigants in criminal cases can expect him to remain sensitive to the facts of the underlying offense.

#### B. On the Confrontation Clause

In contrast to his opinions applying *Strickland*, Judge Gorsuch has said little about his views on perhaps the most heated question of Sixth Amendment jurisprudence: the scope of the Confrontation Clause. The challenge of pinning down the Judge’s likely approach here is notable in light of the questions Justice Scalia’s passing raises about the future of that clause.

Justice Scalia engineered current Confrontation Clause jurisprudence in his majority opinion in *Crawford v. Washington*.<sup>39</sup> He forcefully rejected the Court’s prior test, under which hearsay statements could surmount the confrontation bar if they bore “adequate indicia of reliability.”<sup>40</sup> *Crawford* established that out-of-court statements that qualify as “testimonial” may not be admitted—even

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34. *Williams*, 583 F.3d at 1260 n.4 (Gorsuch, J., dissenting from the denial of rehearing en banc) (emphasis added); see also *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting) (“[D]ue process guarantees a fair trial, not a good bargain.”).

35. *Hooks v. Workman*, 689 F.3d 1148, 1207 (10th Cir. 2012).

36. *Id.* at 1211 (Gorsuch, J., concurring in part and dissenting in part).

37. *Id.*

38. *Id.* at 1212.

39. 541 U.S. 36 (2004).

40. *Id.* at 42 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)); see also *id.* at 61.

under existing exceptions to the hearsay rule—unless the accused has an opportunity to confront the declarant.<sup>41</sup>

Other Justices, however, have criticized the confusion Justice Scalia’s opinion created surrounding what counts as “testimonial.”<sup>42</sup> By 2015, the Court seemed to be creeping back toward a “reliability” standard: when determining whether a statement is “testimonial,” “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”<sup>43</sup> Justice Scalia condemned this perceived doctrinal backsliding, accusing Justice Alito, the author of the Court’s opinion in *Ohio v. Clark*, of “unabashedly display[ing] his hostility to *Crawford* and its progeny” and being “aggravated by inability to muster the votes to overrule them.”<sup>44</sup>

Advocates are no doubt wondering whether Justice Scalia’s replacement will take up the banner of the “testimonial” approach, or whether his will be the vote that puts *Crawford* to rest. Unfortunately, Judge Gorsuch’s Confrontation Clause decisions offer little insight. During his time on the Tenth Circuit, he never authored an opinion addressing the validity of the “testimonial” approach. It is clear, however, that even if he is inclined to defend *Crawford*, a Justice Gorsuch would be unlikely to match Justice Scalia’s zeal for this particular Sixth Amendment protection.

### Conclusion

Judge Gorsuch’s interpretive approach to the Sixth Amendment has been defined by restraint and informed by pragmatism. Guided by these principles, his opinions have articulated a well-developed position on at least one aspect of the Sixth Amendment: ineffective assistance of counsel claims. Meanwhile, he has yet to weigh in on the ongoing debate about the reach of Confrontation Clause.

Much uncertainty exists: whether Judge Gorsuch will become Justice Gorsuch at all; whether his views of *Strickland* prejudice will carry the day; whether he will take up Justice Scalia’s mantle of pathbreaking Sixth Amendment doctrine development; and whether he will continue to profess judicial restraint as he does. But if there is a Justice Gorsuch, a criminal defendant with Sixth Amendment claims can fairly expect an uphill battle to win his vote.

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41. *Id.* at 68-69.

42. *Id.* at 69 (Rehnquist, C.J., concurring in the judgment) (“[The Court’s] decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.”).

43. *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358-59 (2011)).

44. *Id.* at 2184 (Scalia, J., concurring in the judgment).