



## **Criminal Justice Report on Supreme Court Nominee Sonia Sotomayor<sup>1</sup>**

Judge Sonia Sotomayor has more experience in criminal law than any of the justices with whom she will sit if she is confirmed. Judge Sotomayor began her legal career in the Manhattan District Attorney’s office, where for five years she prosecuted “street crimes” such as murders and robberies. She also engaged in investigative matters involving police misconduct and fraud, and she was lead counsel in the first child pornography case prosecuted in New York State after the United States Supreme Court upheld the constitutionality of New York’s laws in *New York v. Ferber*, 458 U.S. 747 (1982). While in private commercial practice, Judge Sotomayor, on behalf of her client Fendi, worked to organize a group of major trademark owners seeking to revise criminal anti-counterfeiting statutes in New York.<sup>2</sup>

Given her long tenure on the federal bench, Judge Sotomayor has participated in hundreds of criminal cases. On the district court, she presided over approximately 61 cases that went to verdict or judgment, 31% of which were criminal,<sup>3</sup> and she regularly presided over pretrial motions, plea hearings, and sentencings. On the Second Circuit, she authored a majority opinion, concurrence, or dissent in approximately eighty criminal appeals. As a judge, she has been called on to: interpret numerous criminal statutes; review hundreds of pre- and post-trial motions to apply proper federal criminal procedure and protect defendants’ constitutional rights; sentence hundreds of convicted defendants; and consider scores of petitions for post-conviction relief. This report analyzes each of these areas of Judge Sotomayor’s record in criminal cases, discusses her significant decisions, and highlights the discernible trends in her criminal jurisprudence.

Judge Sotomayor’s record in the area of criminal law and procedure proves her to be a careful, prudent jurist who adheres strictly to precedent and tends to issue carefully researched rulings on a case-by-case basis. When reviewing issues of criminal procedure, Judge Sotomayor often focuses primarily on procedural questions and resolves the case without reaching the merits of a defendant’s claim. Exhibiting a modest and restrained approach to trial process, she frequently concludes that procedural defects resulted in harmless rather than structural error. Her

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<sup>2</sup> See *U.S. Senate Comm. on the Judiciary, Questionnaire for Judicial Nominees* (“Sotomayor Questionnaire”), at 164, available at <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Questionnaire-2009.pdf>.

<sup>3</sup> See *id.* at 87-88.

cautious style reveals the temperament of a former prosecutor who understands the real-world demands of prosecuting crime and fundamentally respects the rule of law, while remaining alert to the rights of criminal defendants.

In early June 2009, Judge Sotomayor received the endorsement of eight national law enforcement groups, an unprecedented showing of support for a Supreme Court nominee. Introducing these endorsements at the White House, Vice President Joe Biden said too few people were talking about Judge Sotomayor's "tough stands on criminals and her unyielding commitment to finding justice for victims of crimes." Joseph Cassily, President of the National District Attorneys Association, also spoke at the event, praising her "deep understanding" of the law and her "thorough" use of legal precedent.<sup>4</sup>

Judge Sotomayor's current views on the death penalty are not known. As a district court judge, she presided over a murder and racketeering case in which the government sought the federal death penalty for the first time in Manhattan in over 40 years.<sup>5</sup> Judge Sotomayor denied a motion from the lead defendant, Clarence Heatley, to dismiss the charges against him on the ground that the government had breached a promise to give him a formal cooperation agreement in return for information he provided. Heatley had also asserted that the government turned down his cooperation offer because of his race and because it wanted to try its first death penalty case in years. *United States v. Heatley*, 39 F. Supp. 2d 287 (S.D.N.Y. 1999). Heatley ultimately pled guilty before proceeding to trial and accepted a life sentence. Judge Sotomayor is not known to have presided over any other capital cases.

As a member of the Board of Directors of the Puerto Rican Legal Defense Fund (PRLDF), Judge Sotomayor sat on a three-person committee of the board that recommended – in a memorandum signed by Judge Sotomayor – that PRLDF publicly oppose reinstatement of the death penalty in New York State. The memorandum asserted that the committee had reviewed the leading literature in opposition to capital punishment and recounted the eight leading rationales for its position, including capital punishment's association with "evident racism in our society."<sup>6</sup> A month later, the Board wrote a letter to the governor of New York publicly stating its opposition to the reinstatement of the death penalty.<sup>7</sup>

## **Constitutional Protections of the Rights of Defendants**

Judge Sotomayor's decisions reviewing the constitutional rights of criminal defendants stick closely to Second Circuit precedent and dispense narrow rulings tailored to the particular facts of a case. Her opinions reveal an appreciation for the real-world circumstances that arise in

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<sup>4</sup> Michael A. Fletcher & Jerry Markon, "At White House Event, Law Enforcement Groups Back Sotomayor," WASHINGTON POST, June 9, 2009, *available at* [http://voices.washingtonpost.com/44/2009/06/09/at\\_white\\_house\\_event\\_law\\_enfor.html](http://voices.washingtonpost.com/44/2009/06/09/at_white_house_event_law_enfor.html).

<sup>5</sup> See Benjamin Weiser, "Judge Allows Death Penalty Case to Proceed," NEW YORK TIMES, Jan. 30, 1999, at B3, *available at* <http://www.nytimes.com/1999/01/30/nyregion/judge-allows-death-penalty-case-to-proceed.html?scp=1&sq=Judge%20Allows%20Death%20Penalty%20Case%20to%20Proceed&st=cse>.

<sup>6</sup> See Raymond Hernandez & David W. Chen, "Nominee's Links With Advocates Fuel Her Critics," NEW YORK TIMES, May 28, 2009, *available at* [http://www.nytimes.com/2009/05/29/us/politics/29puerto.html?\\_r=1&scp=7&sq=sotomayor%20death%20penalty&st=cse](http://www.nytimes.com/2009/05/29/us/politics/29puerto.html?_r=1&scp=7&sq=sotomayor%20death%20penalty&st=cse).

<sup>7</sup> See Letter to Governor Hugh Carey, dated April 10, 1981, *available at* <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/SoniaSotomayor-Questionnaire.cfm#12B>.

the criminal justice system, as well as a commitment to preserving the delicate balance between the government's ability to prosecute crime and an individual's constitutional rights. Despite ruling in favor of the government in the majority of motions alleging violations of the Fourth, Fifth, or Sixth Amendments, on occasion Judge Sotomayor has criticized the government's tactics in prosecuting cases and urged an internal review of prosecutorial policy.

#### *Fourth Amendment Search and Seizure*

In the criminal context, the Fourth Amendment comes into play when a defendant challenges the propriety of a search or a seizure and seeks to exclude the evidence gathered as a result of the unlawful search or seizure. Judge Sotomayor's approach in this area of the law is consistent with her general case-by-case approach. Like other judges, Judge Sotomayor has most often rejected defense arguments that government searches or seizures violated the Fourth Amendment, but notable exceptions demonstrate that Judge Sotomayor is mindful that courts must protect Fourth Amendment rights from unreasonable encroachment.

In an opinion that she listed on her Senate questionnaire as one of her top ten most significant cases, Judge Sotomayor wrote for a fractured panel and affirmed the district court's denial of a defendant's motion to suppress evidence obtained as a result of a search warrant issued without probable cause. The case, *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008), is an example of Judge Sotomayor's careful attention to the facts to craft narrow rulings in this area of the law. In *Falso*, the defendant entered a conditional plea of guilty in response to a 242 count indictment charging crimes related to child pornography and sexual misconduct with minors. The defendant sought to suppress the evidence in his case arguing that it was obtained pursuant to a faulty search warrant. The district court denied the motion to suppress and sentenced Mr. Falso to thirty years in prison; Falso appealed. Judge Sotomayor, joined by Chief Judge Jacobs, found that no probable cause existed to issue the search warrant. This finding was based on careful review of the facts of the case and the wording of the affidavit supporting the warrant application. *Id.* at 114-17. Judge Sotomayor, however, joined by Judge Livingston over the dissent of Chief Judge Jacobs, held that the good-faith exception to the exclusionary rule applied because the judge who signed the warrant was not knowingly or recklessly misled and because the agent executing the warrant was justified in relying upon it to conduct the search. *Id.* at 125-29.

Judge Sotomayor has also denied motions to suppress evidence in more routine cases such as: *United States v. Simmons*, 560 F.3d 98 (2d Cir. 2009), where Judge Sotomayor joined a unanimous panel opinion, written by Judge Pooler, affirming a district court's denial of a motion to suppress where the police found evidence that Simmons, a felon, was carrying two guns after they stopped him because he matched the race, clothing, and location description given by a 911 caller and he subsequently behaved suspiciously in response to the officers' approach; *United States v. Howard*, 489 F.3d 484 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 525 (2007), where Judge Sotomayor wrote for a unanimous panel reversing a district court's grant of a motion to suppress and holding that the automobile exception permitted the surreptitious searches of the defendants' cars; and *United States v. Santa*, 180 F.3d 20 (2d Cir. 1999), where Judge Sotomayor held that the evidence that Santa was carrying dozens of bags of crack cocaine need not be suppressed even though it was obtained after Santa was arrested on the basis of a warrant that had been

vacated and only remained in the computer system as a result of repeated errors of local court personnel.

