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 2016-18 TERMS THRU APRIL 12, 2018

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I. SEARCH & SEIZURE

A. Historical Cell Phone Location Data. *Carpenter v. United States*, 137 S. Ct. 2211 (cert. granted June 5, 2017); decision below at 2013 WL 6385838 (6th Cir. 2016). In this case, as in thousands of cases each year, the government sought and obtained the historical cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). As a result, the district court never made a probable cause finding before ordering Petitioner's service provider to disclose months' worth of Petitioner's cell phone location records. A divided panel of the Sixth Circuit held that there is no reasonable expectation of privacy in these location records, relying in large part on four-decade-old decisions of this Court. Question presented: Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.

B. Government Subpoena of Email Records Held Abroad. *United States v. Microsoft*, 138 S. Ct. 356 (cert. granted Oct. 16, 2017); decision below at 829 F.3d 197 (2d Cir. 2016). The competing interests of this cert. petition are fully laid out in the divergent questions presented by the parties; one stresses the Stored Communications Act's law enforcement component, while the other stresses the privacy interests of the law. The government's cert. petition outlined the question presented this way: "Under long-standing principles, the recipient of a subpoena to produce documents to the government in the United States is required to produce specified materials within its control, even if the recipient chooses to store those materials abroad. Providers of email

services have long adhered to the same approach and have produced foreign-stored data when served with probable-cause-based warrants requiring disclosure of emails to the government in the United States under 18 U.S.C. 2703. In this case, the Second Circuit up-ended that practice by interpreting such a warrant to call for an impermissible extraterritorial application of the statute. *** Question presented: "Whether a United States provider of email services must comply with a probable-cause-based warrant issued under 18 U.S.C. §2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad." Microsoft laid out the issue differently: "The Stored Communications Act, 18 U.S.C. § 2701 et seq., part of the Electronic Communications Privacy Act of 1986, protects the privacy of communications in electronic storage. It restricts hackers from 'access[ing]' stored electronic communications (§ 2701) and bars providers of electronic communications services from voluntarily 'divulg[ing]' the contents of stored communications without permission of the customer (§ 2702). The Act also creates a limited exception to the prohibitions on accessing and divulging the contents of communications in electronic storage. Under that exception, a federal, state, or local law-enforcement officer may obtain a search warrant to compel a service provider to access and disclose the content of stored electronic communications (§ 2703). The question presented is: Given the presumption against applying federal law in other countries and the Government's concession that Congress did not intend to apply the Stored Communications Act outside the United States, are private electronic communications stored in Ireland outside the scope of the Stored Communications Act's interlocking provisions?"

C. **Suppression of Title III Wiretaps.** *Dahda v. United States*, 138 S. Ct. 356 (cert. granted Oct.16, 2017); decisions below at 853 F.3d 1101 and 852 F.3d 1282 (10th Cir. 2017). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes a judge to issue a wiretap order to intercept communications within the court's territorial jurisdiction and provides for suppression of communications intercepted pursuant to a facially insufficient order. Roosevelt Dahda and his brother Los Dahda (and 41 others) faced criminal charges involving the operation of a marijuana-distribution network centered in Kansas and extending to California. Much of the evidence introduced against them was obtained through wiretaps of cell phones used by Dahda and others. The wiretaps took place during the six months preceding the Dahdas' arrests and had been authorized by the U.S. District Court for the District of Kansas. Petitioners moved to suppress wiretap evidence at their criminal trial because the evidence was obtained pursuant to a series of facially insufficient wiretap orders that authorized interception of

communications outside of the issuing court's territorial jurisdiction. The district court denied petitioners' motion to suppress the evidence and petitioners were convicted. The Tenth Circuit concluded in their separate appeals that suppression was not warranted even though the orders had been facially deficient. The court agreed with petitioners that the orders were extraterritorial and thus facially insufficient. But the court interpreted 18 U.S.C. § 2518(10)(a)(ii)—which provides for suppression of an intercepted communication if the authorizing order was "insufficient on its face"—to include an additional, unwritten requirement that, for suppression to occur, the facial insufficiency must result from a statutory violation that implicates a "core concern" underlying Title III. The court determined that Title III's territorial-jurisdiction limitation did not implicate a core concern of Congress in enacting the statute, and thus held that evidence obtained pursuant to the facially insufficient orders should not be suppressed. In so reasoning, the court of appeals acknowledged the existence of a circuit conflict on the issue whether the territorial- jurisdiction limitation implicates a core concern of Title III. Both Dahdas filed a joint cert. petition challenging this ruling and. contending the court's decisions in these cases also deepen a circuit conflict on the threshold issue whether an extratextual "core concerns" requirement even applies to motions to suppress facially insufficient Title III wiretap orders. They contend that the statute requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction. Question presented: Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction. (Justice Gorsuch was named to be on one of the Dahda appellate panels before his confirmation, although the case was decided by a quorum of two judges in his absence. He elected to not participate in this case, which was heard by eight justices.)

