

SUPREME COURT REVIEW AND PREVIEW

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NOTES

**UNITED STATES SUPREME COURT
REVIEW-PREVIEW-OVERVIEW**

**CRIMINAL CASES GRANTED REVIEW AND DECIDED
DURING THE OCTOBER 2016-17 TERMS
THRU MARCH 29, 2017**

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I. JUDGES

- A. **Constitutional Right to Impartial Judge.** *Williams v. Pennsylvania*, 136 S. Ct. 1899 (June 9, 2016). Chief Justice Castille of the Pennsylvania Supreme Court refused to recuse himself from a contentious death penalty appeal, in a case in which he had been the elected District Attorney who prosecuted the defendant, had personally authorized the death penalty, and had represented the state on appeal in the case. Moreover, the Chief Justice ran for his judicial position on a law and order campaign, including specific reference to his work in prosecuting the defendant. The pending appeal included significant questions of whether his DA's office committed violations of *Brady v. Maryland*. The trial court granted postconviction relief based on prosecutorial misconduct, including failure to disclose exculpatory evidence. The Pennsylvania Supreme Court overturned this decision, with the Chief Justice in the majority, although he was not the deciding vote. Two weeks later, the Chief Justice retired. The U.S. Supreme Court reversed (5-3) in an opinion authored by Justice Kennedy: "The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal." The majority opinion pointed to Castille's participation in the decision to seek the death penalty against Williams, and his own comments during the election campaign that made clear his role was not merely ministerial: "Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation

in the case ‘must be forbidden if the guarantee of due process is to be adequately implemented.’ *Withrow*, 421 U.S., at 47.” Having determined that due process was violated, the Court then determined that the error is structural, not subject to harmless error review: “The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect “not amenable” to harmless-error review, regardless of whether the judge’s vote was dispositive. *Puckett v. United States*, 556 U.S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision making process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. * * * [I]t does not matter whether the disqualified judge’s vote was necessary to the disposition of the case. The fact that the interested judge’s vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party.” Chief Justice Roberts dissented (Alito joining), and Justice Thomas dissented separately.

- B. **Standard for Recusal under Due Process Clause.** *Rippo v. Baker*, 137 S. Ct. ___ (Mar. 6, 2017) (per curiam). Michael Damon Rippo was convicted of first-degree murder and other offenses and sentenced him to death. During his trial, Rippo received information that the judge was the target of a federal bribery probe, and he surmised that the district attorney’s office that was prosecuting him was playing a role in that investigation. Rippo moved for the judge’s disqualification under the Due Process Clause of the Fourteenth Amendment, contending that a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him. But the trial judge declined to recuse himself, and (after that judge’s indictment on federal charges) a different judge later denied Rippo’s motion for a new trial. The Nevada Supreme Court affirmed on direct appeal, reasoning in part that Rippo had not introduced evidence that state authorities were involved in the federal investigation. In a later application for state postconviction relief, Rippo advanced his bias claim once more, this time pointing to documents from the judge’s criminal trial indicating that the district attorney’s office had participated in the investigation of the trial judge. The state postconviction court denied relief, and the Nevada Supreme Court affirmed. It likened Rippo’s claim to the “camouflaging bias” theory that this Court discussed in *Bracy v. Gramley*, 520 U. S. 899 (1997). The *Bracy* petitioner argued

that a judge who accepts bribes to rule in favor of some defendants would seek to disguise that favorable treatment by ruling against defendants who did not bribe him. In *Bracy*, the U.S. Supreme Court explained that despite the “speculative” nature of that theory, the petitioner was entitled to discovery because he had also alleged specific facts suggesting that the judge may have colluded with defense counsel to rush the petitioner’s case to trial. The Nevada Supreme Court reasoned that, in contrast, Rippo was not entitled to discovery or an evidentiary hearing because his allegations “d[id] not support the assertion that the trial judge was actually biased in this case. In a unanimous per curiam decision the Supreme Court vacated the Nevada Supreme Court’s judgment because it applied the wrong legal standard. “Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge ‘ha[s] no actual bias.’ ‘*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). Recusal is required when, objectively speaking, ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); see *Williams v. Pennsylvania*, 579 U.S. ___, ___ (2016) (slip op., at 6) (“The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias’ (internal quotation marks omitted)). Our decision in *Bracy* is not to the contrary: Although we explained that the petitioner there had pointed to facts suggesting actual, subjective bias, we did not hold that a litigant must show as a matter of course that a judge was ‘actually biased in[the litigant’s] case,’ 132 Nev., at ___, 368 P. 3d, at 744—much less that he must do so when, as here, he does not allege a theory of ‘camouflaging bias.’”

II. SEARCH & SEIZURE

- A. **Civil Suit for Fourth Amendment Violation.** *Manuel v. City of Joliet, Ill.*, 137 S. Ct. ___ (Mar. 21, 2017). Police searched Manuel during a traffic stop, finding a vitamin bottle containing pills. Suspecting the pills to be illegal drugs, the officers conducted a field test, which came back negative for any controlled substance. Still, they arrested Manuel and took him to the police station. There, an evidence technician tested the pills and got the same negative result, but claimed in his report that one of the pills tested “positive for the probable presence of ecstasy.” An arresting officer also reported that, based on his “training and experience,” he “knew the pills to be ecstasy.” On the basis of those false statements, another officer filed a sworn complaint charging Manuel with unlawful possession of a controlled substance. Relying exclusively on that complaint, a county

court judge found probable cause to detain Manuel pending trial. Manuel was held in jail for seven weeks after the judge relied on the allegedly fabricated evidence to find probable cause that he had committed a crime. Can Manuel bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement? In a 6-2 decision authored by Justice Kagan, the Court held that he may: “Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes ‘the standards and procedures’ governing pretrial detention. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). And those constitutional protections apply even after the start of ‘legal process’ in a criminal case—here, that is, after the judge’s determination of probable cause. *See Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion); *id.*, at 290 (Souter, J., concurring in judgment). Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim’s timeliness, to the court below).” Justice Alito dissented with Justice Thomas joining. The dissent contends the majority failed to answer the question presented and should have decided the case differently: “[T]he Court’s approach ... entirely ignores the question that we agreed to decide, *i.e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim. If a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause.”

- B. **Motor Vehicles: Criminalizing Refusal to Submit to Warrantless Alcohol Tests.** *Birchfield v. North Dakota*, 136 S. Ct. 2160 (June 23, 2016). North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person’s blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. A consolidated case addressed a Minnesota law making it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person’s blood, breath, or urine to detect the presence of alcohol. Although the State acknowledged that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a “search incident to arrest.” From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The U.S. Supreme Court consolidated the cases of

three separate defendants and its decision yielded three results. The Supreme Court reversed and remanded one North Dakota decision (*Birchfield*), affirmed the Minnesota conviction (*Bernard*), but vacated and remanded the other North Dakota case (*Beylund*). In an opinion by Justice Alito, the Court held (5-3) that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. A breath test is not very intrusive or embarrassing. Blood tests, though, require piercing the skin and extracting part of the defendant's body. It also gives law enforcement a sample from which they can extract more than BAC, potentially causing anxiety for the tested person. The Court's decision balanced the government's interest in preserving highway safety through incentives for cooperation in taking breath tests, against the impact of those tests on personal privacy. The balance favors the state because the impact of breath tests on personal privacy is slight and the need for BAC testing is great. Thus, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, the driver has no right to refuse, and the government can impose criminal penalties for such refusal. However, this same balance does not apply to blood tests because blood tests are more intrusive. A defendant's refusal to submit to a warrantless blood draw cannot be justified as a search incident to arrest or as based on implied consent. The Court concluded: (1) *Birchfield*, who refused the blood draw, was threatened with an unlawful search and unlawfully convicted for refusing that search; (2) *Bernard* could be criminally prosecuted for refusing a breath test because he had no right to refuse; (3) *Beylund*, who submitted to a blood draw after being told state law required him to submit, had his case remanded to the North Dakota Supreme Court to revisit its conclusion that his consent was voluntary in light of the partial inaccuracy of the officer's advisory. Justice Sotomayor (Ginsburg joined) concurred in part and dissented in part, and Justice Thomas dissented in a separate opinion.

- C. **Search Following Unlawful Stop.** *Utah v. Strieff*, 136 S. Ct. 2056 (June 20, 2016). Police were surveilling a home based upon an anonymous tip of drug dealing. *Strieff* was seen leaving the home and stopped by police for questioning. During the stop it was learned that there was an outstanding warrant for his arrest. In a search incident to arrest on the warrant, police found *Strieff* in possession of meth, a glass pipe, and a mall scale with residue. The Utah Supreme Court determined that the initial stop was unlawful and suppressed the evidence found during the arrest on the pre-existing warrant. The U.S. Supreme Court reversed (5-3) in an opinion by Justice Thomas, which found that the outstanding warrant attenuated the unconstitutional stop such that the exclusionary rule does not apply: "To enforce the

Fourth Amendment’s prohibition against ‘unreasonable searches and seizures,’ this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer’s discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.” Justice Sotomayor (joined by Ginsburg) filed an unusually strong dissent: “The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer’s violation of your Fourth Amendment rights. Do not be soothed by the opinion’s technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.” The dissent was particularly troubled by the prevalence of outstanding warrants for all sorts of minor violations, and it relied in part on Justice Sotomayor’s own real world experience. Justice Kagan (joined by Ginsburg) filed a separate dissent: “If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.”

III. RIGHT TO COUNSEL

- A. **Right to Use Untainted Funds for Legal Fees.** *Luis v. United States*, 136 S. Ct. 1083 (Mar. 30, 2016). Luis is an indicted defendant in a federal criminal case, charged with health care fraud offenses. She wished to retain private counsel to defend her in that criminal case.