While these cases demonstrate that Judge Sotomayor recognizes that motions to suppress are the exception, rather than the rule, Judge Sotomayor has also demonstrated that she will protect individuals' rights under the Fourth Amendment when the government oversteps. In *United States v. Gori*, 230 F.3d 44 (2d Cir. 2000), *cert. denied*, 534 U.S. 824 (2001), Judge Sotomayor dissented from a panel opinion that found that the police, who were in the process of watching an apartment where they believed drugs were kept, acted reasonably when they accompanied a food delivery person to the door of the apartment, waited for the occupants to open the door, and then directed the occupants to exit the apartment and submit to questioning that led to a search of the apartment and the discovery of drugs. While the majority found that once the defendants voluntarily opened the door, they exposed the apartment to public view and relinquished any expectation of privacy as to what the officers could see from the hall, Judge Sotomayor rejected the majority's reasoning saying, "I disagree with the majority that an open door translates into an 'open season' on the individual inside." *Id.* at 58. She further explained that while it would be permissible for the officers to use any evidence they could obtain from their vantage point outside the open door (for example, had they seen drugs through the door or heard incriminating conversation), the Fourth Amendment still prohibited officers from entering the apartment and forcing the occupants to exit the apartment and submit to questioning unless they obtained a warrant or an exception to the warrant rule applied. *Id.* at 58-59. Judge Sotomayor concluded by asserting that the Fourth Amendment's protections must be preserved and, quoting Justice Scalia in *Arizona v. Hicks*, 480 U.S. 321 (1987), that "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." 230 F.3d at 65.

Similarly, on the district court Judge Sotomayor granted a motion to suppress evidence when she found that the detective who applied for a warrant induced a magistrate to sign a search warrant by intentionally or recklessly adding false information to the affidavit supporting the warrant application. *United States v. Castellanos*, 820 F. Supp. 80 (S.D.N.Y. 1993). In coming to this conclusion, Judge Sotomayor asserted that "if the exclusionary rule is to have any meaning, it must be applied in a situation such as this where a magistrate, right or wrong, did not issue a warrant except after a proffer of perjured testimony." *Id.* at 89.

#### *Fifth Amendment Right Against Self-Incrimination*

On the Court of Appeals, Judge Sotomayor authored an opinion addressing the public safety exception to the *Miranda* rule. *United States v. Estrada*, 430 F.3d 606 (2005). In that case, Judge Sotomayor carefully reviewed the relevant case law and held that the police officers did not violate the defendant's Fifth Amendment rights by asking him whether there were any weapons in the apartment before giving him the *Miranda* warning. This holding was based on findings that the arresting officers asked the question based on "an objectively reasonable need to protect themselves from immediate danger" and thus the public safety exception applied. *Id.* at 612. Nonetheless, Judge Sotomayor repeatedly stressed that the exception should not be interpreted to allow routine pre-*Miranda* questioning during drug arrests. *Id.* at 613-14.

A series of suppression motions arising out of a capital case involving defendant Clarence Heatley exemplify Judge Sotomayor's handling of the Fifth Amendment right against

self-incrimination. While she denied all of Mr. Heatley's motions to suppress his inculpatory statements, her opinions provided thorough analyses of the issues and carefully reasoned resolutions.

In the lead Heatley decision, *United States v. Heatley*, 39 F. Supp. 2d 287 (S.D.N.Y. 1999), the defendant argued that the indictment against him should be dismissed or the government should be compelled to offer him a cooperation agreement because he made inculpatory statements during proffer sessions based on his belief that he would be offered a cooperation agreement. Although Judge Sotomayor acknowledged that some of the government's conduct troubled her given the robust information Heatley offered and the possibility that the government's actions could erode trust between the United States Attorney's office and defense attorneys, *see id.* at 313 n.13, Judge Sotomayor denied Heatley's motion, finding that the government did not renege on any promises or fraudulently induce Heatley to participate in the proffer sessions. *Id.* at 310-311.

In another decision in the same case, *United States v. Heatley*, 994 F. Supp. 477 (S.D.N.Y. 1998), Judge Sotomayor denied another defendant's motion to suppress inculpatory statements made prior to his indictment and arrest on conspiracy and racketeering charges despite defendant's argument that he made the statements based on a promise of immunity. Recognizing how investigations actually proceed, and based on the evidence presented, she explained that there is nothing "improper in spelling out for a suspect the benefits that could flow from his cooperation" and concluded that the defendant simply may have chosen unwisely to focus on the possibility that cooperation with the district attorney's office would pay off. *Id.* at 483.

Judge Sotomayor also denied co-defendant Yvonne Miller's motion to suppress inculpatory statements made to the officer upon her arrest but prior to her being given *Miranda* warnings. *United States v. Heatley*, 994 F. Supp. 475 (S.D.N.Y. 1998). An FBI agent named Joseph Walsh, whom Miller already knew, arrived at her apartment and informed her she was under arrest. When Miller exclaimed, "This ain't right, Walsh, this ain't right," Walsh replied: "You knew we were coming." Miller then uttered the statement she later sought to suppress: "If I had known you were coming I wouldn't be here." *Id.* at 476. Judge Sotomayor concluded that Walsh's statement was a fairly normal response to justify his actions, and he could not have known it was reasonably likely to elicit an incriminating response from Miller. *Id.* at 477.

### *Double Jeopardy*

The protections against double jeopardy arise out of the Fifth Amendment, which provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This provision has been interpreted to prohibit three distinct harms: a second prosecution of a person for a crime for which he had been previously acquitted; a second prosecution of a person for a crime for which she had been previously convicted; and multiple punishments for the same crime. It is rare for a defendant to prevail on a double jeopardy claim and, not surprisingly, Judge Sotomayor's published opinions resolve double jeopardy arguments in favor of the government. Judge Sotomayor's opinions in this area show deference to Supreme Court precedent and attention to legislative language and intent.

On the Second Circuit, Judge Sotomayor has applied court precedents to reject various types of double jeopardy arguments. For example, in *United States v. Gallego*, 191 F.3d 156, 169-70 (2d Cir. 1999), *cert. denied*, 528 U.S. 1127 (2007), Judge Sotomayor relied on *Witte v. United States*, 515 U.S. 389, 406 (1995), to hold that an individual could be tried for murder even though he had previously pled guilty to assault and robbery resulting from the same incident and received an enhanced sentence for robbery based on the victim's death. In *United States v. Pettus*, 303 F.3d 480 (2d Cir. 2002), Judge Sotomayor dismissed appellant's argument that a judge presented with a defendant who violated the terms of his supervised release must credit the defendant's time already spent on supervised release in calculating the maximum sentence for violating the conditions of supervised release. *Id.* at 483-88. After considering Supreme Court precedent, the text of the statute, and Congress's intent, Judge Sotomayor held the double jeopardy clause did not apply because the revocation of supervised release and post-revocation sanctions were part of a single sentence, and the defendant had no reasonable expectation that credit would be given for time previously spent in supervised release. Applying similar principles in a civil case invoking the double jeopardy clause, Judge Sotomayor rejected a prisoner's claim that he could not be subjected to a prison disciplinary action in connection with his participation in a prison riot when he had also been criminally prosecuted for the same activity. *Porter v. Coughlin*, 421 F.3d 141 (2d Cir. 2005).

As a district court judge, Judge Sotomayor rejected the double jeopardy claims of two members of the Hells Angels Motorcycle Club who pled guilty to various drug charges and sought to avoid forfeiture of the Hells Angels building used as a residence and club house. *United States v. 77 East 3<sup>rd</sup> St.*, 1993 U.S. Dist. LEXIS 18498, at \*1 (S.D.N.Y. Jan. 4, 1994). The defendants argued that subjecting them to both criminal sanctions and civil forfeiture constituted multiple punishments for the same crime. Relying on Second Circuit precedent, Judge Sotomayor concluded that the criminal indictments and civil forfeiture were part of a single proceeding and thus did not implicate the protections against double jeopardy. *Id.* at \*6-7.

### *The Right to Counsel*

The Sixth Amendment of the Constitution guarantees that in criminal prosecutions a defendant will be assigned counsel if she cannot afford her own. The right to counsel is a key element of an individual's ability to access fair justice in the court system. Judge Sotomayor has decided a number of cases touching upon the right to counsel. Most of her decisions denied relief without reaching the merits. Even when she reached the merits, Judge Sotomayor routinely denied relief.

Judge Sotomayor's strongest support of the right to counsel occurred in a case addressing an attorney's failure to file a post-waiver appeal. *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006). The defendant initially pleaded guilty to drug charges, but later sought to file motions to vacate his plea. His attorney refused to file the appeals, forcing the defendant to do so *pro se*. In reversing the decision of the district court, Judge Sotomayor held that the proper procedure for an attorney to follow when the claim is believed to be frivolous is to file the appeal along with a brief explaining counsel's objections and a motion to withdraw from representation. To do otherwise, she held would be "undermining [case law] and the principles of the Sixth Amendment." *Id.* at 776.