D. Search of Premises: Disputed Claim of Invitee. *District of Columbia v. Wesby,* 138 S. Ct. 577 (Jan. 22, 2018). Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. A civil suit followed, brought by 16 of the arrestees against the police. The Court of Appeals for the District of Columbia Circuit held that there was not probable cause to arrest the partygoers, and that the officers were not entitled to qualified immunity. The Supreme Court reversed on both grounds (9-0) in an opinion authored by Justice Thomas. His opinion

noted that there was no dispute the partygoers entered the house against the will of the owner. And the opinion disagreed with the partiers' contention that the officers lacked probable cause to arrest them because the officers had no reason to believe that they "knew or should have known" their "entry was unwanted." Considering the totality of the circumstances—a long vacant home with no real furniture and without any sign it had been recently inhabited—the officers made an "entirely reasonable inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. Justice Sotomayor concurred in part (on qualified immunity only) and in the judgment. Justice Ginsburg concurred in the judgment, but notably questioned whether the Court should continue to ignore why the police actually act when evaluating the totality of circumstances for an arrest. "The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren v. United States*, 517 U. S. 806 (1996), and follow-on opinions, holding that 'an arresting officer's state of mind . . . is irrelevant to the existence of probable cause,' *Devenpeck v. Alford*, 543 U. S. 146, 153 (2004*). See, e.g.*, 1 W. LaFave, Search and Seizure §1.4(f), p. 186 (5th ed.2012) ('The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality.'). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents was not warranted by 'settled law.' The defendants-petitioners are therefore sheltered by qualified immunity." This concurrence is a primer for a new issue to be raised by defense counsel challenging arrests as violating the Fourth Amendment.

E. Warrantless Search of Vehicle at Residence. *Collins v. Virginia*, 137 S. Ct. 53 (cert. granted Sept. 28, 2017); decision below at 790 S.E.2d 611 (Va. 2016). County police officers were looking for the person who eluded them on a motorcycle in two high-speed incidents. Although the rider's helmet had obscured his face, the officers suspected Ryan Collins. A few months after the eluding incidents, the officers encountered Collins at the DMV. During their conversation, one officer visited Collins's Facebook page and spotted a picture of a motorcycle, covered by a tarp, parked at a house. Collins told the officers he did not know anything about the motorcycle. After leaving the DMV, one of the officers located the house in the photograph. Collins's girlfriend (and mother to his child) lived there, as did Collins himself at least several nights each week. A dark-colored car was parked about halfway up the

driveway, where a visitor might pass to reach the front door. A motorcycle covered in a white tarp sat behind that car. The motorcycle rested on the part of the driveway running past the house's front perimeter. This portion of the driveway was enclosed on three sides: the home on one side, a brick retaining wall on the opposite side, and a brick wall in the back. The motorcycle was no more than a car's length away from the side of the dwelling. Seeing the motorcycle covered in a tarp, the officer walked onto the driveway. He did not have permission to go onto this property. The officer then entered the partially enclosed parking space alongside the home, removed the tarp, and obtained the license tag and VIN number. After running the VIN number, the officer learned the motorcycle was flagged as stolen. He knocked at the front door, and Collins was arrested for possession of stolen goods after admitting that he owned the motorcycle. Question presented: Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

F. Warrantless Search of Rental Car. *Byrd v. United States,* 137 S. Ct. 54 (cert. granted Sept. 28, 2017); decision below at 679 Fed. Appx. 146 (3rd Cir. 2017). State troopers in Pennsylvania stopped Byrd for a traffic violation while he was driving a car that his girlfriend had rented for him. Without a warrant or probable cause, the troopers searched Byrd's car and found contraband. Byrd moved to suppress the evidence obtained from the search because it violated the Fourth Amendment, but the district court denied the motion on the ground that Byrd, as a driver not listed on the rental agreement, had no reasonable expectation of privacy in the car. The Third Circuit, while noting a circuit conflict on the issue, affirmed on the same basis. Question presented: A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car—an expectation of privacy that society accepts as reasonable. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?