The government estimated a criminal trial lasting 15 days. In this related, contemporaneous civil action brought by the government under 18 U.S.C. § 1345, a federal district judge entered a preliminary injunction prohibiting her from spending any of her own money, including undisputedly untainted funds that she needed to retain counsel in the criminal case. The federal judge in the civil case rejected her argument that the Constitution prohibits the pretrial restraint of untainted assets needed to pay counsel of choice, finding that “there is no Sixth Amendment right to use untainted, substitute assets to hire counsel.” The Eleventh Circuit affirmed, concluding that the Supreme Court’s jurisprudence addressing the pretrial restraint and forfeiture of tainted assets – *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989) – foreclosed a constitutional challenge to the restraint of untainted assets. The Supreme Court vacated the lower court order (5-3) in a plurality decision authored by Justice Breyer: “A federal statute provides that a court may freeze before trial certain assets belonging to a criminal defendant accused of violations of federal health care or banking laws. See 18 U.S.C. §1345. Those assets include: (1) property ‘obtained as a result of the crime, (2) property ‘traceable’ to the crime, and (3) other ‘property of equivalent value.’ §1345(a)(2). In this case, the government has obtained a court order that freezes assets belonging to the third category of property, namely, property that is untainted by the crime, and that belongs fully to the defendant. That order, the defendant says, prevents her from paying her lawyer. She claims that insofar as it does so, it violates her Sixth Amendment ‘right ... to have the Assistance of Counsel for [her] defence.’ We agree.” The plurality of four justices (including C.J. Roberts, and Justices Ginsburg and Sotomayor) used a balancing approach to arrive at its decision: “The constitutional right taken together with the nature of the assets lead to this conclusion.” Justice Thomas’s concurrence provided the deciding fifth vote: “I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant’s Sixth Amendment right to counsel of choice. But I do not agree with the plurality’s balancing approach. Rather, my reasoning rests strictly on the Sixth Amendment’s text and common-law backdrop.” His concurrence is laden with references to Justice Scalia and his originalist thinking. Justice Kennedy dissented, with Alito joining. Justice Kagan dissented separately because, although she is troubled by *Monsanto*, its continuing vitality was not before the court in this case. Moreover, “... given that money is fungible, the plurality’s approach leads to utterly arbitrary distinctions as among criminal defendants who are in fact guilty.... The thief who immediately dissipates his ill-gotten gains and

thereby preserves his other assets is no more deserving of chosen counsel than the one who spends those two pots of money in reverse order. Yet the plurality would enable only the first defendant, and not the second, to hire the lawyer he wants. I cannot believe the Sixth Amendment draws that irrational line, much as I sympathize with the plurality's effort to cabin *Monsanto*, I would affirm the judgment below."

- B. **Uncounseled Tribal Court Predicate Convictions.** *United States v. Bryant*, 136 S. Ct. 1954 (June 13, 2016). Title 18 U.S.C. § 117(a) makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic violence offenses. The Ninth Circuit in this case—over the dissent of eight judges from the denial of rehearing en banc—held that 18 U.S.C. § 117(a) is unconstitutional as applied to recidivist domestic-violence offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. The government sought cert, which was granted, to decide whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution. The Supreme Court reversed in a unanimous opinion by Justice Ginsburg. The Court pointed first to historical precedent holding that because tribes are separate sovereigns, there is no Sixth Amendment right to counsel in tribal courts. Congress, through the Indian Civil Rights Act, has accorded procedural protections similar to, but not coextensive with, those contained in the Bill of Rights. Only if the tribal court imposes a sentence in excess of one year must the tribe provide appointed counsel to indigent defendants. In *Bryant's* case, because his prior tribal convictions for domestic violence resulted in sentences of less than one year, he had no right to counsel under the ICRA. Thus, his prior uncounseled convictions were valid when entered because they comported with the ICRA (and there is no Sixth Amendment right to counsel). As such, these convictions are unlike prior convictions that were invalid because obtained in violation of the Sixth Amendment right to counsel, which the Court held in *Burgett v. Texas* and *United States v. Tucker*, may not be relied on to impose a longer term of imprisonment for a subsequent conviction. Because *Bryant's* convictions were valid when entered, the Court held, they may be used to establish a prior domestic violence conviction for purposes of 117(a). The ICRA also requires tribes to ensure "due process of law," but the Court rejected that approach, holding that proceedings in compliance with the ICRA "sufficiently ensure the reliability of tribal-court convictions," and that "the use of those

convictions in a federal prosecution does not violate a defendant's right to due process.” Justice Thomas concurred in the opinion, given the Court’s precedents, but wrote separately to suggest that *Burgett* was wrongly decided and (apparently) that the Sixth Amendment is not implicated when an uncounseled prior conviction is used to enhance a sentence, even if invalid when entered. He also urged the Court to reconsider its precedents regarding tribal sovereignty and Congress’ purported plenary power over Indian affairs.

IV. DOUBLE JEOPARDY AND DUAL SOVEREIGNS

A. **Dual Prosecutions in Puerto Rico.** *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (June 9, 2016). In a fractured opinion written by Justice Kagan (6-2, with two concurring opinions), a majority of the Court held that dual prosecutions by Puerto Rico and the U.S. government constitute double jeopardy: “The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the ‘same offence.’ But under what is known as the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns. To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question. The inquiry does not turn, as the term ‘sovereignty’ sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course. Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same ‘ultimate source.’ *United States v. Wheeler*, 435 U.S. 313, 320 (1978). In this case, we must decide if, under that test, Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct. We hold they may not, because the oldest roots of Puerto Rico’s power to prosecute lie in federal soil.” Justice Ginsburg (joined by Thomas) filed a concurring opinion and Justice Thomas filed his own opinion, concurring in part, and concurring in the judgment. Justice Breyer (joined by Sotomayor) dissented.

B. **Double Jeopardy Following Successful Appeal.** *Bravo-Fernandez v. United States*, 137 S. Ct. 352 (Nov. 29, 2016). This case concerns the issue-preclusion component of the Double Jeopardy Clause, which has been set forth generally in three prior decisions of the Supreme Court. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the defendant’s favor by an earlier acquittal. In *United States v. Powell*,

469 U.S. 57 (1984), the Court held that, in a single trial, the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if the conviction is logically inconsistent with the acquittal. And in *Yeager v. United States*, 557 U.S. 110 (2009), the Court held that when a jury acquits on one count and hangs on another, the acquittal retains preclusive effect under *Ashe* and prevents retrial of the hung count—even if the acquittal was logically inconsistent with the hung count. The defendants here were charged with conspiring and traveling to violate 18 U.S.C. § 666, in an alleged program bribery based on a single weekend trip to see a boxing match in Las Vegas. The jury acquitted them of conspiracy, but convicted them of violating § 666. The convictions were vacated on appeal because they rested on incorrect jury instructions, and it is undisputed that the acquittals depended on the jury's finding that petitioners did not violate § 666. The government nonetheless sought to retry petitioners on the § 666 charges. The Supreme Court granted review to decide, "Whether, under *Ashe* and *Yeager*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause." In a unanimous opinion written by Justice Ginsburg (with Justice Thomas concurring) the Court held that the Double Jeopardy Clause does not bar the government from retrying defendants after a "jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated for legal error unrelated to the inconsistency." The Court's opinion explains: "In criminal prosecutions, as in civil litigation, the issue-preclusion principle means that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). *see Green v. United States*, 355 U.S. 184, 188 (1957), but because the verdicts are rationally irreconcilable, the acquittal gains no preclusive effect, *United States v. Powell*, 469 U.S. 57, 68 (1984). Does issue preclusion attend a jury's acquittal verdict if the same jury in the same proceeding fails to reach a verdict on a different count turning on the same critical issue? We have answered yes, in those circumstances, the acquittal has preclusive force. *Yeager v. United States*, 557 U.S. 110, 121–122 (2009). As 'there is no way to decipher what a hung count represents,' the Court had reasoned, a jury's failure to decide 'has no place in the issue-preclusion analysis.' ('[T]he fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything.'). 'In the case before us, the jury returned irreconcilably inconsistent verdicts of conviction and acquittal. Without more, *Powell* would control. There could be no retrial of charges that yielded acquittals but, in view of the inconsistent verdicts, the

acquittals would have no issue preclusive effect on charges that yielded convictions. In this case, however, unlike *Powell*, the guilty verdicts were vacated on appeal because of error in the judge’s instructions unrelated to the verdicts’ inconsistency. Petitioners urge that, just as a jury’s failure to decide has no place in issue-preclusion analysis, so vacated guilty verdicts should not figure in that analysis. We hold otherwise. One cannot know from the jury’s report why it returned no verdict. ‘A host of reasons’ could account for a jury’s failure to decide—‘sharp disagreement, confusion about the issues, exhaustion after along trial, to name but a few.’ *Yeager*, 557 U.S., at 121. But actual inconsistency in a jury’s verdicts is a reality; vacatur of a conviction for unrelated legal error does not reconcile the jury’s inconsistent returns.” Justice Thomas’ concurrence contends that the doctrine of issue preclusion under the Double Jeopardy clause is wrong and the Court should revisit *Ashe* and *Yeager*.

V. CRIMES

A. **International Jurisdiction Over Crimes.** *Baston v. United States*, 137 S. Ct. ___ (cert. denied Mar. 6, 2017) (Thomas, J., dissenting from denial of certiorari). In connection with a U.S. prosecution for sex trafficking, Baston (a non-U.S. citizen) was ordered to pay restitution to a prostitute who prostituted for him in Australia. Baston petitioned for cert. Although the full court denied certiorari, Justice Thomas dissented, laying out a blueprint for making such a challenge anew, when perhaps three other justices will be prepared to grant cert. (in a more sympathetic case). Justice Thomas’ dissent begins: “The Constitution, through the Foreign Commerce Clause, grants Congress authority to “regulate Commerce with foreign Nations.” Art. I, §8, cl. 3. Without guidance from this Court as to the proper scope of Congress’ power under this Clause, the courts of appeals have construed it expansively, to permit Congress to regulate economic activity abroad if it has a substantial effect on this Nation’s foreign commerce. In this case, the Court of Appeals declared constitutional a restitution award against a non-U.S. citizen based upon conduct that occurred in Australia. The facts are not sympathetic, but the principle involved is fundamental. We should grant certiorari and reaffirm that our Federal Government is one of limited and enumerated powers, not the world’s lawgiver. *** We should grant certiorari in this case to consider the proper scope of Congress’ Foreign Commerce Clause power.” The dissent lays out the substance of the argument against such jurisdiction, concluding: Taken to the limits of its logic, the consequences of the Court of Appeals’ reasoning are startling. The Foreign Commerce Clause would permit Congress to regulate any economic activity anywhere in the world, so long as Congress had a

rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other. Congress would be able not only to criminalize prostitution in Australia, but also to regulate working conditions in factories in China, pollution from power-plants in India, or agricultural methods on farms in France. I am confident that whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity. [Disclosure: The Office of the Federal Public Defender for the Southern District of Florida served as counsel for Mr. Baston].