In *Grune v. Thoubboron*, 1995 U.S. Dist. LEXIS 3722, at \*1 (S.D.N.Y. March 24, 1995), Judge Sotomayor denied a defendant's writ of *habeas corpus* to set aside a judgment after a magistrate court denied appointment of counsel during the arraignment. Relying on Second Circuit precedent, she held that the constitutional violation did not rise to the level of actual prejudice. Defendants must have counsel at all critical stages of the hearing in accordance with Sixth Amendment jurisprudence, but the error in this case was, according to Judge Sotomayor, merely a trial error and not a structural mistake that caused prejudice. *Id.* at \*8-9. In *United States v. Parker*, 469 F.3d 57 (2d Cir. 2006), she held that defendants have no constitutional right to continuity of appointed counsel. In *Parker*, the defendant was represented by different counsel at different times during his trial. Absent compelling circumstances, Judge Sotomayor ruled, a district court may substitute counsel. *Id.* at 61-63. And in *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001), *cert. denied*, *Gilchrist v. Smith*, 535 U.S. 1064 (2002), she held that a defendant may forfeit the right to counsel based upon serious misconduct. In *Gilchrist*, after trial but before sentencing the defendant assaulted his public defender. The lawyer withdrew from the case and the trial court denied his request for new counsel. In upholding the decision, Judge Sotomayor held that the court reasonably applied precedent denying counsel in similar situations. *Id.* at 89-90.

Many of Judge Sotomayor's cases failed to reach the merits of right to counsel issues. In *United States v. Jimenez*, 921 F. Supp. 1054 (S.D.N.Y. 1995), the defendant in a deportation case moved to preclude admission of a deportation order, arguing that he had been coerced by the judge at the deportation hearing to waive his right to counsel. During the hearing, the immigration judge stated, "If your [sic] going to fight the deportation [by asking for a lawyer], then they're gonna lock you up again." *Id.* at 1057. Judge Sotomayor decided the case on alternate grounds, holding that although the deportation order was procedurally infirm there was an alternative basis to deport the defendant. *Id.* at 1058. In *United States v. Felzenberg*, 1998 U.S. Dist. LEXIS 4214, at \*1 (S.D.N.Y. April 2, 1998), she denied a defendant's petition to withdraw his guilty plea because she found that, although the defendant claimed that his attorney had coerced him to plead guilty, the record from the defendant's plea allocution and his conduct following his conviction showed ample evidence that his plea was knowing and voluntary. *Id.* at \*34-44.

### *The Right to Confront Witnesses under the Sixth Amendment*

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Am. VI. Judge Sotomayor wrote the first Second Circuit opinion following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), *cert. denied*, 543 U.S. 1079 (2005). In *Crawford*, the Supreme Court held that no prior testimonial statement made by a declarant who does not testify at the trial may be admitted against a defendant unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 68. An open question remained after *Crawford* as to how to deal with non-testimonial statements. In *Saget*, Judge Sotomayor read *Crawford* narrowly to leave earlier Supreme Court precedent concerning such statements intact, and she declined to articulate a comprehensive definition of testimonial statements. 377 F.3d at 229.

Judge Sotomayor also authored an opinion declining to abandon Second Circuit precedent allowing hearsay testimony at sentencing proceedings in light of *Crawford* and *United States v. Booker*, 543 U.S. 220 (2005), which made the U.S. Sentencing Guidelines advisory. *United States v. Martinez*, 413 F.3d 239 (2d Cir. 2005), *cert. denied*, 546 U.S. 1117 (2006). Notably, Judge Sotomayor wrote that judges may exercise greater discretion after *Booker*. If consideration of hearsay testimony during a sentencing was not prohibited under a mandatory guidelines regime, she saw no logical basis for concluding it is prohibited under the advisory *Booker* scheme. *Id.* at 243-44.

Judge Sotomayor's small number of other opinions addressing Confrontation Clause claims tend either to avoid reaching the constitutional question or to reject the defendants' arguments. In *Galdamez v. Keane*, 394 F.3d 68 (2d Cir. 2005), Judge Sotomayor wrote a lengthy procedural opinion affirming the district court's denial of a petition for *habeas*, and declined to reach the merits of a claim of constitutional error, even though the district court had issued a Certificate of Appealability on the constitutional question. *See id.* at 78; *see also Galdamez v. Keane*, 2003 U.S. Dist. LEXIS 13663, at \*28-29, 38 (E.D.N.Y. July 24, 2003). In *Benn v. Greiner*, 402 F.3d 100 (2d Cir. 2005), Judge Sotomayor reversed a district court's grant of a writ of *habeas corpus* to a defendant convicted of rape and sodomy who argued that the trial court erred in prohibiting the defense from cross-examining the victim about her prior unfounded allegations of sexual abuse by others. Judge Sotomayor, writing for a unanimous panel, reversed the district court's decision finding a constitutional violation, concluding that additional cross-examination would not have created reasonable doubt as to the defendant's guilt. *Id.* at 106-07.

## **Criminal Procedure and Trial Process**

Although she is a former prosecutor whose rulings reflect familiarity with the challenges facing the government in criminal matters, Judge Sotomayor is sensitive to the need to protect the rights of defendants to a fair trial. Judge Sotomayor's approach is very case-specific, and she has generally preferred ruling on narrow grounds, rather than announcing rules with wide applicability.

Judge Sotomayor has shown a willingness to reverse a conviction and order a new trial in cases where the government failed to meet its burden of proof or where the jury instruction was improper. For example, in *United States v. Bryce*, 208 F.3d 346, 355-56 (2d Cir. 1999), *reh'g denied*, 2000 U.S. App. LEXIS 731 (2d Cir. Jan. 19, 2000), Judge Sotomayor authored a majority opinion reversing a drug conviction on the ground that the defendant's uncorroborated statements that he had drugs for sale were not sufficient to support a conviction for possession with intent to distribute where the drugs were never recovered and some evidence suggested the defendant did not actually possess the drugs he claimed to be selling. Similarly, in other cases, Sotomayor has accepted procedural arguments advanced by convicted defendants seeking to reduce the length or collateral consequences of their sentences. *See United States v. Draper*, 553 F.3d 174 (2d Cir. 2009) (Sotomayor, J.) (reversing a defendant's conviction for conspiracy where the district court omitted an essential element of a witness retaliation charge from its jury charge); *United States v. Hamdi*, 432 F.3d 115 (2005) (finding a deported immigrant defendant did not waive his right to challenge his sentence under *Booker* by signing a plea agreement reciting that his plea was governed by the Sentencing Guidelines).

These cases notwithstanding, Judge Sotomayor is a moderate on issues of criminal trial procedure. Sotomayor tends to conclude that most trial error is limited to the trial process itself and is subject to harmless error review, rather than a structural error where prejudice is presumed and the conviction must be vacated. A striking example is her dissent in *United States v. Yakobowicz*, 427 F.3d 144 (2d Cir. 2005). In that case, the defendant argued that his right to a fair trial was compromised by a procedure that allowed summations at the conclusion of each witness's testimony. The majority of the panel held that this procedure violated Yakobowicz's right to a fair trial and was a structural error requiring a *per se* reversal of the conviction. *Id.* at 153-54. Judge Sotomayor, however, argued that although the use of interim summations in criminal trials is "suspect at best," on appeal it should be considered trial error subject to harmless error analysis. *Id.* at 154-55. She further reasoned that because the defendant did not offer evidence that he had suffered actual prejudice as a result of the interim summations, the conviction should be upheld. *Id.* at 157-58. Opining on a related topic in a concurrence in *United States v. Marcus*, 538 F.3d 97 (2d Cir. 2008), Judge Sotomayor wrote that even where a district court committed plain error in a jury instruction, a retrial should not be required *per se* where the error "does not seriously affect the fairness, integrity, or public reputation of the judicial proceedings [because] the error concerns an 'essentially uncontroverted' issue." *Id.* at 103 (quoting *United States v. Cotton*, 535 U.S. 625, 633 (2002)).

### **Interpretation of Criminal Statutes**

Much of what appellate judges do when reviewing criminal appeals is decide the scope of criminal statutes. Specifically, circuit court judges frequently decide the meaning of the elements of a given crime to determine what the government must prove at trial. Judge Sotomayor's record reveals that she respects the text of criminal statutes, though she often reads the elements of an offense more broadly than a defendant would like. Judge Sotomayor's decision in *United States v. Figueroa*, 165 F.3d 111 (2d Cir. 1998), reveals her method of statutory interpretation. Writing for a unanimous panel, she interpreted the knowledge requirement of 8 U.S.C. § 1327, which criminalizes the aiding and abetting of any alien excludable from the country for having committed a crime. In addition to applying traditional canons of interpretation to the words of the statute, Judge Sotomayor looked to other federal criminal statutes involving drug and human trafficking to conclude that the government need not show a defendant's knowledge of the particular crime that renders an alien excludable if the defendant has sufficient knowledge to recognize that the alien has done something culpable. *Id.* at 117-18. Judge Sotomayor explained, "The principles of construction underlying the criminal law serve as much better signposts to congressional intent in these kinds of circumstances than a statute's sparse and inconsistent legislative history." *Id.* at 118.