G. Release or Detention Pending Immigration Proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830 (Feb. 27, 2018). **U**nder 8 U.S.C. § 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. § 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. § 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community.

8 C.F.R. § 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. § 1003.19(e). The questions presented were: (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. (3) Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months. In a fragmented decision authored by Justice Alito (3-2-1-3), the Supreme Court reversed the Ninth Circuit's construction of the statutes: "In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. All parties appear to agree that the text of these provisions, when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue. Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must *interpret* the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings." Chief Justice Roberts and Justice Kennedy concurred in Alito's opinion in full. Thomas and Gorsuch joined all but part II (holding the Court has jurisdiction, despite jurisdiction-ousting immigration statutes). Justice Sotomayor joined as to part III-C (holding § 1226(a) does not authorize every-6-month bond hearings to determine by clear and convincing if continued detention is necessary). Thomas concurred in part and concurred in the judgment, to which Gorsuch joined except as to footnote 6 (in which Thomas approves of Justice O'Connor's concurrence in *Demore v. Kim* (2003) which explained that § 1226(e) deprives federal courts of authority to set aside a detention decision by the Attorney General). Three justices dissented: Breyer wrote, joined by Ginsburg

and Sotomayor. Kagan was recused. This may explain why the case was argued twice over the past two Terms before finally being resolved as it was.

II. FIFTH AMENDMENT

A. Shackling of Defendants. *United States v. Sanchez-Gomez*, 138 S. Ct. 543 (cert. granted Dec. 8, 2017); decision below at 859 F.3d 649 (9th Cir. 2017). Defendants successfully challenged in the Ninth Circuit a U.S. Marshal's policy—to which district judges agreed—placing all pretrial detainees in physical restraints during non-jury court proceedings. The Ninth Circuit's ruling held that the Fifth Amendment forbids the blanket policy. The government petitioned for cert. on both the merits of the decision and a procedural claim that the defendant's challenges became moot when they progressed past the pretrial stage of their own cases. The Supreme Court granted cert. on only the mootness question: "Whether the court of appeals erred in asserting authority to review respondents' interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents' individual claims were moot."

B. Pretrial Use of Compelled Statements. *Hays, Kansas v. Vogt*, 137 S. Ct. 55 (cert. granted Sept. 28, 2017); decision below at 844 F.3d 1235 (10th Cir. 2017). Petitioner is a city in Kansas; respondent is one of its former police officers. In 2013, while still employed by the city, Vogt applied for a job with the police department in a different city. During an interview for that position, he revealed that he had kept a knife for his personal use after coming into possession of it while working as a Hays police officer. The interviewing department extended respondent a job offer conditioned on respondent telling petitioner about the knife and returning it. Vogt told the Hays chief of police about the knife. The chief directed Vogt to provide additional information and opened an internal investigation. Vogt gave the chief a vague one-sentence report related to his possession of the knife and submitted his two weeks' notice of resignation. After the lieutenant in charge of internal investigations asked him to provide additional information, Vogt made a further statement, which included the type of police call he was handling when he came into possession of the knife. Using this information, the lieutenant was able to locate an audio recording which captured the circumstances of how Vogt came into possession of the knife. At that point, the chief terminated the internal investigation, and gave Vogt's statements and the resulting information to the Kansas Bureau of Investigation. Because Vogt had become the subject of a criminal investigation, the other city's police department withdrew its job offer. The State of Kansas charged Vogt with two felony counts related to the

knife. Under state law, Vogt was entitled to a probable cause hearing. At this hearing, his statements about the knife and the resulting information were allegedly "used against him." A state district court judge dismissed both charges based on lack of probable cause. Following dismissal of all criminal charges against him, Vogt sued Hays City, the other city with which he sought employment, and four police officers. Vogt alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights. Specifically, he alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) those statements were used against him in a criminal case when they were used at the probable cause hearing. Question presented: "The Self-Incrimination Clause provides that '[n]o person * * * shall be compelled in any criminal case to be a witness against himself.' A "circuit split has developed over whether certain pretrial uses of compelled statements force a person 'to be a witness against himself' within the meaning of that provision. The question presented is: Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial." Justice Gorsuch has recused himself from this case since he sat on the underlying circuit court panel.