- B. **Proof of Insider Trading.** *Salman v. United States*, 137 S. Ct. 420 (Dec. 6, 2016). Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission’s Rule 10b–5 prohibits, under criminal penalty, undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage. These persons also may not tip inside information to others for trading. The tippee acquires the tipper’s duty to disclose or abstain from trading if the tippee knows the information was disclosed in breach of the tipper’s duty, and the tippee may commit securities fraud by trading in disregard of that knowledge. In *Dirks v. SEC*, 463 U.S. 646 (1983), the Supreme Court explained that a tippee’s liability for trading on inside information hinges on whether the tipper breached a fiduciary duty by disclosing the information. A tipper breaches such a fiduciary duty when the tipper discloses the inside information for a personal benefit. A jury can infer a personal benefit—and thus a breach of the tipper’s duty—where the tipper receives something of value in exchange for the tip or “makes a gift of confidential information to a trading relative or friend.” *Salman* challenged his convictions for conspiracy and insider trading. *Salman* received lucrative trading tips from an extended family member, who had received the information from *Salman*’s brother-in-law. *Salman* then traded on the information. He argued that he cannot be held liable as a tippee because the tipper (his brother-in-law) did not personally receive money or property in exchange for the tips and thus did not personally benefit from them. The Court of Appeals disagreed, holding that *Dirks* allowed the jury to infer that the tipper here breached a duty because he made a “gift of confidential information to a trading relative.” The Supreme Court affirmed in a unanimous decision authored by Justice Alito, holding that the Court of Appeals properly applied *Dirks*. The jury could infer that the tipper here personally benefited from making a gift of confidential information to a trading relative: “Maher, the tipper, provided inside information to a close relative, his brother Michael. *Dirks* makes clear that a tipper

breaches a fiduciary duty by making a gift of confidential information to ‘a trading relative,’ and that rule is sufficient to resolve the case at hand.” Additionally, the Court rejected the argument that the gift-giving standard is too vague as applied in this case and should fail under the rule of lenity—yet it left open the possibility that lenity might be applicable in a different case with a different benefit. “We also reject Salman’s appeal to the rule of lenity, as he has shown ‘no grievous ambiguity or uncertainty that would trigger the rule’s application.’ *Barber v. Thomas*, 560 U.S. 474, 492 (2010). To the contrary, Salman’s conduct is in the heartland of *Dirks*’s rule concerning gifts. It remains the case that ‘[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts.’ But there is no need for us to address those difficult cases today, because this case involves ‘precisely the “gift of confidential information to a trading relative” that *Dirks* envisioned.”

- C. **ACCA Elements Under Enumerated Clause: Impermissible Use of Modified Categorical Approach.** *Mathis v. United States*, 136 S. Ct. 2243 (June 23, 2016). Mathis pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pre-*Johnson*, the district court found that Mathis’s five burglary convictions in Iowa were violent felonies and justified sentencing under the ACCA. The court found that the Iowa burglary statutes in question, Iowa Code §§ 713.1 and 713.5, were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Under *Descamps*, the trial court believed it could use the modified categorical approach to determine the particular elements of the specific burglary provision under which Mathis was convicted. Additionally—in a ruling that cannot survive *Johnson*—the trial court found that the burglaries were violent felonies under the ACCA’s residual clause because they were substantially similar to generic burglary and posed the same risk of harm to others. Finally, the court found Mathis’s prior conviction in Iowa for interference with official acts inflicting serious injury was also a violent felony for ACCA purposes. As a result of the ACCA enhancement, Mathis was sentenced to the mandatory minimum of 180 months’ imprisonment with five years of supervised release. On appeal, Mathis argued that the district court erred by finding that the Iowa burglary statute was divisible and by applying the modified categorical approach to determine the nature of his convictions. This error, Mathis argued, led the district court to erroneously conclude that his five previous burglary convictions were violent felonies for ACCA purposes. Still pre-*Johnson*, the court of appeals affirmed under 18 U.S.C. § 924(e)(1)(ii) (enumerating burglary), even though the Iowa burglary statute is not generic. In the

court's view, the non-generic statute is, however, divisible, which allows a court to utilize the modified categorical approach (using certain documents, such as the charging papers and jury instructions) to determine if the prior convictions are violent felonies. Relying on a jury instruction of a related statute that defined "occupied structure," and the underlying charging documents in Mathis's burglary cases, the court of appeals found that his convictions conformed to generic burglary. Mathis argued that the statute was not divisible because it does not provide alternative elements, but rather alternative means of committing the crime. The Supreme Court reversed (5-3), in an opinion written by Justice Kagan, reaffirming the Court's emphasis on the categorical approach. When a statute defines only one crime, with one set of elements, but which lists alternative means by which a defendant can satisfy those elements, and those means are broader than a qualifying offense, a sentencing court cannot explore the means to determine whether a defendant's conduct qualifies as a prior violent offense for purposes of ACCA. Specifically, Iowa's burglary law was broader than generic burglary because "structures" and "vehicles" were alternative means of fulfilling a single element, and it didn't matter that the defendant's prior offense conduct involved burglarizing a structure. The Court held that the sentencing court is prohibited from using the modified categorical approach when it is "clear" according to "authoritative sources of state law" that each of the alternative terms listed in the relevant statute (in this case, "building, structure, [or] land, water or air vehicle") set forth alternative means and not elements. Because authoritative Iowa law makes clear that the jury need not agree on whether the burgled location was a building, structure, boat or other vehicle in order to convict, the question in Richard Mathis's case was "easy" and his prior conviction for Iowa burglary cannot qualify as a "violent felony." The Court also discussed the types of authoritative law to which a court may make reference under this analysis. As sources of authoritative state law, the majority in *Mathis* pointed to a state supreme court decision expressly holding that the jury need not agree on the means of commission. The majority also offered that in some cases the statute itself may provide the answer, either by assigning different punishments tied to alternative terms (thus making them elements under *Apprendi*) or by itself identifying which facts must be charged or are merely means of committing the offense. "[I]f state law fails to provide clear answers," the sentencing judge can at that point "peek" at "the record of a prior conviction itself" to see if the charging document, plea colloquies, plea agreements, or jury instructions reveal that the term is an element or means. In other words, how the prosecutor chose to charge the offense in a particular case may be considered authority for what the

prosecutor must charge by law in order to prevail. But even the majority admits that this “sneak peek” may not always make the answer plain, in which case the defendant must prevail due to lack of clarity. Justice Breyer (Ginsburg joining) dissented, as did Justice Alito in a separate opinion.

- D. **Hobbs Act: Conspiracy to Commit Extortion.** *Ocasio v. United States*, 136 S. Ct. 1423 (May 2, 2016). The Hobbs Act defines extortion, in relevant part, as “the obtaining of property from another, with his consent, ... under color of official right.” 18 U.S.C. § 1951(b)(2). The Supreme Court has previously held that a public official violates that statute when he “obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts.” *Evans v. United States*, 504 U.S. 255, 268 (1992). A jury found Ocasio, a former Baltimore Police officer, guilty of four offenses relating to his involvement in a kickback scheme to funnel wrecked automobiles to a Baltimore auto repair shop in exchange for cash kickbacks. The trial evidence established a wide-ranging kickback scheme involving the Majestic Repair Shop and Baltimore Police officers who referred accident victims to Majestic for body work in exchange for kickbacks of \$150-\$300 per vehicle. Ocasio was convicted on three Hobbs Act extortion counts plus a charge of conspiracy to commit such extortion. On appeal, he maintained that his conspiracy conviction is fatally flawed because the kickbacks were from one co-conspirator to another. The Fourth Circuit affirmed. The Supreme Court granted cert., and also affirmed (5-3), holding that Ocasio’s argument is contrary to “age old conspiracy law.” In an opinion by Justice Alito, the majority held that the person extorting can conspire with the persons extorted to violate the Hobbs Act, with proof that the owner of the property agreed to give it over under color of official right. Justice Breyer concurred, explaining he was bound by the prior precedent of *Evans*—he did not believe that its continuing vitality was included in the question presented or briefed. Justice Thomas dissented, as did Justice Kagan, joined by Chief Justice Roberts. Of interest, cert. was granted and oral argument occurred before Justice Scalia’s death. During that oral argument, held during the first week of October, Justice Scalia revealed dissatisfaction with the holding of *Evans*. Although cases argued in October are ordinarily decided long before May, this case was not decided for seven months, inferring the case may have originally been decided differently, perhaps with a head-on challenge to the continuing vitality of *Evans*. Justice Thomas’ dissent seems as though it may have been such an opinion: “Today the Court holds that an extortionist can conspire to commit extortion with the person whom he is extorting. *See ante*, at 18. This holding further exposes the flaw in this Court’s understanding of extortion. In my view, the Court started

down the wrong path in *Evans v. United States*, 504 U. S. 255 (1992), which wrongly equated extortion with bribery. In so holding, Evans made it seem plausible that an extortionist could conspire with his victim. Rather than embrace that view, I would not extend *Evans*' errors further." Assuming Justice Scalia embraced that view—as he intimated during oral argument—Justice Breyer may well have been persuaded that the issue was ripe and joined in this view, forming an entirely different outcome to the case. Since Justice Breyer's concurrence recognizes the strength of the dissent, it is conceivable that a subsequent case that clearly presents the *Evans* case for reconsideration will lead to a different result.