Judge Sotomayor has authored several other Second Circuit decisions broadly interpreting the provisions of a criminal statute to uphold defendants' convictions. In *United States v. George*, 386 F.3d 383, 398-99 (2d Cir. 2004), Judge Sotomayor ruled that a conviction for making a false statement in a passport application in violation of 18 U.S.C. § 1542 requires only that the defendant provide information in a passport application that he or she knows to be false and does not mandate that the defendant act with specific purpose to make false statements or violate the law. In *United States v. Ganim*, 510 F.3d 134, 143-44 (2d Cir. 2007), an appeal of a Connecticut mayor's conviction for bribery-related offenses, Judge Sotomayor held that the government was not required to prove a direct link between a benefit the mayor received and a

specific act he performed, so long as the government proved that he received benefits in exchange for his agreement to perform specific official acts or to do so as the opportunities arose. Similarly, in *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007), Judge Sotomayor rejected a defendant's constitutional challenge to 18 U.S.C. § 2425, which prohibits the use of a facility of interstate commerce to knowingly transmit information about a person under the age of 16 for the purpose of enticing a person to engage in sexual activity. The court upheld the application of the statute to Giordano's intrastate telephone calls to a prostitute for the purpose of seeking sex with underage girls. *Id.* at 40-41. The court also affirmed, over a dissent from Judge Jacobs, the sufficiency of evidence to find that Giordano violated 18 U.S.C. § 242, which makes it criminal to willfully violate someone's rights by acting under color of state law, concluding it was sufficient to show that Giordano wielded his position of authority to influence the girls to submit to his abuse. *Id.* at 43-45.

Judge Sotomayor has written notable opinions in interpreting the evidence of intent necessary to support a criminal conviction of conspiracy. According to her opinion in *United States v. Samaria*, 239 F.3d 228 (2d Cir. 2001), the "broad reach of the federal conspiracy and aiding and abetting statutes do not extend so far as to permit conviction upon evidence of mere association or suspicion." *Id.* at 242. In *Samaria*, Judge Sotomayor reversed defendant Frank Elaiho's conviction for committing credit card fraud, conspiring to commit credit card fraud, and conspiring to receive or possess stolen goods. Judge Sotomayor conducted a careful review of the facts of the case to determine that Elaiho, an immigrant gypsy cab driver, did not know that the boxes he transported contained stolen property or that the business the co-defendants were conducting was necessarily suspect, and he therefore lacked the requisite knowledge and intent to conspire with them. To hold otherwise "would permit mere suspicious circumstances or association with criminals to suffice as proof of conspiracy." *Id.* at 240.

Judge Sotomayor's opinion in *Samaria* appears to have been abrogated by the majority ruling in *United States v. Huevo*, 546 F.3d 174 (2d Cir. 2008), from which she dissented. In *Huevo*, the district court entered a judgment of acquittal upon finding the evidence presented at trial was insufficient to show the defendant had the requisite knowledge and intent to support his convictions for money laundering and conspiracy to commit money laundering, and the Second Circuit reversed. *Id.* at 176. In her dissent, Judge Sotomayor accused the majority of ignoring the clear reading of a recent Supreme Court case, *Regalado Cuellar v. United States*, 128 S. Ct. 1994 (2008), which she maintained held that "the government must prove not merely that a defendant concealed funds, but also that a defendant had the intent to *launder* such funds by concealing or disguising their nature, location, source, ownership, or control." 546 F.3d at 190. "At best," she wrote, the government's evidence weakly supported an inference that Huevo may have known that the suitcases he transported contained money and that the money constituted proceeds of illegal activity, *id.* at 191, but that inference did not establish his knowledge of money laundering any more than it established his knowledge of being involved in some other illegal activity. *Id.* at 191-93. According to Judge Sotomayor, the majority "fail[ed] to recognize that evidence of such knowledge must be something more than mere presence at the exchange or delivery of concealed money." *Id.* at 196.

## Removal of Immigrants Convicted of Criminal Acts

While sitting on the Court of Appeals, Judge Sotomayor has issued a series of rulings interpreting the complex and often competing demands of federal criminal and immigration statutes governing the removal of immigrants who have been convicted of crimes. As compared to other areas of her criminal jurisprudence, Judge Sotomayor's record on reviewing decisions from the Board of Immigration Appeals ("BIA") stands out for its tendency to craft rules that diminish the BIA's ability to deport immigrants convicted of felonies. The Immigration and Nationality Act, § 237(a)(2)(A)(iii), provides that any alien who is convicted of an aggravated felony after admission to this country is deportable. What constitutes an aggravated felony for purposes of removal proceedings is a heavily litigated question that has resulted in numerous split-circuit decisions over the last several years. Although on a few occasions she affirmed the BIA's orders of removal based on the commission of an aggravated felony, *see, e.g., Sutherland v. Reno*, 228 F.3d 171 (2d Cir. 2000); *Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005), Judge Sotomayor has also read the competing statutory demands in the light most favorable to an immigrant defendant facing removal. For example, in *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007), Judge Sotomayor ruled that a larceny offense was not a crime involving moral turpitude that would render the defendant removable because he did not plead to taking the stolen goods permanently, regardless how implausible it was that he intended to return them. On the other hand, in *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000), Judge Sotomayor deferred to the BIA's interpretation of what constitutes a crime involving moral turpitude and renders an alien removable.

Judge Sotomayor has authored two key decisions applying Supreme Court sentencing precedent to alien removal cases. In both cases, she limited the BIA's scope of inquiry into a convicted felon's criminal record when determining when he or she committed an aggravated felony for purposes of removal. She held that the BIA could not rely on certain documents from the sentencing court because they did not comprise part of the "record of conviction." In *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003), Judge Sotomayor concluded that the BIA erred by relying on the presentence report, which may contain background information suggesting the commission of an offense even though the defendant was never convicted of it. 346 F.3d at 54. In *Dulal-Whiteway v. Department of Homeland Security*, 501 F.3d 116 (2d Cir. 2007), an immigrant defendant had pleaded guilty to a fraud offense involving a value of \$1000 or more, but the immigration judge looked to the restitution order to determine the amount of loss exceeded \$10,000 and therefore rendered him removable. The Second Circuit held that the restitution order could not establish that an alien's conviction was for a removable offense. In both these cases, Judge Sotomayor followed Second Circuit precedent applying the Supreme Court's sentencing decisions in *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny, *Shepard v. United States*, 544 U.S. 13, 17 (2005), to the civil removal context. Circuit courts were split 3-3 on whether to apply *Taylor-Shepard* to the civil removal context. On June 15, 2009, the Supreme Court ruled that an immigration court may look to the particular circumstances in which an offender committed a fraud or deceit crime to determine whether the loss amount exceeds \$10,000 and renders him or her removable, and it more broadly rejected the application of *Taylor-Shepard* to the civil removal context. *Nijhawan v. Holder*, 557 U.S. \_\_\_\_\_, No. 08-495, slip op. at 1-2 (June 15, 2009). The Supreme Court's decision appears to directly overrule *Dulal-Whiteway* and abrogate earlier Second Circuit precedent limiting an immigration judge's review to the record of conviction.

## Sentencing and Civil Forfeiture

### *United States Sentencing Guidelines*

The United States Sentencing Guidelines were designed to alleviate sentencing disparities and were originally imposed as mandatory determinations. The guidelines calculate a sentence range based upon the conduct in question and the defendant's criminal history. In 2005, the Supreme Court ruled that mandatory guidelines violated the Sixth Amendment right to trial by jury. *United States v. Booker*, 543 U.S. 220 (2005). Although the guidelines are now only advisory, sentencing judges must still calculate them when imposing a sentence.

As in other areas of the law, Judge Sotomayor adheres strictly to precedent and rarely departs from the Guidelines' recommendations. Overall, her sentencing decisions, tend to align with the government's requests. During her confirmation hearing for the Second Circuit, she said she had no problem with mandatory minimum sentences for drug offenses. Judge Sotomayor also stated, "I have found the guidelines to be very helpful in giving some comfort to me as a judge that I am not arbitrarily imposing sentences based on my personal feelings . . . [a sentencing guideline] permits me not to impose my personal views but to let the democracy impose the society's views." *Nominations Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 362 (1997). As she stated to Senator Sessions during her hearing when asked about comments she had made during sentencing: "my strong feelings were reflected . . . [but] I do what the law requires and I think that is the greatest respect I could show for it." *Id.*

Judge Sotomayor's district court record reflects a tough jurist unafraid of imposing sentences at the high end of the guideline range for both white collar and violent criminals. In *United States v. Duker*, 1:97-cr-00822-SS (S.D.N.Y. 1997), a lawyer who worked for the federal government in connection with the savings and loan bailout of the 1990s pleaded guilty to multiple felony counts relating to his defrauding the government. A sentence below the guidelines range would have allowed him to avoid incarceration, but Judge Sotomayor resisted the lesser sentence because of the "serious nature of Mr. Duker's criminal conduct." In a police corruption case in the early 1990s, Judge Sotomayor sentenced a former member of the elite New York Drug Enforcement Task Force unit to a seven-year prison sentence, more than the three to four year sentence recommended by the probation officer. *United States v. Robles*, 1:93-cr-00433-SS (S.D.N.Y. 1993). The former officer pleaded guilty to selling drugs he had seized from a drug dealer and confiscating thousands of dollars of drug money. At the sentencing hearing, Judge Sotomayor told the tearful defendant that she did not believe his remorse was genuine and referred to "a much broader pattern of corruption and abuse of trust" in his work.<sup>8</sup>