C. DOUBLE JEOPARDY

1. **Double Jeopardy Following Acquittal at Severed Trial**. *Currier v. Virginia*, 138 S. Ct. 355 (cert. granted Oct. 16, 2017); decision below at 292 Va. 737 (Va. 2016). The Double Jeopardy Clause protects the integrity of acquittals through the doctrine of issue preclusion, also known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016) (preferring the term "issue preclusion" to "collateral estoppel"). Issue preclusion dictates that where a jury's acquittal has necessarily decided an issue of ultimate fact in the defendant's favor, the Double Jeopardy Clause bars the prosecution "from trying to convince a different jury of that very same fact in a second trial." *Bravo-Fernandez*, 137 S. Ct. at 359. Particularly now that "prosecutors [can] spin out a startlingly numerous series of offenses from a single alleged criminal transaction," the issue preclusion doctrine ensures that individuals who are acquitted cannot be forced to defend a second time against functionally the same allegations. *Ashe*, 397 U.S. at 445 n.10. Here, Currier faced three charges relating to the burglary of a home and theft of a safe containing cash and firearms: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after being convicted

of a felony. The firearm charge was based on the theory that he had briefly handled the guns inside the safe. In Virginia (as elsewhere), evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial and generally inadmissible. Therefore, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction. The parties acceded to that procedure here. Trying all three charges simultaneously would have unduly prejudiced petitioner by bringing his prior convictions to the attention of the jury to which the breaking-and-entering and grand larceny charges would be tried. Accordingly, the trial court severed the felon-in-possession charge from the other two charges. The Commonwealth elected to first try Currier for breaking and entering and grand larceny. Notably, due to a discovery violation, the trial court excluded from evidence a DNA report connecting Currier to a cigarette butt found in the pickup truck used in the theft. In the end, both the prosecution and defense agreed that the sole issue before the jury was whether Currier was involved in stealing the safe. The prosecutor argued to the jury: "What is in dispute? Really only one issue and one issue alone. Was the defendant, Michael Currier, one of those people that was involved in the offense?" The jury acquitted Currier of both charges concerning the theft of the safe. The Commonwealth insisted on pressing ahead with the felon-in-possession prosecution. In response, Currier asserted that the issue preclusion component of the Double Jeopardy Clause barred the Commonwealth from trying to convince a second jury that he had been involved in the break-in and theft. In a related motion, Currier asked to have the felon-in-possession charge dismissed outright, emphasizing that "if he did not steal the firearms[,] he cannot [have] possess[ed] the firearms." The trial court denied both motions. It described the issue preclusion doctrine as concerned with "prevent[ing] the Commonwealth from subjecting the accused to the hazards of vexatious multiple prosecutions." Reasoning that the Commonwealth had not sought separate trials for the purpose of harassing Currier—to the contrary, it had been required to try the charges separately to avoid unduly prejudicing him—the court held that this concern was not implicated. The case then proceeded to trial for a second time. The Commonwealth advanced the same basic theory as in the first trial: that petitioner broke into the residence and helped steal the safe containing cash and firearms.

But given the second opportunity to convince a jury of Currier's involvement in the break-in and theft, the Commonwealth modified its presentation in two ways: (1) Its key witnesses refined their testimony and redelivered it with greater poise; and (2) the Commonwealth corrected its procedural error from the first trial by successfully introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that Currier had at some point been in the truck used to steal the safe. This time, the jury found Currier guilty and sentenced him to five years in prison. Currier moved to set aside the verdict on double jeopardy grounds. The trial court acknowledged that the jury in the first trial had necessarily rejected the theory the Commonwealth renewed in the second trial: "If they didn't find him guilty of [stealing] the safe, they didn't find him guilty of [possessing] the guns" inside it. The court, however, denied Currier's motion. It reasoned that issue preclusion did not apply because the severance had not been an attempt by the government to infringe upon Currier's Fifth Amendment protection against double jeopardy, but rather to protect him from undue prejudice. The Virginia Court of Appeals affirmed, although recognizing that courts are divided over whether issue preclusion applies when the defendant has obtained severance of the charges against him and the first trial results in an acquittal. It acknowledged that one of the purposes of the Double Jeopardy Clause is to protect final judgments; nevertheless, the court held that issue preclusion did not apply because the Clause's other purpose—preventing prosecutorial overreaching through successive trials—was not implicated. It saw no overreaching in this case because the separate trials occurred with the defendant's consent and for his benefit. The Virginia Supreme Court affirmed. Currier filed this cert. petition. Question presented: Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue preclusive effect of an acquittal.