- E. **Requisite Proof of Bank Fraud.** *Shaw v. United States*, 137 S. Ct. 462 (Dec. 12, 2016). The bank fraud statute, 18 U.S.C. §1344(1), makes it a crime to knowingly execute a scheme ... to defraud a financial institution, such as a federally insured bank. Shaw was convicted of violating this provision. He argued that the provision does not apply to him because he intended to cheat only a bank depositor, not a bank. It was undisputed that Shaw schemed to steal a bank customer's money from the customer's bank account by deceiving the bank, BUT Shaw did not intend to steal the bank's money. Shaw argued that a conviction for bank fraud under 18 U.S.C. § 1344(1) required proof both that he deceived the bank AND intended to cheat the bank. The Supreme Court rejected his argument in a unanimous decision authored by Justice Breyer. As to the primary argument, the Court held: "The basic flaw in this argument lies in the fact that the bank, too, had property rights in [the depositor's] bank account. When a customer deposits funds, the bank ordinarily becomes the owner of the funds and consequently has the right to use the funds as a source of loans that help the bank earn profits (though the customer retains the right, for example, to withdraw funds). 5A Michie, Banks and Banking, ch. 9, §1, pp. 1–7 (2014) (Michie); *id.*, §4b, at 54-58; *id.*, §38, at 162; *Phoenix Bank v. Risley*, 111 U. S. 125, 127 (1884). Sometimes, the contract between the customer and the bank provides that the customer retains ownership of the funds and the bank merely assumes possession. Michie, ch. 9, §38, at 162; *Phoenix Bank, supra*, at 127. But even then the bank is like a bailee, say, a garage that stores a customer's car. Michie, ch. 9, §38, at 162. And as bailee, the bank can assert the right to possess the deposited funds against all the world but for the bailor (or, say, the bailor's authorized agent). 8A Am. Jur. 2d, Bailment §166, pp. 685-686 (2009). This right, too, is a property right. 2 W. Blackstone, Commentaries on the Laws of England 452-454 (1766) (referring to a bailee's right in a bailment as a 'special qualified property'). Thus, Shaw's scheme to cheat [the depositor] was also a scheme to deprive the bank of certain bank property rights." The Court

also rejected a series of alternative arguments, including the rule of lenity. The Court of Appeals' decision was vacated, however, to address Shaw's claim in the Supreme Court that the jury instruction given at his trial was ambiguous or improper; the court of appeals was directed to consider (1) if that issue had been fairly presented to it on appeal; (2) if the instruction was lawful; and, if not, (3) if any error was harmless.

- F. **Hobbs Act Robbery.** *Taylor v. United States*, 136 S. Ct. 2074 (June 20, 2016). Taylor was a member of a local gang that ripped off drug dealers, believing they would not report the robberies. He was nevertheless charged with Hobbs Act robbery in federal court. He contended that the government did not prove the drugs were in interstate commerce and he sought to introduce defense evidence that the objects of the robberies were not in interstate commerce. The district court refused his defense evidence and found that illicit drugs are inherently in interstate commerce. The Supreme Court affirmed (7-1) in an opinion authored by Justice Alito. "The Hobbs Act makes it a crime for a person to affect commerce, or to attempt to do so, by robbery. 18 U.S.C. §1951(a). The Act defines 'commerce' broadly as interstate commerce 'and all other commerce over which the United States has jurisdiction.' §1951(b)(3). This case requires us to decide what the Government must prove to satisfy the Hobbs Act's commerce element when a defendant commits a robbery that targets a marijuana dealer's drugs or drug proceeds. The answer to this question is straightforward and dictated by our precedent. We held in *Gonzales v. Raich*, 545 U.S. 1 (2005), that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug theft. And since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce 'over which the United States has jurisdiction,' §1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction. In this case, petitioner Anthony Taylor was convicted on two Hobbs Act counts based on proof that he attempted to rob marijuana dealers of their drugs and drug money. We hold that this evidence was sufficient to satisfy the Act's commerce element." Justice Thomas dissented, contending: "The Court's holding creates serious constitutional problems and extends our already expansive, flawed commerce-power precedents. I would construe the Hobbs Act in

accordance with constitutional limits and hold that the Act punishes a robbery only when the Government proves that the robbery itself affected interstate commerce.”

- G. **Federal Bribery, Hobbs Act and Honest Services Fraud.** *McDonnell v. United States*, 136 S. Ct. 2355 (June 27, 2016). Robert McDonnell, a former Virginia governor, and his wife, Maureen, were convicted on federal corruption charges based on a theory that he accepted otherwise-lawful gifts and loans in exchange for taking five supposedly “official acts.” Specifically, they were indicted and convicted for honest services fraud and Hobbs Act extortion relating to their acceptance of \$175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office. Williams was the chief executive officer of Star Scientific, a Virginia-based company that had developed Anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped that Virginia’s public universities would perform research studies on anatabine, and Williams wanted Governor McDonnell’s assistance in obtaining those studies. To convict the McDonnells, the government was required to show that Governor McDonnell committed (or agreed to commit) an “official act” in exchange for the loans and gifts. An “official act” is defined as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. §201(a)(3). According to the government, Governor McDonnell committed at least five “official acts,” including “arranging meetings” for Williams with other Virginia officials to discuss Star Scientific’s product, “hosting” events for Star Scientific at the Governor’s Mansion, and “contacting other government officials” concerning the research studies. The McDonnells claimed, those five acts were limited to routine political courtesies: arranging meetings, asking questions, and attending events. It is undisputed that Governor McDonnell never exercised any governmental power on behalf of his benefactor, promised to do so, or pressured others to do so. Indeed, the only staffer to meet with the alleged bribe-payor during the supposed conspiracy testified that Governor McDonnell never “interfere[d]” with her office’s “decision-making process.” The courts below nonetheless reasoned that arranging a meeting to discuss a policy issue, or inquiring about it, is itself “official” action “on” that issue—even if the official never directs any substantive decision. Moreover, the jury was never instructed that, to convict, it needed to find that Governor McDonnell exercised (or pressured others to exercise) any governmental power. But the panel upheld the instructions as “adequat[e]” because they quoted a statute,

while adding a host of improper elaborations that the Government aggressively exploited. The Supreme Court reversed in a unanimous decision authored by Chief Justice Roberts, which substantially limited the meaning of “official acts” in §201(a)(3): “According to the Government, ‘Congress used intentionally broad language’ in § 201(a)(3) to embrace ‘any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity.’ ... The Government concludes that the term ‘official act’ therefore encompasses nearly any activity by a public official. In the Government’s view, ‘official act’ specifically includes arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject, including a broad policy issue such as Virginia economic development. ... Governor McDonnell, in contrast, contends that statutory context compels a more circumscribed reading, limiting ‘official acts’ to those acts that ‘direct[] a particular resolution of a specific governmental decision,’ or that pressure another official to do so. ... He also claims that ‘vague corruption laws’ such as § 201 implicate serious constitutional concerns, militating ‘in favor of a narrow, cautious reading of these criminal statutes.’ ... Taking into account the text of the statute, the precedent of this Court, and the constitutional concerns raised by Governor McDonnell, we reject the Government’s reading of § 201(a)(3) and adopt a more bounded interpretation of ‘official act.’ Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an ‘official act.’”

- H. **SORNA: International Registration.** *Nichols v. United States*, 136 S. Ct. 1113 (Apr. 4, 2016). Title 42 U.S.C. § 16913(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided. Two men lived on opposite sides of the Missouri River in the Kansas City Metropolitan area, one in Missouri within the Eighth Circuit, the other in Kansas within the Tenth Circuit. Both men were convicted of sex offenses before the enactment of the Sex Offender Registration and Notification Act (“SORNA”), but were required to register under SORNA. Both men traveled from their homes to the Kansas City International Airport, flew to the same foreign country—the Philippines—to reside, and thereafter did not update their registrations in the jurisdictions they had left. On these facts, the Eighth Circuit ruled in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), that the failure to update a registration does not violate SORNA. The Tenth Circuit came to the opposite conclusion in Nichols’ case. The Supreme Court reversed Nichols’ conviction in a unanimous decision authored by Justice Alito. The decision reasons that “[a] person who moves from Leavenworth to

Manila no longer ‘resides’ (present tense) in Kansas,” thus SORNA “did not require Nichols to update his registration in Kansas once he no longer resided there.”

- I. **Reckless Misdemeanor as Crime of Domestic Violence Under 922(g)(9).** *Voisine v. United States*, 136 S. Ct. 2272 (June 27, 2016). Two defendants, Armstrong and Voisine, were convicted of misdemeanor assault crimes of domestic violence in violation of Maine state law. Both were subsequently charged with possession of a firearm or ammunition by a prohibited person in violation of 18 U.S.C. § 922(g)(9). Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution. The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court’s decision. The defendants argued that a misdemeanor assault on the basis of offensive physical contact, as opposed to one causing bodily injury, is not a “use of physical force,” and, concordantly, not a “misdemeanor crime of domestic violence.” They also made a Second Amendment challenge. The First Circuit consolidated their cases and affirmed. The defendants petitioned for certiorari in 2014 (cert. I), which the Supreme Court granted, vacating the court of appeals’ decision, and remanding for reconsideration in light of *United States v. Castleman*, 134 S. Ct. 1405 (2014). *Castleman* held that “Congress incorporated the common-law meaning of ‘force’—namely, offensive touching—in § 921(a)(33)(A)’s definition of a ‘misdemeanor crime of domestic violence.’” Thus, the “physical force” in § 921(a)(33)(A) required violence or could be satisfied by offensive touching. *Castleman* left open whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate. On remand, the First Circuit again affirmed, basing its decision on a categorical approach to the statute. Again, the defendants petitioned for cert, in 2015 (cert. II), which the Supreme Court granted, to answer the question left open in *Castleman*. In a 6-2 decision authored by Justice Kagan, the Court held that for purposes of determining whether a prior conviction qualifies as a “misdemeanor crime of domestic violence” under 18 U.S.C. § 922(g)(9), the phrase “use ... of physical force” in § 921(a)(33)(A) includes acts of force undertaken recklessly, “i.e., with conscious disregard of a substantial risk of harm.” In footnote 4, however, the Court was careful to point out that its interpretation of “use of force” in this context “does not resolve” whether reckless behavior is encompassed by 18 U.S.C. § 16, and that courts of appeals have “usually read the same term in § 16 to reach only ‘violent force,’” i.e., intentional force. The Court’s more expansive reading of § 921(a)(33)(A) “do[es] not foreclose the possibility” that § 16 excludes reckless conduct “in light of differences in their contexts and

purposes.” Justice Thomas (Sotomayor joining in part) dissented, discussing the concepts of “use,” transferred intent, and “volition” in the context of the hypothetical Angry Plate Thrower, the Door Slammer, the Text-Messaging Dad, the Reckless Policeman, the Soapy-Handed Husband, and the Chivalrous Door Holder. The dissenters would hold that the “use of physical force” in § 921(a)(33)(A) is narrower than most state assault statutes. Justice Thomas separately expresses concerns about the permanent deprivation of the Text-Messaging Dad’s right to bear arms, should he be prosecuted for recklessly causing injury to a family member by getting into a car accident.