In *United States v. Hendrickson*, 26 F.3d 321 (2d Cir. 1994), however, Judge Sotomayor, sitting by designation on the Second Circuit, wrote for a divided panel giving the government the burden of proof in a drug conspiracy case. In *Hendrickson*, the defendant was convicted of crimes related to international heroin trafficking, without any specific findings on drug quantities. At sentencing, the court adopted the presentence report's finding that he had conspired to distribute a specific quantity of drugs that would result in a life sentence. Throughout the trial, however, the defendant contended that he was unable to procure the drug and any allegations to the contrary were mere puffery. *Id.* at 329. On appeal, Judge Sotomayor

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<sup>8</sup> Richard Perez-Pena, "Officer Who Sold Heroin Gets a 7-Year Sentence," *NEW YORK TIMES*, Nov. 2, 1993, available at <http://www.nytimes.com/1993/11/02/nyregion/officer-who-sold-heroin-gets-a-7-year-sentence.html?scp=2&sq=SOTOMAYOR%20ROBLES&st=cse>.

agreed with the defendant's assertion that, as described in an guideline application note, "where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount," the court shall exclude from the base offense level the quantity the defendant "did not intend and was not reasonably capable of producing." *Id.* at 331. Observing a circuit split on the burden of proof issue, Judge Sotomayor held that where the government asserts that a defendant negotiated to produce a contested amount, the government bears the burden of proving the defendant's intent to produce such an amount. Accordingly, the court remanded for resentencing to allow the trial court to set forth in greater detail the evidence that supported its finding of the amount of narcotics agreed upon. *Id.* at 341.

Most of Judge Sotomayor's sentencing decisions as a trial judge were affirmed by the Second Circuit. A majority of cases presented non-controversial sentencing decisions and followed precedent. Her district court decisions were reviewed in the pre-*Booker* era, when appeals courts reviewed cases under the highly deferential "clear error" standard. *See United States v. Okafor*, 2000 U.S. App. LEXIS 5195 (2d Cir. March 24, 2000) (finding Judge Sotomayor did not abuse her discretion in denying a downward adjustment for defendant's acceptance of responsibility on obstruction of justice claim); *United States v. Medina*, 1999 U.S. App. LEXIS 11857 (2d Cir. June 4, 1999) (affirming a sentence above non-binding revocation guidelines governing violations of supervised release because sentence was within statutory maximum); *United States v. Davis*, 1999 U.S. App. LEXIS 9214 (2d Cir. May 14, 1999) (finding ample evidence in record to support Judge Sotomayor's upward departure from guidelines); *United States v. Gonzales*, 1997 U.S. App. LEXIS 35609 (2d Cir. Dec. 17, 1997) (finding no error for an upward departure for obstruction of justice when ample evidence shows defendant committed perjury).

A few of Judge Sotomayor's district court sentencing decisions have been overturned. Several of these reversals did not address the merits of her application of the sentencing guidelines. *See United States v. Gottesman*, 122 F.3d 150 (2d Cir. 1997) (vacating Judge Sotomayor's court-ordered restitution because under terms of plea agreement defendant agreed only to pay taxes according to future IRS determination); *United States v. Bauers*, 47 F.3d 535 (2d Cir. 1995) (affirming upward departure on base crime, but finding "excessive" Judge Sotomayor's two-year addition to period of supervised release).

On one occasion, however, the Second Circuit did directly reverse Judge Sotomayor's application of the guidelines. *United States v. Moreno*, 181 F.3d 206 (2d Cir. 1999), *cert. denied*, 528 U.S. 977 (1999). Following a jury trial, the defendant was convicted of multiple drug conspiracy counts. Judge Sotomayor calculated the sentence under the guidelines applicable to crack cocaine, even though the defendant also possessed powder cocaine, and sentenced him to life in prison. The defendant would have been eligible for a mandatory maximum sentence of forty years under the guidelines applicable to powder cocaine. On appeal, Moreno alleged that the jury's verdict did not specify which charge was the basis for his sentence and the default position should have been to calculate the guideline based upon the most lenient charge. The Second Circuit agreed. An intervening Circuit decision, *United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998), clarified the issue and required district courts to make specific findings of fact on disputed sentencing issues. Because Judge Sotomayor had not done so, the case was remanded for such a determination. Arguably, *Moreno* reveals less about Judge Sotomayor's sentencing philosophy and more about her strict adherence to precedent, but when presented with a general jury verdict, she erred toward imposing the higher sentence.

Judge Sotomayor has continued to support strong sentences on the Second Circuit. On a matter of unclear guidelines, Judge Sotomayor wrote for a split panel holding that the district court should have applied a two-level enhancement for a defendant's concealment of assets in a bankruptcy proceeding. *United States v. Kennedy*, 233 F.3d 157 (2d Cir. 2000). Judge Sotomayor ruled against narrowly interpreting the statute, although it was largely silent on whether Kennedy's actions fit within its definition of prohibited acts. She has also declined to apply the rule of lenity to sentencing decisions. *See United States v. Smith*, 354 F.3d 171 (2d Cir. 2003) (upholding sentencing for violation of supervised release based on version in effect at time defendant would have originally been committed and rejecting more lenient guideline application); *Sash v. Zenk*, 428 F.3d 132 (2d Cir. 2005), *rehearing denied*, 439 F.3d 61 (2d Cir. 2006), *cert. denied*, 547 U.S. 920 (2006) (declining to apply the rule of lenity to the Bureau of Prison's interpretation of the statute governing good time credit because it was not a "criminal statute," even though the Supreme Court had ruled such calculations are criminal for purposes of an *ex post facto* analysis); *see also U.S. v. Matthews*, 205 F.3d 544 (2d Cir. 2000) (upholding district court's inclusion of youthful offender conviction in sentence calculation because records not completely sealed and thus, not expunged).

Following *Booker*, defendants across the country challenged their sentences. On the Second Circuit, Judge Sotomayor held that the decision did not affect many well-established sentencing practices within the Circuit. In *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, *Lindo v. United States*, 547 U.S. 1060 (2006), she rejected a defendant's argument that *Booker* violated the *ex post facto* principle because it exposed him to sentencing enhancements not authorized by the jury verdict. She also rejected the claim that the Due Process Clause requires sentences to be applied only in accordance with facts proven beyond a reasonable doubt. In *Vaughn*, the jury found beyond a reasonable doubt that the defendants had distributed between fifty and 100 kilograms of drugs, but the judge sentenced them based upon a preponderance of the evidence that over 500 kilograms were in issue. Judge Sotomayor ruled that the Circuit's pre-*Booker* preponderance standard did not change. She also rejected the argument that *Booker* precluded sentencing on the basis of conduct for which the defendant had been acquitted. *Id.* at 526. *See also United States v. Avello-Alvarez*, 430 F.3d 543 (2d Cir. 2005) (upholding term of supervised release longer than that recommended by Probation Department because *Booker* does not alter reasonableness standard of review of sentencing courts upward departure); *United States v. Sheikh*, 433 F.3d 905 (2d Cir. 2006) (rejecting claim that it is a violation of Fifth and Sixth Amendment for district court to consider facts outside of those alleged in the indictment).

Judge Sotomayor, however, does not reflexively support sentence enhancements, particularly when she determines that district courts are injecting personal policy preferences into sentencing decisions. She rejected the majority's reasoning in *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (*en banc*), *cert. denied*, 2009 U.S. LEXIS 4065 (June 1, 2009), upholding an above-guideline sentence for the offense of conspiring to deal and transport firearms where a district judge concluded that gun trafficking in a heavily populated urban area of New York City was a severe problem warranting a greater than average sentence. The U.S. Sentencing Commission had previously rejected such a "locality" approach. Judge Sotomayor dissented from the majority's deferential review of the district court's variance, finding that none of the reasons were supported by objective criteria. The same facts, she reasoned, could support the opposite conclusion, noting that the judge strayed far from his expertise when making judgment calls about other parts of the country. "A serious danger exists [when] sentencing judges [] dress

their subjective views in objective trappings, either by using questionable empirical data or by invoking a common sense at odds with reality.” *Id.* at 220.

Finally, in a case addressing confinement but not directly interpreting a sentence, Judge Sotomayor wrote a separate concurrence in *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 486 (2007), arguing that a person held in contempt of court should be retained for a maximum of eighteen-months under the Recalcitrant Witness Statute, 18 U.S.C. § 1826 (calling it a “a presumptive benchmark”). In this case, petitioner challenged his detention as, *inter alia*, a violation of the statute and his Fifth Amendment right against self-incrimination. Armstrong ran a Ponzi scheme generating losses totally nearly \$1 billion. During initial court proceedings, Armstrong refused to fully comply with a court order placing millions of dollars worth of assets into receivership. The district court held him in contempt and sent him to jail, where he remained for six years. While both the majority decision and Judge Sotomayor’s concurrence agreed that a new hearing should be held to address his continued confinement, the majority declined to create a benchmark for what constituted an appropriate detention length. Judge Sotomayor argued that anything beyond eighteen months crossed into punitive detention.