III. CRIMES

A. Intimidating or Impeding IRS Officer. *Marinello v. United States*, 138 S. Ct. 1101 (Mar. 21, 2018). The Internal Revenue Code at 26 U.S.C. § 7212(a) includes the following provision aka The Omnibus Clause:

> Whoever corruptly or by force . . . endeavors to intimidate or impede any officer . . . of the United States acting in an official capacity under this title, ***or in any other way corruptly or by***

> ***force . . . endeavors to obstruct or impede[] the due administration of this title***, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both . . . . (emphasis added)

Does § 7212(a) require that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct? The Second Circuit had held it does not, but two judges dissented from rehearing en banc. Judges Jacobs and Cabranes warned that "[i]f this is the law, nobody is safe." They continued: "The panel opinion in *Marinello* affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed." The Supreme Court reversed (7-2), narrowly construing the clause in an opinion written by Justice Breyer. Relying on prior precedents interpreting other obstruction provisions, the Court construed the law to require (1) that there be "a 'nexus' between the defendant's conduct and a particular administrative proceeding," and (2) that a proceeding was pending or reasonably foreseeable by the defendant at the time of the charged conduct. The Court restricted the phrase "administrative proceeding" to mean a "targeted administrative action," such as an investigation or an audit. This does not include "routine day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns." Its ruling adopted the reasoning of its ruling in *United States v. Aguilar*, 515 U.S. 593 (1995), interpreting 18 U.S.C. § 1503(a). As in *Aguilar*, the Court grounded its "interpretive restraint" in two factors: (1) its view that Congress did not/could not have intended the broad scope of the alternative, and (2) its concern over "the lack of fair warning and related kinds of unfairness." The Court's majority was concerned with the overlap between a broadly-interpreted Omnibus Clause (which is a felony), and other (misdemeanor) tax offenses, because redundant provisions could erode fair warning, and exacerbate plea gamesmanship. The majority rejected the government's argument that prosecutorial discretion has effectively constrained a broad reading of the statute, highlighting how rarely prosecutions occur under the provision. In response, the majority cited Attorney General Sessions' written charging policy (confirmed during oral argument by the government) that "the government will charge a violation of the more punitive provision." Also, the majority rejected the prosecutorial-discretion premise, because "we cannot construe a criminal statute on the assumption that the government will use it responsibly," for "doing so risks allowing policemen, prosecutors, and juries to pursue their personal predilections" leading to intolerable non-uniformity. Justice Thomas dissented (joined by Alito) on textual grounds, concluding that

the majority's limitation on the provision's scope was not grounded in the text, and was instead the Court substituting its own judgment for that of Congress. The majority and dissenting opinions disagreed about the *mens rea* differences between the terms "willfully" and "corruptly," in case Congress cares to take this into account in amending the statute.

B. Robbery as a "Violent Felony" Under ACCA. *Stokeling v. United States*, 138 S. Ct. ___ (cert. granted Apr. 2, 2018); decision below at 684 Fed. Appx. 870 (11th Cir. 2017). Issue presented: Whether a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance. [Disclosure: Brenda Bryn, AFPD, SDFL is counsel of record for petitioner].