VI. TRIAL AND PLEA

A. Jurors

1. **Batson Jury Challenges.** *Foster v. Chatman*, 136 S. Ct. 1737 (May 23, 2016). In this capital case involving a black defendant and a white victim, Georgia struck all four black prospective jurors and provided roughly a dozen “race-neutral” reasons for each of the four strikes. The prosecutor later argued that the jury should impose a death sentence to “deter other people out there in the projects.” At the trial level and on direct appeal, Georgia’s courts denied the defendant’s claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). In habeas proceedings, the defendant obtained the prosecution’s notes from jury selection, which were previously withheld. The notes reflect that the prosecution (1) marked the name of each black prospective juror in green highlighter on four different copies of the jury list; (2) circled the word “BLACK” next to the “Race” question on the juror questionnaires of five black prospective jurors; (3) identified three black prospective jurors as “B#1,” “B#2,” and “B#3”; (4) ranked the black prospective jurors against each other in case “it comes down to having to pick one of the black jurors;” and (5) created strike lists that contradict the “race-neutral” explanation provided by the prosecution for its strike of one of the black prospective jurors. The Georgia courts again declined to find a *Batson* violation. The Supreme Court granted cert. and reversed (7-1) in an opinion authored by Chief Justice Roberts. The Court held that (1) the Supreme Court had jurisdiction to hear the claim as a federal question, even though it was unable to ascertain if Georgia’s unelaborated judgment might possibly have rested on an independent state ground; and (2) the Georgia decision that Foster failed to show purposeful discrimination was clearly

erroneous. To this end, the Court held that under *Batson*'s step 3 the challenged party must respond with race-neutral reasons but here the record belies much of the prosecution's reasoning as to two of its strikes, and undermined the justification given for a third juror. Justice Thomas dissented because the Court did not seek to clarify whether a federal question was involved.

2. **Post-Trial Inquiry of Juror Prejudice.** *Pena-Rodriguez v. Colorado*, 137 S. Ct. ___ (Mar. 6, 2017). A man entered a women's bathroom at a Denver horse-racing track and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him away. The man also grabbed the other girl's shoulder and buttocks. The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was another employee at the racetrack, who worked in the nearby horse barn. From that description, their father surmised they were referring to Mr. Pena-Rodriguez. At his criminal trial for unlawful sexual contact and harassment, a juror injected racial animus into the deliberations—urging, for example, that the jury convict petitioner "because he's Mexican and Mexican men take whatever they want," and that the jury disbelieve petitioner's alibi witness because the witness was Hispanic. The jury convicted the defendant after deliberating for 12 hours and being given an *Allen* charge. The jurors' comments were revealed to defense counsel by two other jurors in a post-trial informal discussion. After learning of these statements, Mr. Pena-Rodriguez sought a new trial, claiming a violation of his constitutional right to an impartial jury. But the Colorado Supreme Court held that the Sixth Amendment allows a "no impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict. In fact, most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law. The Supreme Court has ruled, in *Warger v. Shauers*, 135 S. Ct. 521 (2014), and *Tanner v. United States*, 483 U.S. 107 (1987), that the Sixth Amendment posed no barrier to ignoring affidavits alleging, respectively,

that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue and that jurors were intoxicated during trial; but it also cautioned that “[t]here may be cases of juror bias so extreme” that applying a no-impeachment rule would abridge a defendant’s right to an impartial jury. The Supreme Court granted cert. here to decide if a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury. In an opinion by Justice Kennedy, the Supreme Court held (5-3) that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee. Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.” **PRACTICE NOTE:** The Court cautioned that “[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel’s post-trial contact with jurors.” Justice Alito dissented, joined by Chief Justice Roberts and Justice Thomas.

- B. **Appellate Consequences of Guilty Plea.** *Class v. United States*, 137 S. Ct. ___ (cert. granted Feb. 21, 2017); decision below unreported (D.C. Cir. 2016). The defendant had firearms in his car, which was parked and locked in a parking lot on the grounds of the U.S. Capitol. He was charged with violation of 40 U.S.C. § 5104(e), which prohibits carrying on, or having readily accessible, a firearm on the grounds of the U.S. Capitol building. In defense, he raised Second Amendment and due process challenges, but he ultimately pled guilty, conceding his factual guilt. The plea agreement did not contain an express waiver of his right to appeal his conviction. On appeal, he re-raised his

constitutional challenges to the statute. The D.C. Circuit held that by pleading guilty, he waived all “claims of error on appeal, even constitutional claims.” The Supreme Court granted cert. to decide if “a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.” The question implicates two prior Supreme Court decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), the Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does not depend on challenging his “factual guilt.” In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime. In the years since those two cases were decided, the circuits have become deeply divided on whether a defendant’s challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt. Two circuits (First and Tenth) agree with the D.C. Circuit that a guilty plea waives constitutional challenges to the statute of conviction. Other circuits (Third, Fifth, Sixth, Ninth, and Eleventh) hold that a guilty plea does not inherently waive such constitutional challenges. Three others (Fourth, Seventh, and Eighth) allow facial, but not as-applied, constitutional challenges to a conviction.

- C. **Immigration Consequences of Guilty Plea.** *Lee v. United States*, 137 S. Ct. 614 (cert. granted Dec. 14, 2016); decision below at 825 F.3d 311 (6th Cir. 2016). In 1982, Jae Lee and his family moved from South Korea to the United States. After completing high school, Lee moved to Memphis and became a successful restaurateur. He also started using—and sharing—ecstasy at parties and was charged in 2009 with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1). Because the evidence against Mr. Lee was considered quite strong, his attorney advised him to plead guilty in exchange for a shorter sentence. The attorney assured Mr. Lee that the plea would not subject him to deportation, but that advice was wrong. Possession of ecstasy with intent to distribute is an aggravated felony that results in mandatory and permanent deportation. See 8 U.S.C. §§ 1101(a)(43)(B), 1227 (a)(2)(A)(iii); 1182(a)(9)(A)(i). Upon learning of this consequence, Lee moved to vacate his conviction and sentence under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The government concedes that his attorney provided deficient performance, the first part of the two-part test under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The question is whether Lee can demonstrate prejudice under the second part of *Strickland* where he is deemed to be

facing strong evidence of guilt. As the Sixth Circuit panel noted, there is a “growing circuit split” over the answer to that question. The Second, Fourth, Fifth, and Sixth Circuits all hold that a defendant in Lee’s position is not entitled to relief. The Third, Seventh, Ninth, and Eleventh Circuits have all “reached the opposite conclusion.” Following its prior circuit precedent, the panel held it lacked the authority “to change camps.” But the panel noted the incongruity of the result: “It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn’t lived in since childhood for committing a relatively small drug offense.” Question presented: “To establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show ‘a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, the question that has deeply divided the circuits is whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.”

VII. SENTENCING

- A. **Speedy Trial Right at Sentencing.** *Betterman v. Montana*, 136 S. Ct. 1609 (May 19, 2016). Betterman missed a court date on a domestic assault charge. He turned himself in and was sentenced to 5 years imprisonment on that charge. He was also charged with bail jumping, to which he pleaded guilty, but was not sentenced for over 14 months. In the interim, he was kept at a local jail, so he was denied early release and programs offered only in prison. He made repeated requests to be sentenced, but the trial judge refused to do so. When eventually sentenced on the bail jumping charge, he received an additional 7 years. On appeal, he argued he was denied a speedy trial as to sentencing, but the Montana courts ruled that the speedy trial right does not extend to sentencing. The Supreme Court granted cert. and affirmed, in an opinion written by Justice Ginsburg, which concluded: “the Sixth Amendment’s speedy trial guarantee ... does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.” “[B]etween conviction and sentencing, the Constitution’s presumption-of-innocence-protective speedy trial right is not engaged.” The Court left open the possibility that a defendant who suffers inordinate delay “may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments.” Because no due

process claim was raised with the Court in this case, the majority “express[ed] no opinion on how he might fare under that more pliable standard,” though a footnote indicated that relevant considerations for such a claim “may include the length of and reasons for the delay, the defendant's diligence in requesting expeditions sentencing, and prejudice.” The majority also “reserve[d] the question [of] whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined” as well as the question of “whether the right reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence.” Justice Sotomayor concurred separately to emphasize that the question of the standard to apply to a due process claim for delayed sentencing “is an open one.” But she suggested that the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) may be appropriate: the “factors capture many of the concerns posed in the sentencing delay context” and “because the test is flexible it will allow courts to take account of any differences between trial and sentencing delays.” Justices Thomas and Alito also concurred, but wrote separately to argue against “prejudg[ing]” whether the *Barker* factors are the correct test for a due process claim relating to a delayed sentencing.

- B. **Sentencing Variances in Counts Accompanying § 924(c) Convictions.** *Dean v. United States*, 137 S. Ct. 368 (cert. granted Oct. 28, 2016); decision below at 810 F.3d 521 (8th Cir. 2016). Dean and his brother were charged and convicted of various counts relating to two Hobbs Act robberies of different drug dealers, and possession of a firearm in furtherance of the robberies. Dean was sentenced to 400 months for the robberies and consecutive terms of 60 and 300 months for the § 924(c) violations. At sentencing, Dean requested a variance from the advisory guideline range on the counts that did not carry mandatory minimum or consecutive terms, but U.S. District Judge Mark Bennett declined to do so, stating that he had no authority to do so under Eighth Circuit precedent. He did state, however, that if he did have such authority he would have sentenced Dean to 360 months on the § 924(c) convictions, and a one-day sentence on the remaining convictions. The Eighth Circuit affirmed the 760-month sentence, holding that its decision in *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), controlled. The panel did not address Dean’s argument that the Court’s decision in *Pepper v. United States*, 562 U.S. 476 (2011), overruled *Hatcher*. *Pepper* held that 18 U.S.C. § 3661 states “no limitation” may be placed on a court’s power to consider information about a defendant’s “background, character, and conduct” when seeking to fashion an appropriate sentence. Dean argued that by failing to consider the sentences imposed on the § 924(c) charges, a

court is essentially barred from considering an entire category of information about a defendant and risks contravening express Congressional intent in 18 U.S.C. § 3661. The Tenth Circuit, in *United States v. Smith*, 756 F.3d 1179 (10th Cir. 2014), decided that *Pepper* overruled the contrary view expressed in the Eighth Circuit's *Hatcher* decision. Question presented: Whether the Eighth Circuit's decision is contrary to the Supreme Court's decision in *Pepper v. United States*, 562 U.S. 476 (2011), which overruled *United States v. Hatcher*, and related opinions from the Eighth Circuit to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence or sentences under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the 18 U.S.C. § 924(c) convictions.

