Vexed and Perplexed

Reviewing Mixed Questions of Law and Fact on Appeal

BY CHRISTINA GOMEZ

This article discusses the different standards appellate courts have applied in reviewing trial court decisions on so-called "mixed questions of law and fact"—questions that raise intertwining legal and factual issues.

Mixed questions of law and fact have long confounded appellate judges and advocates. The U.S. Supreme Court has remarked on "the vexing nature of the distinction between questions of fact and questions of law."[1] The Tenth Circuit likewise has acknowledged being "perplexed" and "inconsistent" in determining the appropriate standard for reviewing certain mixed questions of law and fact.[2] And the Colorado Supreme Court has resolved that appellate courts "may take a number of different approaches" when confronted with mixed questions.[3]

This article describes the varying approaches appellate courts have taken in addressing mixed questions of law and fact and attempts to develop a workable approach for resolving such questions.

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Appellate Review Standards

The standard of review is critical to any appeal. It provides the framework for the appellate court's consideration of the issues—the lens through which the court weighs the choices made by the trial court and determines how much deference to apply to those choices. For similar reasons, it also provides a guideline for would-be appellants in deciding whether to take an appeal, what issues to raise on appeal, and how to present those issues, because appellants have a much better chance at obtaining relief when the applicable review standard is less deferential to the trial court's decision.

Generally, appellate courts apply de novo review when considering questions of law, such as issues of standing, interpretation of a statute or contract, dismissal of claims on a motion to dismiss or for summary judgment, or sufficiency of the evidence to support a verdict.[4] Under this standard, the reviewing court gives no deference to the lower court's decision, but decides the issue independently, applying the same legal standards as applied in the trial court.[5]

By contrast, appellate courts apply clear error review when considering questions of fact, such as the factual findings underlying a trial court's rulings on subject matter jurisdiction, motions to suppress, *Batson* challenges, sentencing, and trials to the court.[6] Under this standard, the reviewing court defers to the lower court's factual findings, reversing them only if they lack factual support in the record or if, upon review of all the evidence, the reviewing court is "left with a definite and firm conviction that a mistake has been made."[7]

Appellate courts also review discretionary decisions, such as rulings on discovery disputes, continuances, and evidentiary issues, for an abuse of discretion.[8] This very deferential standard generally considers whether the trial court's decision was "arbitrary, capricious, or whimsical, or results in a manifestly unreasonable judgment" or "exceeded the bounds of permissible choice in the circumstances."[9] But sometimes, determining whether a decision was arbitrary, unreasonable, or beyond the bounds of permissible choices will depend on whether the underlying issue it resolved was legal or factual in nature. To the extent that discretionary decisions rest on legal or factual issues, the de novo or clear

error standards may apply, as the appellate courts have held that "[a] trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[10]

Mixed Questions of Law and Fact

Frequently, however, the legal and factual issues in a case overlap, making it difficult to classify a particular issue as one purely involving law or fact. The U.S. Supreme Court has characterized such mixed questions of law and fact this way: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[11] The Colorado Supreme Court has explained that "[a] mixed question of law and fact involves the application of a legal standard to a particular set of evidentiary facts in resolving a legal issue."[12]

For instance, in the last few years Colorado's federal and state appellate courts have recognized the following issues (among others) as raising mixed questions of law and fact:

- waiver of a personal jurisdiction defense,[13]
- reasonableness inquiries under the Fourth Amendment,[14]
- suppression of statements by the accused,[15]
- whether a defendant's actions were taken under color of state law for § 1983 purposes,[16]
- piercing the corporate veil,[17]
- whether an accommodation is reasonable under the Americans with Disabilities Act,[18]
- termination of parental rights,[19]
- judgments following a bench trial,[20] and
- claims for ineffective assistance of counsel.[21]

In each of these cases, the trial court applied the law to the facts it found to determine whether the applicable legal standard had been satisfied. And in each case, the appellate court recognized that reviewing the trial court's decision presented elements of both law and fact.