IV. TRIAL AND PLEA

A. Challenging Juror's Alleged Racial Bias. *Tharpe v. Sellers*, 138 S. Ct. 545 (Jan. 8, 2018) (per curiam). Tharpe moved to reopen his federal habeas corpus proceedings under Fed, R. Civ. P. 60(b) regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. The district court denied the motion on the ground that, among other things, Tharpe's claim was procedurally defaulted in state court. The district court also noted that Tharpe could not overcome that procedural default because he had failed to produce any clear and convincing evidence contradicting the state court's determination that Gattie's presence on the jury did not prejudice him. Tharpe sought a certificate of appealability (COA), which the Eleventh Circuit denied after deciding that jurists of reason could not dispute that the district court's procedural ruling was correct. The Eleventh Circuit's decision, as the Supreme Court read it, was based solely on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Supreme Court reversed (6-3). It noted that Tharpe had produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill

blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." The Court held that Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. Thus, the Court held, the Eleventh Circuit erred when it concluded otherwise. The Court also noted the ground on which the Eleventh Circuit chose to dispose of Tharpe's application—prejudice—is not the only question relevant to the broader inquiry whether Tharpe should receive a COA. The district court denied Tharpe's Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit. As to those additional issues, the majority expressed no view. It also noted that under the applicable standard for relief from judgment under Rule 60(b)(6), which is available only in " 'extraordinary circumstances,' " *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), Tharpe faces a high bar in showing that jurists of reason could disagree whether the district court abused its discretion in denying his motion. It may be that, at the end of the day, Tharpe should not receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the Court of Appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe. Justice Thomas dissented, joined by Alito and Gorsuch. In their view Tharpe will not be able to meet the procedural requirements for relief and the remand is therefore is an unnecessary do-over.

B. **Appellate Consequences of Guilty Plea.** *Class v. United States*, 138 S. Ct. 798 (Feb. 21, 2018). The defendant had firearms in his car, which was parked and locked in a parking garage 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 reversed (6-3) in an opinion by Justice Breyer, holding that a guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. "The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the

constitutionality of the statute of conviction on direct appeal. We hold that it does not. Class did not relinquish his right to appeal the District Court's constitutional determinations simply by pleading guilty. [T]his holding flows directly from this Court's prior decisions . . . in *Haynes* v. *United States*, 390 U.S. 85, 87, n. 2 (1968) . . ., *Blackledge* v. *Perry,* 417 U.S. 21 (1974) . . . , and *Menna* v. *New York,* 423 U.S. 61 (1975) (*per curiam*)**."** Notably the majority was not persuaded by the government's argument that Fed. R. Crim. P. 11(a)(2) (conditional pleas) is the exclusive way in which a defendant can both plead guilty and then appeal the underlying statute of conviction. The majority made clear, however, that a defendant may waive the right to such an appeal by an express waiver taken in conjunction with the guilty plea, but no such waiver occurred in Class's case. Justice Alito dissented (joined by Kennedy and Thomas).

C. Immigration Consequences of Guilty Plea. *Lee v. United States*, 137 S. Ct. 1958 (June 23, 2017). 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 restauranteur. 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 conceded 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 presented was whether Lee can demonstrate prejudice under the second part of *Strickland* where he is deemed to be facing strong evidence of guilt. The Sixth Circuit held that Lee could not show prejudice because he had "no *bona fide* defense, not even a weak one," so he "stood to gain nothing from going to trial but more prison time." The Supreme Court reversed (6-2) in an opinion written by Chief Justice Roberts, holding that Lee was prejudiced by his attorney's bad advice. The question is not whether, had he gone to trial, the result of the trial would have been different than the result of the plea bargain. Rather, the question is whether Lee could show a reasonable probability that, but for counsel's bad advice, he would have insisted on going to trial rather than give up that right. Here, Lee was prejudiced under the proper standard despite that he "knew, correctly, that his prospects of

acquittal at trial were grim, and his attorney's error had nothing to do with that." The Court rejected the government's request that the Court, like the Sixth Circuit, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Justice Thomas dissented, joined by Justice Alito. Justice Thomas reasoned: "Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice." "[A] defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the 'smallest chance of success at trial'—relying on nothing more than a 'Hail Mary'—may be able to satisfy it." "[A] challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking," requiring a hearing in every case. [**ENDNOTE**: On remand, the government voluntarily dismissed the indictment.]

V. SENTENCING

A. Sentence Reduction Based on Retroactive Reduction of Applicable Sentencing Guidelines Under 18 U.S.C. §3582(c)(2)

1. Eligibility Following Rule 11(c)(1)(C) Sentence. *Hughes v. United States*, 138 S. Ct. 542 (cert. granted Dec. 8, 2017); decision below at 849 F.3d 1008 (11th Cir. 2017). Is a defendant who enters into an agreed sentence under Fed. R. Crim. P. 11(c)(1)(C) eligible for a later sentence reduction based on a retroactively applicable change in the Sentencing Guidelines, under 3583(c)(2)? The application and construction of seemingly competing Supreme Court precedent is highlighted by the detailed question presented by petitioner: "This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."' In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply *Freeman*'s result. The questions presented are: (1) Whether this Court's decision in *Marks* means

that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other; (2) Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed. (3) Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range."