- C. **Forfeiture.** *Honeycutt v. United States*, 137 S. Ct. 588 (cert. granted Dec. 9, 2016); decision below at 816 F.3d 362 (6th Cir. 2016). Under 21 U.S.C. § 853(a)(1), any person convicted of a federal drug crime must forfeit “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.” This case concerns the application of § 853(a)(1) to individuals convicted of participating in a drug conspiracy who did not personally receive proceeds of that conspiracy. The question presented is whether all members of the conspiracy are jointly and severally liable for forfeiture of all of the reasonably foreseeable proceeds of the conspiracy, even if they did not personally receive those proceeds. The courts of appeals have divided over that question. Here the Sixth Circuit held that “§ 853 mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy.” The Sixth Circuit observed that its decision was consistent with the decisions of a number of other circuits, but it expressly acknowledged that its decision conflicted with *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), which “held that § 853 does not countenance joint and several liability.” Rather, *Cano-Flores* held that a defendant is required to forfeit only those “funds that actually reach the defendant.”

VIII. DEATH PENALTY

- A. **Execution of Intellectually Disabled.** *Moore v. Texas*, 137 S. Ct. ____ (Mar. 28, 2017). Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed fact findings and determined that, under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. ____ (2014), Moore qualified as

intellectually disabled. For that reason, the court concluded, Moore’s death sentence violated the Eighth Amendment’s proscription of “cruel and unusual punishments.” The habeas court therefore recommended that Moore be granted relief. The Texas Court of Criminal Appeals declined to adopt the judgment recommended by the state habeas court. In the court of appeal’s view, the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (2004). The appeals court further determined that the evidentiary factors announced in *Briseno* “weigh[ed]heavily” against upsetting Moore’s death sentence. In a 5-3 decision authored by Justice Ginsburg, the Supreme Court vacated the Texas appellate judgment. “As we instructed in *Hall*, adjudications of intellectual disability should be ‘informed by the views of medical experts.’ ... That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community’s consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source. Not aligned with the medical community’s information, and drawing no strength from our precedent, the *Briseno* factors ‘creat[e]an unacceptable risk that persons with intellectual disability will be executed,’ ... Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.” Chief Justice Roberts dissented, joined by Justices Thomas and Alito.

IX. APPEALS

- A. **Perfecting Appeal of Deferred Restitution Judgment.** *Manrique v. United States*, 136 S. Ct. 1712 (cert. granted Apr. 25, 2016); decision below at 618 F. App’x 579 (11th Cir. 2015). Fed. R. App. P. 4(b)(2) allows that “[a] notice of appeal filed after the court announces a decision, sentence or order—but before entry of the judgment—is treated as filed on the date of and after entry.” The rule incorporates the Supreme Court’s decision in *Lemke v. United States*, 346 U.S. 325 (1953) (per curiam), and decisions of the circuits that a premature notice of appeal matures or springs forward when the judgment under review is entered. The interaction of this rule with deferred restitution judgments has become a source of circuit conflict, particularly following this Court’s decision in *Dolan v. United States*, 560 U.S. 605 (2010), which allows a sentencing court to retain jurisdiction after sentencing to award restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5). At the time *Dolan* was decided, the Court acknowledged that “the interaction of [deferred] restitution orders with appellate time limits could have consequences,” but it

“le[ft] all such matters for another day.” 560 U.S. at 618. The *Manrique* decision, below, exemplifies those consequences and highlights the significant circuit split that exists concerning the jurisdictional prerequisites for appealing a deferred restitution award. At Manrique’s sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that “restitution is mandatory.” The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second final judgment was entered, identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award. The Court of Appeals ruled, *sua sponte*, that it did not have jurisdiction over the restitution award because Manrique did not file a second notice of appeal designating the amended judgment setting forth the restitution amount. The Eleventh Circuit’s decision conflicts with the Court’s decision in *Lemke*, the ripening clause of Rule 4(b)(2), and the jurisdictional determinations of the First, Second, Sixth and Ninth Circuits. Confusing that circuit split, two of the four circuits that acknowledge their jurisdiction over deferred restitution judgments have failed to give effect to the ripening clause of Rule 4(b)(2). Uncertain about the interaction of appellate rules, the First Circuit recommends, prospectively, that a second notice of appeal should be filed as to restitution awards, while the Ninth Circuit will dismiss such an appeal if the government simply objects to the timeliness of the premature notice. Question presented: Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court’s decision in *Dolan v. United States*, 560 U.S. 605, 618 (2010)? [Disclosure: The Office of the Federal Public Defender for the Southern District of Florida served as counsel for Mr. Manrique.]

- B. **Sentence Based on Erroneous Guideline Calculation as Plain Error.** *Molina-Martinez v. United States*, 136 S. Ct. 1338 (Apr. 20, 2016). In sentencing the defendant, the district court applied a Guidelines range higher than the applicable one. The error went unnoticed by the court and the parties, so no timely objection was entered. The error was first noted when, during briefing to the Court of Appeals for the Fifth Circuit, petitioner himself raised the mistake. The Fifth Circuit refused to correct the error because, in its view, petitioner could not establish a reasonable probability that but for the error he would have received a different sentence. Under that court’s

decisions, if a defendant's ultimate sentence falls within what would have been the correct Guidelines range, the defendant, on appeal, must identify "additional evidence" to show that use of the incorrect Guidelines range did in fact affect his sentence. Absent that evidence, in the Court of Appeals' view, a defendant who is sentenced under an incorrect range but whose sentence is also within what would have been the correct range cannot demonstrate he has been prejudiced by the error. The Supreme Court reversed, unanimously (with concurrences), overruling the Fifth Circuit's categorical rule. In an opinion by Justice Kennedy (joined by Roberts, Ginsburg, Breyer, Sotomayor and Kagan), the Court held that "courts reviewing sentencing errors cannot apply a categorical rule requiring additional evidence in cases, like this one, where the district court applied an incorrect range but nevertheless sentenced the defendant within the correct range. ... [A] defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights." The majority opinion reasoned: "From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used. In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." In other words: "When a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." The government, however, remains free to point to statements by the sentencing court that the sentence it chose was appropriate irrespective of the Guidelines range. Two justices concurred, limiting the reach of the "reasonable probability" formulation. Justice Alito (joined by Thomas), agreed with the result and that the Fifth Circuit's "rigid approach" is incorrect, but took issue with the majority's "speculat[ion]" about "how often the reasonable probability test will be satisfied in future cases." The concurrence explained: "The Court's predictions ... are predicated on the view that sentencing judges will continue to rely very heavily on the Guidelines in the future, but that prediction may not turn out to be accurate."

X. IMMIGRATION

- A. **Loss of Citizenship in Criminal Proceeding.** *Maslenjak v. United States*, 137 S. Ct. 809 (cert. granted Jan. 13, 2017); decision below at

821 F.3d 675 (6th Cir. 2016). “Whether the Sixth Circuit erred by holding, in direct conflict with the First, Fourth, Seventh, and Ninth Circuits, that a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement.”

- B. Removal Based on State Arson Crime as Aggravated Felony.** *Luna Torres v. Lynch*, 136 S. Ct. 1619 (May 19, 2016). After records disclosed that Torres, an alien, had been convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 and 150.10, the Department of Homeland Security instituted removal proceedings against him. An immigration judge found that Torres was inadmissible to enter the country based on his conviction and that his conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. The Board of Immigration Appeals affirmed that ruling, and the court of appeals upheld the Board’s decision. Luna Torres contended that a state offense, such as arson, does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43), as “described in” a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks. The Supreme Court disagreed with Luna Torres and affirmed (5-3) in an opinion authored by Justice Kagan. The majority opinion held that a state offense counts as a § 1101(a)(43) “aggravated felony” when it has every element of a listed federal crime except one requiring a connection to interstate or foreign commerce. Justice Sotomayor (joined by Thomas and Breyer) dissented: “There is one more element in the federal offense than in the state offense—(5), the interstate or foreign commerce element. Luna thus was not convicted of an offense ‘described in’ the federal statute. Case closed.”
- C. Derivative Citizenship.** *Sessions v. Morales-Santana*, 136 S. Ct. 2545 (cert. granted June 28, 2016); decision below at 804 F.3d 520 (2d Cir. 2015). In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present in the United States for a particular period of time prior to the child’s birth. Here, the government petitioned for cert. after the court of appeals held that, despite the statutory requirement, the Equal Protection clause requires citizenship be conferred on the foreign-born child of an unwed citizen mother. The questions presented are: (1) Whether Congress’s decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. § 1401 and § 1409 (1958) violates the Fifth Amendment’s guarantee of equal protection; (2) Whether the court of appeals erred in conferring U.S.

citizenship on respondent, in the absence of any express statutory authority to do so.

- D. **Unconstitutional Vagueness of 18 U.S.C. § 16(b).** *Sessions v. Dimaya*, 137 S. Ct. 31 (cert. granted Sept. 29, 2016); decision below at 803 F.3d 1110 (2d Cir. 2016). Whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act’s provisions governing an alien’s removal from the United States, is unconstitutionally vague. This is a certiorari petition filed by the government, seeking to overturn the Ninth Circuit’s holding that the provision—a residual clause similar to that found vague in *Johnson*—is also void for vagueness, following the Supreme Court’s decision in *Johnson*. There is presently a circuit split on this question: The Sixth, Seventh, Ninth, and Tenth Circuits have held that § 16(b) is unconstitutionally vague under the reasoning in *Johnson*; the Fifth Circuit held that it is not. The residual clause in § 16(b) is identical to the residual clause in 18 U.S.C. § 924(c)(3)(B), so the outcome in this case will likely also decide whether the residual clause in § 924(c)(3)(B) is unconstitutionally vague.
- E. **Sex Between 21-Year-Old and 17-Year-Old as Aggravated Felony.** *Esquivel-Quintana v. Sessions*, 137 S. Ct. 368 (cert. granted Oct. 28, 2016); decision below at 810 F.3d 1019 (6th Cir. 2016). Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct. The question presented is whether a conviction under one of those seven state statutes constitutes the “aggravated felony” of “sexual abuse of a minor” under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act—and therefore constitutes grounds for mandatory removal.