This is not to say that the courts are in uniform agreement on what types of issues present mixed questions of law and fact.[22] The courts occasionally disagree about when a question becomes a "mixed" one, as opposed to one purely involving law or fact. In one case addressing such a disagreement, the U.S. Supreme Court expressed that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive" and the Court "has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion,'" aside from a few guiding principles—for instance that the fact "that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact" and that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."[23]

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Nor are the courts uniform in their approach to resolving mixed questions of law and fact. Even where the appellate courts agree that an issue presents a mixed question, they often diverge in their approach to reviewing that issue. One commentator has noted that "[t]here is no uniform standard for reviewing mixed questions of law and fact."[24] Others similarly have stated that "there is neither a general rule nor a consensus among the courts as to which standard of review should be applied when considering mixed questions of fact and law," as opinions on the issue are "largely ad hoc and inconsistent."[25]

The varying methods that have evolved for resolving mixed questions generally can be categorized into four approaches: the predominance approach, the bifurcated approach, the sliding scale approach, and the presumptive standard approach.

The Predominance Approach

Under the predominance approach, a court presented with a mixed question of law and fact will apply either a de novo or a clearly erroneous standard of review to the entire question, based on whether the question is primarily legal or primarily factual in nature. The U.S. Supreme Court seems to espouse this approach. In a series of decisions, it held that the review standard applied to mixed questions depends on whether the trial court or the appellate court is "better positioned" to decide the issue and whether "probing appellate scrutiny [will or] will not contribute to the clarity of legal doctrine."[26]

The Tenth Circuit has more expressly adopted this approach, describing it as follows: "Where the mixed question involves primarily a factual inquiry, the clearly erroneous standard is appropriate. If, however, the mixed question primarily involves the consideration of legal principles,

then a *de novo* review by the appellate court is appropriate."[27] Several other federal circuits have also adopted or applied this approach.[28]

Thus, for example, the Tenth Circuit has established alternative standards for reviewing a decision on entitlement to attorney fees under 42 USC § 1988's prevailing party provisions where a claim is resolved without a judicial determination, depending on whether the decision rests primarily on factual or legal grounds. If a decision rests on the first element to establishing entitlement to fees—whether the plaintiff's lawsuit caused the defendant to change its conduct—review is for clear error, as "[t]he trial court is in the best position to evaluate this issue because it has dealt with the parties and can evaluate the strengths and weaknesses of the case."[29] But if a decision rests on the second element—whether the defendant's conduct was required by federal law—then review is de novo, because that issue "primarily requires legal analysis, although the facts certainly bear on the outcome."[30] Likewise, the Tenth Circuit has held that where the underlying facts are undisputed, mixed questions such as whether a defendant acted under color of state law or when a seizure occurred for Fourth Amendment purposes are issues of law to be reviewed de novo.[31]

The Bifurcated Approach

A court alternatively may attempt to bifurcate a mixed question of law and fact into its component parts, applying the de novo standard to the legal aspects and the clear error standard to the factual aspects of the issue. While the Tenth Circuit has announced its adoption of the predominance approach, in reality it often applies bifurcation, reviewing the legal and factual aspects of a mixed question separately according to their applicable review standards.[32] Most, if not all, of the other federal circuits have also applied this approach in some of their decisions.[33]

The Colorado Supreme Court has identified the bifurcated approach as its preferred method for resolving mixed questions of law and fact: "We apply a bifurcated standard to such questions, reviewing the evidentiary factual findings for an abuse of discretion and the legal conclusions de novo."[34] The Supreme Court has described this bifurcated approach in various ways—for instance, expressing that the Court "defer[s] to the trial court's finding of facts in the record but review[s] all legal conclusions de novo, including the application of legal factors to the facts of the case";[35] that it "conduct[s] an independent and *de novo* review of the trial

court's legal conclusions based on the factual record";[36] and that it "defers to the trial court's credibility determinations, will not disturb the court's factual findings unless they are clearly erroneous and not supported by the record, and reviews de novo the court's application of the governing legal standards."[37]