### *Civil Forfeiture*

Civil forfeiture laws authorize the government to deprive criminals of the proceeds of their criminal activities. Judge Sotomayor’s forfeiture decisions carefully follow the facts of each case and closely adhere to governing authority. While she holds both the government and defendant to the highest legal and procedural standards, Judge Sotomayor is generally responsive to forfeiture challenges. Her most informative case is *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003), in which she held that New York City’s vehicle forfeiture process violated the Constitution. Writing for a unanimous panel, she held that because a car is intimately connected to a person’s livelihood, the City’s lengthy and indeterminate forfeiture process combined with the absence of a prompt neutral fact-finder violated the due process requirements of the Fourteenth Amendment. In *United States v. Capoccia*, 503 F.3d 103 (2d Cir. 2007), Judge Sotomayor overturned the forfeiture of a bank account’s assets because the government failed to allege a sufficient nexus between the violation and the proceeds held in the account. She also joined an order overruling a district court’s summary judgment grant in favor of the government on forfeited assets of allegedly illegal drug sales when questions of fact remained over the true source of the funds. *United States v. 9,380 in U.S. Currency*, 1999 U.S. App. LEXIS 22958 (2d Cir. Sept. 16, 1999).

Judge Sotomayor has, however, also agreed with the government’s ownership assertions, but again her rulings are very case specific. See *United States v. \$557,933.89 More or less in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (upholding administrative forfeiture of money orders confiscated at airport, finding no unreasonable delay and no violation of Fourth Amendment when funds confiscated without warrant); *United States v. 77 East 3<sup>rd</sup> St.*, 1993 U.S. Dist. LEXIS 18498 (S.D.N.Y. Jan. 4, 1994) (denying a claim that an *in rem* civil forfeiture action violated the Double Jeopardy clause because it constituted part of a single proceeding with property owners’ prior criminal prosecutions).

## Habeas Corpus

In 1996, Congress changed the rules for filing habeas petitions in the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which imposed a one-year time limit on a state prisoner’s ability to file a habeas petition. In a series of decisions discussed in further detail below, Judge Sotomayor wrestled with the practical application of the Second Circuit’s interpretation of AEDPA’s new time limit, as well as several constitutional issues raised by AEDPA’s procedural restrictions. She remained a strict adherent of AEDPA’s procedural bars once elevated to the Second Circuit. As discussed below, in the overwhelming majority of cases, Judge Sotomayor dismissed habeas petitions as unexhausted or time-barred under AEDPA, even where faced with potentially credible – and, in one instance, newsworthy – claims of actual innocence.

Judge Sotomayor’s strict adherence to procedural requirements led her to dismiss most petitions without reviewing the substance of the claims. *See, e.g., Vicioso v. United States*, 1997 U.S. Dist. LEXIS 14772 (S.D.N.Y. Sept. 29, 1997). When she reached the merits, she most often denied the petition for failure to demonstrate actual prejudice. *See, e.g., Loliscio v. Goord*, 263 F.3d 178, 191-92 (2d Cir. 2001); *United States v. Fanelli*, 1997 U.S. Dist. LEXIS 14893 (S.D.N.Y. Sept. 29, 1997); *Grune v. Thoubboron*, 1995 U.S. Dist. LEXIS 3722 (S.D.N.Y. March 24, 1995). In *Grune*, for example, she struggled with deciding whether to categorize petitioner’s ineffective assistance of counsel claim as a trial or a structural error, but ultimately concluded it was a trial error and petitioner had failed to demonstrate actual prejudice. *Id.* at \*4-8. More significantly, in a particularly striking assertion of the authority of an appellate court, she reversed a district court’s reversal of a conviction based on a finding of actual innocence. *Doe v. Menefee*, 391 F.3d 147 (2004), *cert. denied*, 546 U.S. 961 (2005).

Our review has revealed only one case in which Judge Sotomayor has sided with the petitioner after reviewing a habeas claim on its merits, *Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001) (regarding the improper use of race at the petitioner’s jury selection), and on another occasion she vacated an immigrant defendant’s conviction and remanded to the district court for determination whether erroneous information given to him by the government rendered his deportation order fundamentally unfair. *United States v. Lopez*, 445 F.3d 90 (2d Cir. 2006). She also authored two Second Circuit decisions reviewing a habeas petitioner’s claim of racial discrimination in the jury selection process, which are notable for her willingness to reach beyond procedural constraints and evaluate the merits of the petitioners’ claims. *Galarza v. Keane*, 252 F.3d at 639; *Green v. Travis*, 414 F.3d 288, 294-96 (2d Cir. 2005).

In one particularly revealing opinion, *Pham v. United States*, 317 F.3d 178 (2d Cir. 2003), Judge Sotomayor expounded on the need for fairness and encouraged district courts to expand the factual record in habeas cases and give petitioners full-blown hearings with live testimony. In *Pham*, Judge Sotomayor wrote a separate concurrence to emphasize a fundamental procedural problem in a habeas case alleging ineffective assistance of counsel: “the district court’s multiple decisions, responding to piecemeal submission by the petitioner and the government, illustrate both the risk in summarily adjudicating § 2255 claims on an unamplified ‘paper’ record, and the need to advise *pro se* petitioners, early in the proceedings, of the factual specificity required to avoid dismissal of their § 2255 petitions.” *Id.* at 185. Once a court has determined that the nature of the prisoner’s allegations precludes summary adjudication, Judge Sotomayor wrote, “it should ensure that a full record is developed on disputed issues and that a live testimonial hearing be included as part of that process when warranted.” *Id.* at 186. She

encouraged the courts to “strive to level the playing field” when disparities exist between *pro se* habeas litigants and trained counsel “by rendering the process as fair and reasonable as is practical in the circumstances.” *Id.* at 188.

### *AEDPA’s Procedural Hurdles*

In numerous cases filed in the wake of AEDPA, Judge Sotomayor dismissed habeas petition as untimely, demonstrating her strict adherence to the rule of law, her straightforward and technical implementation of procedural rules, and her cautious approach to reviewing controversial or unexplored issues in the law. *See Santana v. Artuz*, 1998 U.S. Dist. LEXIS 126 (S.D.N.Y. Jan. 13, 1998); *Alexander v. Keane*, 991 F. Supp. 329 (S.D.N.Y. 1998); *Cowart v. Goord*, 1998 U.S. Dist. LEXIS 1698 (S.D.N.Y. Feb. 18, 1998). While noting that other circuits allowed habeas petitioners a full year after the effective date of AEDPA to file their petitions in federal court, Judge Sotomayor followed Second Circuit precedent established in *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997), which held that a habeas petitioner is entitled to a “reasonable time” after the effective date of AEDPA to file a petition. In circumstances where a petitioner already had several years to bring a habeas petition, the Second Circuit “s[aw] no need to accord a full year after the effective date of the AEDPA.” *Id.*; *see also Albert v. Strack*, 1998 U.S. Dist. LEXIS 129 at \*4-8 (citing cases). In addition to considering the length of time since conviction, Judge Sotomayor followed other courts in the district in considering (1) whether the federal petition merely restates claims made to state courts, *id.* at \*10; (2) whether the petitioner was proceeding *pro se*, *id.* at \*11; (3) whether the petitioner was pursuing state collateral relief during the post-AEDPA period, *id.* at \*11-12; and (4) the difficulty or complexity of the issues raised by the petition. *Id.* at \*12. Applying these factors, Judge Sotomayor generally found petitions untimely under the Second Circuit’s reasonableness rule, sometimes acknowledging that other circuits would have found the petitions timely. *See, e.g., United States v. Felzenberg*, 1998 U.S. Dist. LEXIS 4214, at \*30 n.9 (S.D.N.Y. April 2, 1998).

On two exceptional occasions, however, Judge Sotomayor ruled that a petition was not time-barred by AEDPA. In *Shariff v. Artuz*, 1998 U.S. Dist. LEXIS 371 (S.D.N.Y. Jan. 16, 1998), she denied a motion to dismiss a habeas petition as untimely. Petitioner Kareem Ali Shariff filed his petition 363 days after the effective date of AEPDA and over ten years after his conviction had become final, and his petition raised essentially the same claims as he did in his state court proceedings. *Id.* at \*6. Judge Sotomayor nevertheless accepted several reasons cited for Shariff’s delay, including: that his briefs and trial transcripts were destroyed in a flood at the Department of Corrections, a situation which took over three years and numerous attempts to correct; that Shariff was hospitalized on at least two occasions, preventing him from effectively participating in the preparation of his petition; and the consistent failure of Shariff’s counsel to pursue his claims in a diligent manner, despite persistent efforts by Shariff and his family to encourage counsel to do so. *Id.* at \*7-10. Judge Sotomayor also noted in a footnote that in every other circuit that had considered the issue, Shariff’s application would be timely because it was filed within one full year of the effective date of AEDPA. “The Court does not mean to suggest that the Second Circuit erred in refusing to grant the full year, but it does suggest that allowing a full year grace period in the rare case does not do damage to the purpose of the AEDPA’s statute of limitations.” *Id.* at \*9 n.3.