XI. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254 AND 2255

- A. ***Johnson* Is Retroactively Applicable.** *Welch v. United States*, 136 S. Ct. 1257 (Apr. 18, 2016). Welch was sentenced to 15 years imprisonment under the ACCA, pre-*Johnson*. He had entered a conditional plea, reserving his right to challenge reliance on one of his prior convictions. His sentence was affirmed on appeal. After the Supreme Court’s decision in *Johnson* struck down ACCA’s residual clause as unconstitutionally vague, he filed a § 2255 proceeding challenging his sentence under ACCA, but the district court denied relief and a certificate of appealability. The Eleventh Circuit also refused to grant a COA on this first § 2255 motion because the

Eleventh Circuit held that *Johnson* is not retroactively applicable in collateral review, a position at variance with most other circuits. The Supreme Court reversed (7-1), in an opinion written by Justice Kennedy, holding that *Johnson* is retroactively applicable on collateral review because it is a new rule of substantive law under *Teague v. Lane*, 489 U.S. 288 (1989), rather than a procedural rule. The ruling in *Johnson* alters “the range of conduct or the class of persons that the law punishes.” It is not procedural because procedural rules “regulate only the manner of determining the defendant’s culpability,” and *Johnson* “had nothing to do with that.” The decision does not comment on whether the *Johnson* decision applies retroactively to the Sentencing Guidelines or any other statute. Justice Thomas dissented.

- B. Application of *Johnson* to Federal Sentencing Guidelines.** *Beckles v. United States*, 137 S. Ct. ___ (Mar. 6, 2017) *Johnson v. United States*, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining “violent felony”). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2) (defining “crime of violence”). But the Supreme Court ruled (7-0) that *Johnson*’s holding does not apply to the post-*Booker* federal sentencing guidelines, which are only advisory. In an opinion written by Justice Thomas, the Court held that “the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause” and that § 4B1.2’s residual clause is not void for vagueness. The majority reasoned that the advisory guidelines do not “fix the permissible sentences” for the defendant, but “merely guide the exercise of the court’s discretion.” According to the Court’s majority, the advisory guidelines do not “implicate the twin concerns underlying vagueness doctrine”—notice and preventing arbitrary enforcement. Even if a person regulates his or her conduct to avoid a guideline enhancement, such as the career offender enhancement, the sentencing court has the discretion to impose the same enhanced sentence. And the district court “did not ‘enforce’ the career offender Guideline” against Beckles; it merely enforced the statutory penalty range for Beckles’ conviction under § 922(g). Justice Ginsburg concurred in the judgment only. In her view, Beckles’ case should have been decided on the narrow ground that the Sentencing Commission identified possession of a sawed-off shotgun as a “crime of violence” in the commentary to § 4B1.2, which she says was “authoritative” under *Stinson*. She would have deferred “any more encompassing ruling” on the vagueness issue. Justice Sotomayor also concurred in the judgment only. She agreed with Justice Ginsburg that Beckles’ particular case falls on the commentary issue (stating simply that “the commentary

under which he was sentenced was not unconstitutionally vague”), but wrote a lengthy opinion explaining why the majority’s vagueness analysis is wrong. She recognized that the advisory guidelines involve legal “rules” that set the “baseline” from which defendants must negotiate, and that “[y]ears of Beckles’ life thus turned solely on whether the career-offender Guideline applied.” Justice Kagan recused herself from participation in this case. **NOTE:** The Court’s holding is limited to the advisory guidelines only, leaving open the possibility that those sentenced under the mandatory guidelines may raise vagueness challenges to their sentence. Justice Sotomayor expressly notes that the issue regarding the mandatory guidelines was not decided and was left open. Neither Justices Ginsburg nor Sotomayor fully analyzed the commentary issue. Justice Ginsburg summarily dispatched it in a single footnote, and Justice Sotomayor offered no analysis at all. If the government relies on their concurring opinions regarding the commentary issue, in this or any context, contact the Sentencing Resource Counsel Project for assistance in formulating arguments to show why the government’s view is wrong. Additionally, the majority emphasized that its holding does “not render the advisory Guidelines immune from constitutional scrutiny.” Among other things, it specifically pointed out that “in the Eighth Amendment context,” “a district court’s reliance on a vague sentencing factor in a capital case, even indirectly, ‘can taint the sentence.’” (*See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992)). Justice Sotomayor, too, pointed to the Eighth Amendment and *Espinosa*, stating that “the Guidelines carry sufficient legal weight to warrant scrutiny under the Eighth Amendment.” Finally, for those who have already been resentenced after *Johnson* without the career offender or § 2K2.1 enhancement, Deputy Solicitor General Michael Dreeben stated during oral argument “They will keep their sentences,” (OA Tr. at 43), implying the government will not appeal those cases (at least those decided by the oral argument date in November 2016. [Disclosure: The Office of the Federal Public Defender for the Southern District of Florida served as counsel for Mr. Beckles. Also, thank you to Sentencing Resource Counsel Jennifer Coffin for providing valuable portions of this summary.]

C. ***Brady* Violations.**

1. **Prosecution Failure to Disclose Exculpatory Evidence.** *Wearry v. Cain*, 136 S. Ct. 1002 (Mar. 7, 2016) (per curiam). Wearry was on Louisiana’s death row, convicted of murder following a trial that relied heavily on a jail-house snitch, Sam Scott, who told multiple conflicting tales. Wearry’s alibi defense was rejected by the jury. After his conviction became final, it emerged that the prosecution had withheld three pieces of

exculpatory evidence: (1) Undisclosed police reports revealed that two of Scott's fellow inmates made statements casting doubt on Scott's credibility—he told one inmate he wanted to “make sure [Weary] gets the needle because he jacked over me”; he unsuccessfully tried to orchestrate another inmate to lie about Weary at trial; (2) Police failed to disclose that Scott had sought a plea deal seeking to reduce his sentence in return for testimony; and (3) Medical evidence undermined Scott's testimony about the way the crime occurred—a knee injury and recent surgery to an alleged accomplice made it impossible for the accomplice to have run, lifted substantial weight, and crawled into a space, as Scott claimed. Based on this new evidence, Weary alleged violations of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and of his Sixth Amendment right to effective assistance of counsel. Acknowledging that the State “probably ought to have” disclosed the withheld evidence, and that Weary's counsel provided “perhaps not the best defense that could have been rendered,” the postconviction court denied relief. Even if Weary's constitutional rights were violated, the court concluded, he had not shown prejudice. In turn, the Louisiana Supreme Court also denied relief. The U.S. Supreme Court reversed (6-2) in a per curiam disposition based solely on the *Brady/Giglio* violations. Procedurally the case is interesting because it directly and summarily reversed the state court's decision denying habeas relief—before the commencement of federal habeas corpus proceedings—noting that the Supreme Court has jurisdiction over final judgments of state postconviction courts, *see* 28 U.S.C. § 1257(a) and has used that authority in another case this Term, *Foster v. Chatham* (raising *Batson* claim). The merits of the decision reiterate the standard for reversal based on *Brady/Giglio* violations, which is much more favorable to the accused than traditional ineffective-assistance-of-counsel review. “Because we conclude that the Louisiana courts' denial of Weary's *Brady* claim runs up against settled constitutional principles, and because a new trial is required as a result, we need not and do not consider the merits of his ineffective-assistance-of-counsel claim. [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady, supra*, at 87. *See also Giglio v. United States*, 405 U.S. 150, 153–154 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness

credibility). Evidence qualifies as material when there is “any reasonable likelihood” it could have “affected the judgment of the jury.” *Giglio, supra*, at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). To prevail on his *Brady* claim, Wearry need not show that he ‘more likely than not’ would have been acquitted had the new evidence been admitted. *Smith v. Cain*, 565 U.S. 73, ___–___ (2012) (slip op., at 2–3) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to ‘undermine confidence’ in the verdict. *Ibid.* Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry’s conviction. The State’s trial evidence resembles a house of cards, built on the jury crediting Scott’s account rather than Wearry’s alibi. *See United States v. Agurs*, 427 U.S. 97, 113 (1976) (“[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.”). In a footnote, the Court held: “Given this legal standard, Wearry can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury’s verdict.” In another footnote, the Court reminded that *Brady* requires disclosure even if the prosecution is unaware of evidence in the possession of police: “*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.’ *Youngblood v. West Virginia*, 547 U.S. 867, 869–870 (2006) (*per curiam*) (internal quotation marks omitted). *See also Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (rejecting Louisiana’s plea for a rule that would not hold the State responsible for failing to disclose exculpatory evidence about which prosecutors did not learn until after trial when that evidence was in the possession of police investigators at the time of trial.” Justice Alito dissented, joined by Thomas, due to the summary nature of the decision, arguing that the state did not have a fair opportunity to fully brief the issues.

2. **Wearry Redux.** *Turner v. United States* and *Overton v. United States*, 137 S. Ct. 614 (cert. granted Dec. 14, 2016, and cases consolidated); decisions below at 116 A.3d 894 (DC CA 2016). Under *Brady v. Maryland*, 373 U.S. 83 (1963), evidence favorable to the defense is material, and constitutional error results from its suppression by the government, if “there is any reasonable likelihood it could have affected the judgment of the jury.” *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (*per curiam*). In this case, the District of Columbia Court of Appeals required petitioner to show a reasonable probability that the suppressed evidence—including identifications of two potential alternative

perpetrators, information suggesting that the crime was committed by a much smaller group than posited by the government, information calling into question the thoroughness and accuracy of the government's investigation, and evidence impeaching a purported eyewitness who testified against petitioner—"would have led the jury to doubt virtually everything" about the government's case. Applying that standard, the court rejected petitioner's *Brady* claim, even though the jury deadlocked repeatedly before finding him guilty and the prosecution itself acknowledged that the case "easily could have gone the other way." The question presented by the petitioners was whether, consistent with this Court's *Brady* jurisprudence, a court may require a defendant to demonstrate that suppressed evidence "would have led the jury to doubt virtually everything" about the government's case in order to establish that the evidence is material. The question presented was re-worded by the Court: Whether the petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).