In applying this standard, the Colorado Supreme Court has attempted to demarcate the "sometimes blurry" "line between ultimate facts and evidentiary facts" by explaining that an ultimate fact "is a conclusion of law or at least a determination of a mixed question of law and fact" that "settle[s] the rights and liabilities of the parties," whereas evidentiary facts are the "factual and historical findings on which an ultimate fact rests."[38]

In reality, it is frequently difficult to distinguish where an evidentiary finding or finding of fact ends and an ultimate fact or conclusion of law begins. And quite often reviewing courts do not distinguish the boundaries between law and fact, even as they are reviewing mixed questions under the bifurcated approach. Instead, the courts will set out the applicable standards for reviewing the legal and factual aspects of the trial court's ruling and then decide the issues without making clear which standard they are applying to particular aspects of the case.

Additionally, while the Colorado Supreme Court usually applies the bifurcated approach, it has held that reviewing courts may choose to employ alternative approaches, including "treat[ing] the ultimate conclusion as one of fact for purposes of review and apply[ing] the clear error standard" and "conclud[ing] that a mixed question of fact and law demands de novo review."[39] The cases cited by the Court for this proposition (including one Tenth Circuit case) exemplify the predominance approach.[40] Thus, it seems that Colorado's state appellate courts may also choose to apply that approach, particularly where the issues cannot readily be bifurcated.

The Sliding Scale Approach

Another, less common approach to resolving mixed questions employs a sliding scale. Under this approach, the level of review and amount of deference applied to the trial court's judgment is adjusted according to where the issues fall on the spectrum between purely legal and purely factual. The First Circuit, which has adopted this approach, explains it this way: "The more the district court's conclusions are characterized as factual conclusions, the more our review of those facts is for clear error; the more the district court's conclusions are conclusions of law, the more independent review we give."[41]

So, for instance, while the First Circuit does not label or describe its interim standards on the path from de novo to clear error, it has held that where the lower court's decision was "deeply fact intensive" and "rested, not on any particular piece of evidence, but on its assessment of the whole factual record," the review standard on the sliding scale "approaches 'clear error.'"[42] However, much like the cases applying bifurcation, more often the court simply sets out the sliding scale approach and then decides the issues without further explaining what standard it is applying or where that standard falls along the sliding scale.

The Presumptive Standard Approach

Finally, a court may adopt a presumptive standard, assuming that all mixed questions of law and fact are subject to de novo review[43] or, alternatively, to clear error review, absent any circumstances indicating another standard should apply. Several federal circuits have applied this approach, with some expressing that mixed questions generally are reviewed de novo and others expressing that such questions generally are reviewed for clear error.[44]

The decisions, however, are inconsistent. Even within the same circuit, some cases may indicate that de novo is the default review standard, while others may indicate that clear error is the default standard, or even that one of the other approaches applies. This fact, combined with the fact that this approach offers only a *presumption* that may be overcome in favor of another standard, suggests that what the courts are actually doing is applying the predominance approach and adjusting the standard based on the issues before them. But, having expressed a preference for one standard over the other, these courts (particularly the Seventh Circuit, with its predilection for the clear

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error standard) are more likely to opt for their preferred standard when an issue is unsettled or difficult to categorize as predominantly legal or factual.

Settling on a Workable Approach

The case law reflects a considerable inconsistency in approaches to mixed questions of law and fact—not only among the various federal and state courts, but also within each court's own jurisprudence. This has at times led to significant confusion and dissent, in part because the standard by which the lower court's decision is reviewed often can be outcome-determinative.[45]

There probably is no one-size-fits-all approach that would work for resolving all mixed questions. But more clarity and consistency in judicial decisions would help both the courts and counsel work through such questions.