Judge Sotomayor also allowed a habeas petition to proceed in *United States v. Felzenberg*, 1998 U.S. Dist. LEXIS 4214. The court allowed Felzenberg's petition, filed 362 days after AEDPA took effect and over three years after the date of his conviction, because he raised new claims of actual innocence in a complex multi-million dollar fraud case which had not been raised before, and the court recognized that denying the petition on timeliness grounds would in effect preclude any judicial review of the merits of his claims. *Id.* at \*29. She also determined he had diligently tried to find an attorney who would bring his motion, and once he did retain counsel, six months was not an unreasonable time to prepare the petition given the complexity of the case. *Id.* at \*29-30. Judge Sotomayor concluded the petition should not be time-barred, describing it as a "very close call," but one in which she found it preferable to err on the side of considering the merits." *Id.* at \*30. However, upon review of the merits, the court rejected Felzenberg's substantive claims of actual innocence and ineffective assistance of counsel. *Id.* at \*34-58.

Judge Sotomayor also routinely dismissed habeas petitions for failure to exhaust state remedies. *See Beharry v. Ashcroft*, 329 F.3d 51, 59 (2d Cir. 2003) (finding no jurisdiction to review petitioner's claim to discretionary relief from order of removal due to aggravated felony conviction where he did not present claim to either IJ or BIA); *Brown v. Miller*, 1998 U.S. Dist. LEXIS 2270, at \*4 (S.D.N.Y. March 3, 1998); *Cuadrado v. Stinson*, 992 F. Supp. 685, 687 (S.D.N.Y. 1998).

She remained a strict adherent to AEDPA's procedural restrictions when she moved to the Second Circuit. One extreme example is the case of Jeffrey Deskovic, who was imprisoned at the age of 16 for killing a high school classmate. Deskovic was arrested after seeming especially distraught over the killing, and he confessed after several hours of questioning – and after being promised that he would go home if he admitted to the murder. DNA extracted from semen found in the victim's body did not match Deskovic's, but prosecutors argued at trial that the victim had consensual sex with another man before being attacked. In 1997, he filed a habeas petition in district court, claiming that his conviction resulted from a coerced confession and that DNA evidence offered proof of his innocence. Deskovic claimed that his lawyer had been misinformed of the proper filing date by the clerk of the court's office, who said that the petition would be deemed filed as of the date it was mailed rather than the date it was received. Nevertheless, because the court received the petition four days after the one-year filing deadline, the district court dismissed his petition as untimely. *Deskovic v. Mann*, 2000 U.S. App. LEXIS 15400, at \*3-4 (2d Cir. Apr. 26, 2000).<sup>9</sup>

On appeal, Judges Sotomayor and Pooler issued a three-paragraph summary order refusing to equitably toll the AEDPA limitations period. Such tolling is permitted in the "rare and exceptional case where extraordinary circumstances prevent a petitioner from filing his papers in time even though petitioner acted with reasonable diligence throughout the period he seeks to toll." *Deskovic*, 2000 U.S. App. LEXIS 15400 at \*3. The court ruled that the "alleged reliance of Deskovic's attorney on verbal misinformation from the court clerk constitutes excusable neglect that does not rise to the level of an extraordinary circumstance." *Id.* at \*4. The court was similarly unpersuaded that the four-day delay did not prejudice the government, that Deskovic himself did not create the delay, that his situation was unique, or that his petition

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<sup>9</sup> See also Fernanda Santos, "A Supreme Court Nomination Stirs Up Bad Memories," NEW YORK TIMES, June 10, 2009, available at <http://www.nytimes.com/2009/06/10/nyregion/10dna.html?scp=1&sq=deskovic&st=cse>.

had substantive merit. *Id.* The opinion ended with the following: “We have considered all of petitioner-appellant’s remaining arguments and find them to be without merit.” *Id.* at \*5. Six years later, Deskovic was released from prison after DNA evidence exonerated him and connected another man to the crime.<sup>10</sup>

While on the Second Circuit, Judge Sotomayor also authored key decisions limiting the circumstances under which AEDPA’s time limitation may be equitably tolled and expanding AEDPA’s reach over Second Circuit habeas procedure. In an opinion for a unanimous panel, Judge Sotomayor rejected a petitioner’s request to equitably toll the habeas statute of limitations for the 216-day period he spent in solitary confinement without access to legal materials. *Hizbullahankhamon v. Walker*, 255 F.3d 65 (2d Cir. 2001), *cert. denied*, 536 U.S. 925 (2002). The district court rejected his argument on the grounds that the deprivation of his access to legal materials did not qualify as an extraordinary circumstance because he was placed in solitary confinement “due to his own misbehavior” and that the petitioner failed to exercise reasonable diligence by “waiting over 250 days before filing” his first motion. *Id.* at 75 (*quoting Hizbullahankhamon*, 105 F. Supp. 2d at 344). Because the Second Circuit substantially agreed with the district court’s second ground, it did not reach the question of whether the deprivation of a petitioner’s legal materials and access to law library materials could constitute an extraordinary circumstance warranting equitable tolling of the one-year limitation period. *Id.* Even assuming that such a deprivation did constitute an extraordinary circumstance, Judge Sotomayor decided that in this case the petitioner could not show that the extraordinary circumstance prevented him from filing a timely petition. “It cannot plausibly be said that, but for those 22 days at the very beginning of the one-year limitations period during which petitioner was allegedly denied access to legal materials, he would have been able to file his petition within the one-year limitations period.” *Id.* at 76. In another case, *Hom Si Chung v. United States*, 298 F.3d 174 (2d Cir. 2002), Judge Sotomayor interpreted AEDPA in a light more favorable to a habeas petitioner, holding that a second petition filed before adjudication of a previous § 2255 motion was complete should be considered a motion to amend rather than procedurally barred second or successive petition. *Id.* at 175, 177-78.

Judge Sotomayor also wrote the Second Circuit decision determining whether AEDPA altered the inquiry into harmless error on collateral review, holding that when a state appellate court explicitly engages in harmless error review, a habeas court must assess whether the state court unreasonably applied Supreme Court precedent governing direct review of constitutional error. *Gutierrez v. McGinnis*, 389 F.3d 300, 303 (2d Cir. 2004). Extending the analytical framework of AEDPA did not “blindfold habeas courts to constitutional error infecting state trials; what we have frequently labeled AEDPA deference is by no means blind obedience.” *Id.* at 307.

### *Constitutional Challenges to AEDPA*

Beyond dutifully executing the Second Circuit’s rule regarding AEDPA’s time limitations, Judge Sotomayor wrote two lengthy opinions considering their constitutionality. In *Rodriguez v. Artuz*, 990 F. Supp. 275 (S.D.N.Y. 1998), the petitioner asserted that the application of the AEDPA statute of limitations to deny hearing of his first federal habeas petition was

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<sup>10</sup> See “A Supreme Court Nomination Stirs Up Bad Memories,” at <http://www.nytimes.com/2009/06/10/nyregion/10dna.html?scp=1&sq=deskovic&st=cse>.

unconstitutional. A recent opinion by Judge Sweet of the Southern District had held the imposition of time limitations was an unconstitutional ‘suspension’ of the writ of habeas corpus. *Rosa v. Senkowski*, 1997 U.S. Dist. LEXIS 11177 (S.D.N.Y. Aug. 1, 1997). Judge Sotomayor rejected *Rosa*, holding that “this Court does not find that a statute of limitations applied to habeas petitions *per se* ‘deprives [petitioners] of the ability to obtain any collateral review in a federal court of the merits of [their] claim[s].’” *Rodriguez*, 990 F. Supp. at 278 (quoting *Rosa*, 1997 U.S. Dist. LEXIS 11177 at \*19). In reaching this conclusion, Judge Sotomayor extensively recounted the reasoning in Judge Sweet’s opinion as well as in the two Supreme Court cases dealing with the Suspension Clause. She ultimately disagreed with Judge Sweet’s position that AEDPA’s time limitation rendered the habeas remedy “ineffective or inadequate to test the legality of detention” in violation of the Supreme Court standard established by *Swain v. Pressley*, 430 U.S. 372, 381 (1977). *Rodriguez*, 990 F. Supp. at 282. Because *Rodriguez* did not assert a claim of actual innocence, and it did not appear from the face of the petition that he could make such a claim, Judge Sotomayor declined to decide whether procedural bars to habeas where actual innocence could be shown violate the Suspension Clause. She concluded: “at least where no claim of actual or legal innocence has been raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits, the limits do not render habeas inadequate or ineffective to test the legality of detention and, therefore, do not constitute a suspension of the writ in violation of Article I of the United States Constitution.” *Id.* Six months later in *Halo v. New York State Division of Parole*, 1998 U.S. Dist. LEXIS 9711 (S.D.N.Y. July 1, 1998), Judge Sotomayor issued a Certificate of Appealability on the question of whether the AEDPA time limits violate the Suspension Clause. *Id.* at \*6. The Second Circuit issued a one-sentence summary order affirming Judge Sotomayor’s denial of *Halo*’s petition for the reasons stated in her opinion and in *Rodriguez*. *Halo v. N.Y. Div. of Parole*, 1999 U.S. App. LEXIS 2242 (2d Cir. Feb. 10, 1999).