XII. AEDPA

- A. **Certificate of Appealability Standard for IAC Claim; Race; Rule 60(b).** *Buck v. Davis*, 137 S. Ct. 759 (Feb. 22, 2017). A Texas jury convicted Duane Buck of capital murder. Under state law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Buck's attorney called a psychologist, Dr. Quijano, to offer his opinion on that issue. The psychologist testified that Buck probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person's propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black. The jury sentenced Buck to death. Buck contended that his attorney's introduction of this evidence violated his Sixth Amendment right to the effective assistance of counsel. This claim was never heard on the merits in any court, because the attorney who represented Buck in his first state postconviction proceeding failed to raise it. In 2006, a federal district court relied on that failure—properly, under then-governing law—to hold that Buck's claim was procedurally defaulted and unreviewable. In 2014, Buck sought to reopen that 2006 judgment by filing a motion under Federal Rule of Civil Procedure 60(b)(6). He argued that this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. ___ (2013), had changed the law in a way that provided an excuse for his procedural default, permitting him to litigate his claim on the merits. In addition to this

change in the law, Buck's motion identified ten other factors that, he said, constituted the "extraordinary circumstances" required to justify reopening the 2006 judgment under the Rule. See *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The district court denied the motion, and the Fifth Circuit declined to issue the certificate of appealability (COA) requested by Buck to appeal that decision. The Supreme Court granted cert. to decide the question: "Whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an 'expert' who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?" In a 6-2 decision authored by Chief Justice Roberts, the Court held that (1) the Fifth Circuit exceeded the limited scope of proper COA analysis; (2) Buck demonstrated ineffective assistance of counsel under *Strickland*; and (3) denial of the Rule 60(b) motion was an abuse of discretion. As to the first part of the holding, the Court held that the COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U.S.C. § 2253. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327. Here, the Fifth Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the case on the merits, repeatedly faulting Buck for having failed to demonstrate extraordinary circumstances. The question for the court of appeals was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. Second, the Court held that Buck demonstrated ineffective assistance of counsel under *Strickland*. To satisfy *Strickland*, a defendant must first show that counsel performed deficiently. Buck's trial counsel knew that Dr. Quijano's report reflected the view that Buck's race predisposed him to violent conduct and that the principal point of dispute during the penalty phase was Buck's future dangerousness. Counsel nevertheless called Dr. Quijano to the stand, specifically elicited testimony about the connection between race and violence, and put Dr. Quijano's report into evidence. No competent defense attorney would introduce evidence

that his client is liable to be a future danger because of his race. *Strickland* further requires a defendant to demonstrate prejudice—“a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. The Court held that it is reasonably probable that without Dr. Quijano’s testimony on race and violence, at least one juror would have harbored a reasonable doubt on the question of Buck’s future dangerousness. This issue required the jury to make a predictive judgment inevitably entailing a degree of speculation. But Buck’s race was not subject to speculation, and according to Dr. Quijano, that immutable characteristic carried with it an increased probability of future violence. Dr. Quijano’s testimony appealed to a powerful racial stereotype and might well have been valued by jurors as the opinion of a medical expert bearing the court’s imprimatur. For these reasons, the district court’s conclusion that any mention of race during the penalty phase was *de minimis* was rejected by the Supreme Court. So was the state’s argument that Buck was not prejudiced by Dr. Quijano’s testimony because it was introduced by his own counsel, rather than the prosecution. Jurors understand that prosecutors seek convictions and may reasonably be expected to evaluate the government’s evidence in light of its motivations. When damaging evidence is introduced by a defendant’s own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value. Third, the Supreme Court held that the district court’s denial of Buck’s Rule 60(b)(6) motion was an abuse of discretion. Relief under Rule 60(b)(6) is available only in “extraordinary circumstances.” *Gonzalez*, 545 U.S. at 535. Determining whether such circumstances are present may include consideration of a wide range of factors, including “the risk of injustice to the parties” and “the risk of undermining the public’s confidence in the judicial process.” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–864. The district court’s denial of Buck’s motion rested largely on its determination that race played only a *de minimis* role in his sentencing. But there is a reasonable probability that Buck was sentenced to death in part because of his race. This is a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are. That it concerned race amplifies the problem. Relying on race to impose a criminal sanction “poisons public confidence” in the judicial process, *Davis v. Ayala*, 576 U.S. ___, a concern that supports Rule 60(b)(6) relief. The extraordinary nature of this case is confirmed by the remarkable steps the state itself took in response to Dr. Quijano’s testimony in other cases. Although the state attempted to justify its decision to treat Buck differently from the other five defendants also subject to Dr. Quijano’s testimony in other cases, the Supreme Court

found that justification suspect. Finally, the Supreme Court rejected as “waived” the state’s argument that *Martinez* and *Trevino* should not govern Buck’s case because they announced a “new rule” under *Teague v. Lane*, 489 U.S. 288, that does not apply retroactively to cases (like Buck’s) on collateral review. Justices Thomas and Alito dissented.

- B. **Overcoming Procedural Default.** *Davila v. Davis*, 137 S. Ct. 810 (cert. granted Jan. 13, 2017); decision below at 650 F. App’x. 860 (5th Cir. 2016). The Court granted cert. on the first question in this death penalty case: (1) Does the rule established in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial claim of ineffective-of-assistance-of-counsel by trial counsel, also apply to a procedurally defaulted, but substantial, claim of ineffective assistance by appellate counsel.
- C. **Clearly Established Precedent re Independent Expert Assistance.** *McWilliams v. Dunn*, 137 S. Ct. 808 (cert. granted Jan. 13, 2017); decision below at 634 F. App’x 698 (11th Cir. 2016). The defendant’s mitigation in this Alabama death penalty case was based on severe mental health disorders that resulted from multiple head injuries. In response to the defense motion for a mental health expert, the trial judge appointed an expert who reported his findings simultaneously to the court, the prosecution, and the defense just two days before the sentencing hearing. Defense counsel had no opportunity to consult with the expert or have him review voluminous medical and psychological records that were not made available to the defense until the start of the sentencing hearing. Thus, as the dissent below noted, “McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State’s psychiatric experts.” McWilliams petitioned for cert, arguing that this meaningless expert assistance violated his rights under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which held that when an indigent defendant’s mental health is a significant factor at trial, the State must “assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” However, there is a division among the circuits with regard to this holding, which affects the type of expert assistance indigent defendants receive nationwide, in both capital and non-capital trials. Most circuits have held that an independent defense expert is required by *Ake*, but a minority of circuits, including the Eleventh Circuit, has found that *Ake* is satisfied by an expert who reports to both sides and the court. The petition presented two questions but cert.

was granted on only the first: (1) When this Court held in *Ake* that an indigent defendant is entitled to meaningful expert assistance for the “evaluation, preparation, and presentation of the defense,” did it clearly establish that the expert should be independent of the prosecution?

- D. **Establishing Ineffective Assistance of Counsel as Structural Error.** *Weaver v. Massachusetts*, 137 S. Ct. 809 (cert. granted Jan. 13, 2017); decision below at 54 N.E.3d 495 (Mass. 2016). Because “most constitutional errors can be harmless,” the Supreme Court has “adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction” and instead is subject to a “harmless-error analysis.” *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). At the same time, the Court has identified a category of “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless error’ standards.” *Fulminante*, 499 U.S. at 309. The consequences of such errors are “necessarily unquantifiable and indeterminate” and are therefore not susceptible to a harmless-error inquiry. *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993). The question presented is whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.
- E. **Deference to State Court Determinations in Absence of Clearly Established Supreme Court Precedent**

1. **“Looking Through” Summary State Decisions.** *Wilson v. Sellers*, 137 S. Ct. ___ (cert. granted Feb. 27, 2017); decision below at 834 F.3d 1227 (11th Cir. 2016) (en banc). Question presented: Did the Supreme Court’s decision in *Harrington v. Richter*, 562 U.S. 86 (2011), silently abrogate the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) that a federal court sitting in habeas proceedings should “look through” a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc Eleventh Circuit held in this case—despite the agreement of both parties that the *Ylst* presumption should continue to apply? Due to the government’s concession, the court has appointed amicus counsel to argue that the *Ylst* rule has been abrogated.

2. **Ineffective Assistance of Counsel.** *Woods v. Etherton*, 136 S. Ct. 1149 (Apr. 4, 2016) (per curiam). Law enforcement received an anonymous tip that two white males were traveling on I-96 between Detroit and Grand Rapids in a white Audi, possibly carrying cocaine. Officers spotted a vehicle matching that description and pulled it over for speeding. Etherton was driving; Pollie was in the passenger seat. A search of the car uncovered 125.2 grams of cocaine in a compartment at the bottom of the driver side door. Both Etherton and Pollie were arrested. Etherton was tried in state court on a single count of possession with intent to deliver cocaine. At trial the facts reflected in the tip were not contested. The central point of contention was instead whether the cocaine belonged to Etherton or Pollie. Pollie testified for the prosecution pursuant to a plea agreement. He claimed that he had accompanied Etherton from Grand Rapids to Detroit, not knowing that Etherton intended to obtain cocaine there. According to Pollie, once the pair arrived in Detroit, Etherton left him alone at a restaurant and drove off, returning some 45 minutes later. It was only after they were headed back to Grand Rapids that Etherton revealed he had obtained the drugs. The prosecution also called several police officers to testify. Three of the officers described the content of the anonymous tip leading to Etherton's arrest. On the third recounting of the tip, trial counsel objected based on hearsay, but the objection was not resolved because the prosecutor agreed to move on. Etherton was convicted. In postconviction proceedings, in state and federal court, Etherton argued that admission of the anonymous tip violated his Confrontation Clause rights under the Sixth Amendment, and that his trial and appellate counsel were ineffective for not objecting or appealing that issue. The state courts rejected his claims (on procedural and substantive grounds), as did the federal district court. But the Sixth Circuit reversed, finding that Etherton's confrontation right had been violated and he was prejudiced by his counsels' failures to object or appeal the issue. The Supreme Court reversed, in a per curiam opinion, finding that the Sixth Circuit violated the limited standard of review allowed by AEDPA. "Etherton's underlying complaint is that his appellate lawyer's ineffectiveness meant he had 'no prior opportunity to cross-examine the anonymous tipster.' ... But it would not be objectively unreasonable for a fairminded judge to conclude—especially in light of the deference afforded *trial* counsel under *Strickland*— that the failure to raise such a claim was not due to incompetence but because the facts in the

tip were uncontested and in any event consistent with Etherton’s defense. *See Harrington[v. Richter]*, 562 U.S., at 105 (‘Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one.’). A fairminded jurist could similarly conclude, again deferring under *Strickland*, that *appellate* counsel was not incompetent in drawing the same conclusion. And to reach the final point at issue before the Sixth Circuit, a fairminded jurist—applying the deference due the *state court* under AEDPA—could certainly conclude that the court was not objectively unreasonable in deciding that appellate counsel was not incompetent under *Strickland*, when she determined that trial counsel was not incompetent under *Strickland*. Given AEDPA, both Etherton’s appellate counsel and the state habeas court were to be afforded the benefit of the doubt. *Burt [v. Titlow]*, [571 U.S.] *supra*, at _____. Because the Sixth Circuit failed on both counts, we grant the petition for certiorari and reverse the judgment of the Court of Appeals.”

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