Of course, skilled advocates will argue for application of the review standard that best supports their case. If a party seeks reversal of the trial court's judgment, counsel will look for ways to frame the issues as primarily legal in nature, warranting de novo review. On the other hand, if the party seeks affirmance of the judgment, counsel will look for ways to frame the issues as primarily fact-based or discretionary, warranting more deferential review. Given the range of authority on what issues present mixed questions and what review standards should apply to such mixed questions, counsel will argue and are likely to find support for the approach that best leads to their preferred standard of review. Nonetheless, counsel could assist the courts in addressing mixed questions by acknowledging when a less-preferred standard necessarily must apply and by clearly delineating in mixed question cases what issues or aspects of the question should be subject to de novo review and what issues or aspects should be subject to clear error review.

And what approach should the courts apply? One sensible framework would be to bifurcate the issues whenever possible, but to apply the predominance test in those circumstances where the legal and factual issues cannot readily be separated. Whatever method is used, expressly stating what approach is being applied, and then explaining its application—including which issues or aspects a court considers to be legal and which it considers to be factual—would create more clarity and hopefully lead to more consistency in this evolving area of the law. CL

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NOTES

1. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (citing *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)).

2. *United States v. Craig*, 808 F.3d 1249, 1255 (10th Cir. 2015) (describing the court's conflicting decisions in determining the standard for reviewing a district court's decision that an act or event is relevant conduct under the federal sentencing guidelines).

3. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000).

4. *See, e.g., Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015) (summary judgment); *United States v. Sorensen*, 801 F.3d 1217, 1225 (10th Cir. 2015) (statutory interpretation); *United States v. Anaya*, 727 F.3d 1043, 1050 (10th Cir. 2013) (sufficiency of evidence to support conviction); *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 606 (Colo. 2016) (dismissal for failure to state a claim); *People v. Bros.*, 308 P.3d 1213, 1215 (Colo. 2013) (standing); *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020, 1023 (Colo. 2013) (summary judgment and contract

interpretation); *Northstar Project Mgmt., Inc. v. DLR Grp., Inc.*, 295 P.3d 956, 959 (Colo. 2013) (statutory interpretation and sufficiency of evidence to support verdict).

5. *See, e.g., Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1294 (10th Cir. 2010) ("We review the trial court's conclusions on legal issues de novo, . . . and need not defer to its decisions on questions of law.") (citation omitted); *People v. Novotny*, 320 P.3d 1194, 1207 (Colo. 2014) ("Appellate courts afford this determination no deference because it presents a question of law subject to de novo review.").

6. *See, e.g., United States v. Piper*, 839 F.3d 1261, 1270 (10th Cir. 2016) (sentencing), *cert. denied*, 137 S.Ct. 2263 (2017); *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1305 (10th Cir. 2015) (bench trial); *People v. Beauvais*, 393 P.3d 509, 516–17 (Colo. 2017) (*Batson* challenge claiming a prospective juror was struck on the basis of race, ethnicity, or sex); *In Interest of Baby A*, 363 P.3d 193, 204 (Colo. 2015) (bench trial); *Tulips Invs., LLC v. State ex rel. Suthers*, 340 P.3d 1126, 1131 (Colo. 2015) (subject matter jurisdiction).

7. *Mathis*, 787 F.3d at 1305; *accord Beauvais*, 393 P.3d at 516 ("We set aside a trial court's factual findings only when they are so clearly erroneous as to find no support in the record."). *See also Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2017 COA 149, ¶ 32 ("[E]ven under the clearly erroneous standard of review, we can reverse the district court's factual findings when, although there may be some evidence to support them, we are nonetheless left, after a review of the entire record, with the definite and firm conviction that a mistake has been made.").