Judge Sotomayor also rejected a challenge to the AEDPA time limitation as a violation of the Ex Post Facto Clause. In *Rashid v. Khulmann*, 991 F. Supp. 254 (S.D.N.Y. 1998), the petitioner argued that the application of the *Peterson* reasonable time limit to his petition violated the Ex Post Facto Clause. She rejected this position because the Ex Post Facto Clause applies only to penal statutes. *Id.* at 260 (citing *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997) and *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)).

### *Reversing a Defendant’s Successful Claim of Actual Innocence*

In a particularly striking decision, Judge Sotomayor overruled a district court’s conclusion that a petitioner satisfied his burden of making a credible showing of actual innocence. *Doe v. Menefee*, 391 F.3d 147, 149 (2d Cir. 2004), *cert. denied*, 546 U.S. 961 (2005). Petitioner *Doe*’s conviction was the result of a long-running investigation into a pedophilia ring, after which he pled guilty to a count of sodomy. *Doe* appealed from a denial of his habeas petition in district court. *Doe* had failed to file his petition within the AEDPA limitations period, which he argued should be tolled because he was actually innocent of the offense to which he pled guilty; because the attorney whom he hired to file his state post-conviction motion incompetently failed to file the motion in time to trigger the tolling provision provided in 28 U.S.C. § 2244(d)(2); and because the unavailability of the New York State case law in the library of the federal prison in which he was incarcerated rendered him unable to file his post-conviction motion *pro se*. *Id.* The district court found *Doe* actually innocent, but it declined to hold that

actual innocence provides a basis for tolling AEDPA's limitations period, and it rejected Doe's other asserted bases for tolling. *Id.* On remand from the Second Circuit, the district court conducted an evidentiary hearing on the actual innocence question, at which both Doe and the alleged teenage victim, who had previously stated in an interview with the DA's office that Doe had molested him, testified to the effect that Doe had never assaulted him. The district court therefore determined that Doe had established his innocence by a preponderance of the credible evidence. 391 F.3d at 155.

On review of the district court's decision after remand, Judge Sotomayor held that the district court relied on clearly erroneous findings of fact in determining that Doe had presented new reliable evidence of innocence and was actually innocent. Accordingly, she did not review the district court's conclusion that a credible claim of actual innocence does not toll AEDPA's limitations period. *Id.* at 174. She found it "worth noting," however, "that the Supreme Court has recently counseled lower courts to avoid extending the actual innocence exception to new contexts if there are 'other grounds for cause to excuse the procedural default.'" *Id.* (quoting *Dretke v. Haley*, 541 U.S. 386 (2004)). Judge Sotomayor read *Dretke* to "counsel[] restraint in the judge-created area of equitable tolling as well." *Id.* Thus, Judge Sotomayor instructed in dicta, "district courts confronted with allegations of actual innocence as a ground for tolling the limitations period should first consider any other grounds for tolling, and only after having ruled out any other possible means of tolling, consider petitioner's actual innocence claim." *Id.*

In a blistering dissent, Judge Pooler accused the panel of second-guessing the trial judge's credibility findings where no compelling extrinsic or other evidence compels a different conclusion. "In holding otherwise, the majority supplants the district court's reasoned factual findings with its own speculations and conjectures. More importantly, the majority glosses over the most unusual and disconcerting aspect of this case: here, the alleged victim of a violent sexual assault has come forward and testified that the crime never occurred." 391 F.3d at 179. She therefore concluded that no reasonable jury "faced with a witness, found highly credible by the district court, who emphatically testifies that he was never victimized, could find beyond a reasonable doubt that the defendant was guilty of that same crime." *Id.* See also *id.* at 182-90.

### *Racial Discrimination in Jury Selection*

Judge Sotomayor has authored two opinions on the Second Circuit reviewing habeas petitions claiming racial discrimination in the selection of juries. To protect a defendant's right to a fair trial as well as a citizen's right to participate equally in the judicial process, jurors may not be chosen or rejected on the basis of race or national origin. See *Batson v. Kentucky*, 476 U.S. 79 (1986). Judge Sotomayor, in a very rare opinion, found for the petitioner on the merits of his habeas petition. *Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001), *reh'g denied*, 2001 U.S. App. LEXIS 15583 (2d Cir. July 12, 2001). In a more typical ruling while on the district court, she declined to review a *Batson* claim of discrimination on the basis that it was procedurally barred because *Batson* did not apply retroactively. *Epps v. Comm'r of Corr. Servs.*, 92 Civ. 1709 (SS), 1993 U.S. Dist. LEXIS 8162 (S.D.N.Y. June 15, 1993), *affirmed by* 13 F.3d 615 (2d Cir. 1994), *cert. denied*, *Epps v. Coughlin*, 511 U.S. 1023 (1994).

In *Galarza*, Judge Sotomayor vacated a district court's denial of a habeas petition that asserted a *Batson* violation. *Galarza v. Keane*, 252 F.3d at 630. During jury selection in *Galarza*'s state court trial, the prosecution used peremptory challenges to strike eleven members

of the 18-person jury panel. The defense objected to the strike of the first six or seven jurors with Hispanic last names, charging they were struck on racial grounds. The trial judge was satisfied that the prosecution provided permissible reasons for striking at least three of the Hispanic jurors, so he continued the trial without forcing any of the stricken jurors to be seated. *Id.* at 634. After exhausting his state remedies, Galarza filed a habeas petition in federal district court, arguing that he had been denied equal protection of the law because the prosecutor exercised her peremptory challenges in a racially discriminatory manner. The district court accepted the magistrate's determination that Galarza's counsel had waived his *Batson* challenge by failing to object at trial, dismissed the habeas petition and granted a Certificate of Appealability on the issue of whether the prosecutor's use of peremptory challenges violated *Batson*.

Judge Sotomayor, writing for a split panel, disagreed that defense counsel waived Galarza's *Batson* challenges as to the other prospective jurors because counsel had specifically identified each of these panel members and had objected again after the prosecutor proffered race-neutral explanations for each of them. 252 F.3d at 636-37. Judge Sotomayor held that counsel's contemporaneous objections to the trial court's *Batson* ruling sufficed. She also disagreed with the district court that Galarza's claim was procedurally barred for failing to exhaust state court remedies, concluding that he fairly presented his claim to all state courts. *Id.* Reaching the merits of the *Batson* claims, the court concluded that the trial court had failed to adjudicate the credibility of the race-neutral explanations offered by the prosecutor for three of the challenged prospective jurors and did not credit the prosecutor's explanations for striking two other prospective jurors. The court also read the trial court's statements to imply that it was unwilling to make a decision on discriminatory intent due to a stated unwillingness to stop the trial. *Id.* at 640. For these reasons, Judge Sotomayor vacated the district court's denial of Galarza's habeas petition and remanded the case to the district court to determine whether to expand the record to resolve the issues as to the three challenged jurors or to return the matter to the state court for reconsideration. In response to the dissent's statement that the case would have to be retried, eleven years after the fact, or the petitioner released, Judge Sotomayor took judicial notice that "the trial judge is still alive, and we therefore disagree with the dissent that 'in all probability, this case will have to be retried or [petitioner] released.'" *Id.* at 641.

In another *Batson* case, *Green v. Travis*, 414 F.3d 288 (2d Cir. 2005), Judge Sotomayor upheld a district court ruling that the defendant's *Batson* claim was not procedurally barred but that he had failed to meet his burden of showing that the prosecution's peremptory challenges were discriminatory. During the first round of jury selection, the prosecution used three peremptory challenges to strike a black man, a black woman, and a Hispanic woman. In the second round, the prosecutor used two more peremptory challenges to strike another black man and another Hispanic woman, at which point defense counsel objected under *Batson*. The trial judge decided that the defense failed to show a prima facie case for racial discrimination and ended the inquiry. On appeal, the state appellate court held that Green's *Batson* claim was procedurally barred and, in the alternative, he failed to establish a prima facie case under *Batson* because he did not show that the members together composed a cognizable racial group. Green filed a habeas petition in district court, which held a reconstruction hearing to complete the *Batson* inquiry, allowing the prosecution to offer race-neutral explanations for its peremptory challenges and allowing the defendant the opportunity to rebut those explanations. The district court held that the prosecutor offered acceptable non-racial reasons and that Green could not show beyond a preponderance of evidence a pattern of racial discrimination. *See id.* at 291-93.

Writing for a unanimous panel, Judge Sotomayor upheld the district court's ruling that Green's habeas petition was not procedurally barred because the state's procedural default rule in this instance was so intertwined with federal constitutional law. 414 F.3d at 295-96. The court rejected the state court's conclusion that combining black and Hispanic jurors would run afoul of Supreme Court precedent defining "cognizable racial group." *Id.* at 296. However, reviewing the findings made at the reconstruction hearing, the Second Circuit decided that the district court did not err in accepting the prosecutor's race-neutral justifications or finding that Green failed to undermine their persuasiveness. *Id.* at 299-301.

## **Conclusion**

In sum, an examination of Judge Sotomayor's criminal justice record shows her to be a careful, cautious, and thoughtful jurist. She faithfully follows precedent, avoids reaching constitutional questions when possible, and limits her rulings to the specific cases before her. Although she tends to rule more often in favor of the government, she has a healthy respect for the rule of law and the rights of criminal defendants.