8. *See, e.g., Punt v. Kelly Servs.*, 862 F.3d 1040, 1046–47 (10th Cir. 2017) (discovery issues); *Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016) (extensions of time); *Hill v. J.B. Hunt Transp., Inc.*, 815 F.3d 651, 658 (10th Cir. 2016) (evidentiary issues); *People v. Ahuero*, 403 P.3d 171, 175 (Colo. 2017) (continuances); *In re Marriage of Gromicko*, 387 P.3d 58, 61 (Colo. 2017) (discovery issues); *Murray v. Just In Case Bus. Lighthouse, LLC*, 374 P.3d 443, 450 (Colo. 2016) (evidentiary issues).

9. *United States v. Meisel*, 875 F.3d 983, 998 (10th Cir. 2017) (citations omitted); *accord Gen. Steel Domestic Sales, LLC v. Bacheller*, 291 P.3d 1, 11 (Colo. 2012) ("Under this standard, we reverse a trial court only if its decision was manifestly arbitrary, unreasonable, or unfair. It is not necessary that we agree with the trial court's decision. The trial court's determination simply must not exceed[ ] the bounds of the rationally available choices.") (citations and quotation marks omitted).

10. *Murray*, 374 P.3d at 450 (citation omitted); *accord Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017) ("[C]ommitting a legal error or making a factual finding that is not supported by substantial record evidence is necessarily an abuse of discretion.") (citation omitted).

11. *Ornelas v. United States*, 517 U.S. 690, 696–97 (1996) (quoting *Pullman–Standard*, 456 U.S. at 289 n.19) (alterations in original).

12. *Atl. Richfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1179, 1184 (Colo. 2014) (citation omitted).

13. *Am. Fid. Assur. Co. v. Bank of New York Mellon*, 810 F.3d 1234, 1237 (10th Cir.), *cert. denied*, 137 S.Ct. 90 (2016).

14. *E.g., McInerney v. King*, 791 F.3d 1224, 1232 (10th Cir. 2015) (exigent circumstances); *People v. Cox*, 401 P.3d 509, 511–12 (Colo. 2017) (probable cause).

15. *People v. Kutlak*, 364 P.3d 199, 203 (Colo. 2016).

16. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016).

17. *Stockdale v. Ellsworth*, 407 P.3d 571, 576 (Colo. 2017).

18. *Punt*, 862 F.3d at 1050–51.

19. *In Interest of Baby A*, 363 P.3d at 200.

20. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 396 P.3d 651, 654 (Colo. 2017).

21. *Littlejohn v. Royal*, 875 F.3d 548, 558 (10th Cir. 2017); *People v. Corson*, 379 P.3d 288, 293 (Colo. 2016).

22. *See, e.g., Hana Fin., Inc. v. Hana Bank*, 135 S.Ct. 907, 910–13 (2015) (resolving circuit split over whether application of the trademark doctrine of "tacking" presents a legal or a factual issue); *Williams v. Taylor*, 529 U.S. 362, 385 (2000) (noting differences of opinion in the Court's precedent regarding the legal and/or factual nature of federal habeas review); *Lewis v. Lewis*, 189 P.3d 1134, 1140–41 (Colo. 2008) (resolving disagreement on whether unjust enrichment claims present a mixed question of law and fact or a discretionary issue).

23. *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (quoting *Pullman-Standard*, 456 U.S. at 288).

24. Wright and Miller, 9C *Fed. Prac. & Proc. Civ.* § 2589 (Thomson Reuters 3d ed. 2008).

25. Wesley and Tennant, "Standards of review—Review of mixed questions of law and fact," 6 *Bus. & Com. Litig. Fed. Cts.* § 60:19 (Thomson Reuters 4th ed. 2017).

26. *See, e.g., Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744, 1748 (2014); *Brown v. Plata*, 563 U.S. 493, 517 (2011); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991).

27. *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986); *accord Littlejohn*, 875 F.3d at 558 n.3; *Wyoming v. U.S. Envtl. Prot. Agency*, 875 F.3d 505, 513 (10th Cir. 2017).

28. *See generally* Wright and Miller, *supra* note 24 (citing cases); Wesley and Tennant, *supra* note 25 (same).

29. *Supre*, 792 F.2d at 962.

30. *Id.*

31. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016); *United States v. Salazar*, 609 F.3d 1059, 1063–64 (10th Cir. 2010).

32. *See, e.g., Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1207 (10th Cir. 2015) ("We review mixed questions de novo 'with the presumption of correctness continuing to apply to any underlying findings of fact.'") (citation omitted); *United States v. Creighton*, 639 F.3d 1281, 1288 (10th Cir. 2011) ("The existence of exigent circumstances is a mixed question of law and fact . . . . We review the district court's factual findings for clear error and the ultimate question regarding the reasonableness of a warrantless seizure from a residence de novo.") (citations omitted).

33. *See generally* Wesley and Tennant, *supra* note 25 (citing cases).

34. *State Farm*, 396 P.3d at 654.

35. *People v. Ferguson*, 227 P.3d 510, 512–13 (Colo. 2010).

36. *People v. Zadran*, 314 P.3d 830, 834 (Colo. 2013).

37. *State Farm*, 396 P.3d at 654 (citing *E-470 Pub. Highway Auth.*, 3 P.3d at 23).

38. *Ritzert v. Bd. of Educ. of Acad. Sch. Dist. No. 20*, 361 P.3d 966, 973 (Colo. 2015) (citations and quotation marks omitted).

39. *E-470 Pub. Highway Auth.*, 3 P.3d at 22–23 (citing cases); *accord Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (Kourlis, J., dissenting).

40. *See, e.g., Rascon v. US W. Commc'ns, Inc.*, 143 F.3d 1324, 1333 (10th Cir. 1998); *Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997).

41. *Quint v. A.E. Staley Mfg. Co.*, 246 F.3d 11, 14 (1st Cir. 2001); *accord In re IDC Clambakes, Inc.*, 727 F.3d 58, 64 (1st Cir. 2013); *United States v. Sicher*, 576 F.3d 64, 70 and n.6 (1st Cir. 2009).

42. *In re IDC Clambakes, Inc.*, 727 F.3d at 71 (citation omitted).

43. *See, e.g., Estate of Elkins v. C.I.R.*, 767 F.3d 443, 449 (5th Cir. 2014) ("We review mixed questions of fact and law *de novo*."); *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 n.2 (2d Cir. 2013) ("Mixed questions of law and fact are . . . reviewed *de novo*."); *United States v. Lang*, 149 F.3d 1044, 1047 (9th Cir.) ("Mixed questions are typically reviewed de novo, but, depending on the nature of the inquiry involved, may be reviewed under a more deferential clearly erroneous standard."), *amended*, 157 F.3d 1161 (9th Cir. 1998). *See also generally* Wesley and Tennant, *supra* note 25 (citing cases).

44. *See, e.g., VLM Food Trading Int'l, Inc. v. Illinois Trading Co.*, 748 F.3d 780, 787 (7th Cir. 2014) ("[O]ur default standard of review for such 'mixed' questions of law and fact is clear error. There are exceptions, but most involve constitutional questions.") (citations omitted). *See also generally* Wesley and Tennant, *supra* note 25 (citing cases).

45. *See, e.g., Valdez*, 966 P.2d at 590–91, 597, 598–602 (reflecting disagreement among the majority, concurring, and dissenting opinions regarding the applicable review standard for a mixed question involving a *Batson* challenge); *McKenna v. Edgell*, 617 F.3d 432, 448–49 (6th Cir. 2010) (Rogers, J., dissenting) (disagreeing with the majority on the review standard applied to a mixed question, and discussing precedent in which the court had "drift[ed]" from its initial analysis of the issue); *United States v. McConney*, 728 F.2d 1195, 1199–1204 (9th Cir. 1984) (en banc) (noting the "disarray in standard of review jurisprudence" and adopting the predominance approach for resolving mixed questions).

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