2. **Eligibility Following Substantial Assistance Sentence**. *Koons v. United States*, 138 S. Ct. 543 (cert. granted Dec. 8, 2017); decision below at 850 F.3d 973 (8th Cir. 2017). Koons, and four similarly situated defendants in other cases, received initial sentences reduced to account for their substantial assistance to the government. Koons, for example, was sentenced to 180 months of prison after pleading guilty to conspiracy to distribute 500 grams or more of meth, a violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(A), 846 and 851. The sentencing court found Offense Level 31–Criminal History IV = advisory range of 151-188 months, which was elevated to 240 months based on the statutory minimum mandatory sentence. The 180 month sentence resulted because the 240 months was reduced by 25% based on a government motion recognizing substantial assistance. Each of the defendants was denied later sentence reductions under 18 U.S.C. § 3582(c)(2), after the U.S. Sentencing Commission implemented guideline amendment 782, retroactively applying sentence reductions in such cases. Their cases were consolidated on appeal and each was categorically denied eligibility for relief. The Eight Circuit held that a defendant sentenced based on a mandatory minimum was not sentenced "based on a sentencing range that has been lowered" by the sentencing commission, as required by § 3582(c). Question Presented: Whether a defendant who is subject to a statutory mandatory minimum sentence, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e), is eligible for a further sentence reduction under 18 U.S.C. § 3582(c)(2), when the Sentencing Commission retroactively lowers the advisory sentencing guidelines range that would have applied in the absence of the statutory mandatory minimum.

3. **Explanation for Denial of Relief.** *Chavez-Meza v. United States*, 138 S. Ct. 734 (cert. granted Jan. 12, 2018); decision below at 854 F.3d 655 (10th Cir. 2017). Question presented: When a district court decides not to grant a proportional sentence reduction under 18 U.S.C. § 3582(c)(2), must it provide some explanation for its decision when the reasons are not otherwise apparent from the record, as the United States Courts of Appeals for the Sixth, Eighth, Ninth, and Eleventh Circuits have held, or can it issue its decision without any explanation whatsoever so long as it is issued on a pre-printed form order containing boilerplate language providing that the court has "tak[en] into account the policy statement set forth at U.S.S.G. § lBl.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable," as the Courts of Appeals for the Fourth, Fifth and Tenth Circuits have held? (Justice Gorsuch recused).

B. **Forfeiture.** *Honeycutt v. United States*, 137 S. Ct. 1626 (June 5, 2017). 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 concerned the application of § 853(a)(1) to individuals convicted of participating in a drug conspiracy who did not personally receive proceeds of that conspiracy. In an 8-0 decision, the Supreme Court held that § 853(a)'s limitation of forfeiture to tainted property acquired or used by the defendant, together with the plain text of § 853(a)(1), foreclose joint and several liability for co-conspirators. Justice Gorsuch took no part in the decision.

C. **Extent of Mandatory Restitution.** *Lagos v. United States,* 138 S. Ct. 734 (cert. granted Jan. 12, 2018); decision below at 864 F.3d 320 (5th Cir. 2017). Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4). In the decision below, the Fifth Circuit, adopting the decisions of multiple courts of appeals, held that this provision covers the costs of internal investigations and private expenses that were "neither required nor requested" by the government; these private costs were incurred outside the government's official investigation, and, indeed, were incurred before the government's investigation even began. In reaching this conclusion, the Fifth Circuit expressly rejected the "opposite conclusion" from the D.C. Circuit, which itself "recognize[d]" but "respectfully disagree[d]" with the decisions of four other courts of

appeals. One judge concurred below, acknowledging that he was bound by circuit precedent, but "agree[d] with the D.C. Circuit's persuasive interpretation" of the statute. Petitioners contend that the courts of appeals are clearly and intractably divided over this important and recurring question of statutory interpretation—one that repeatedly occurs whenever companies detect hints of fraud and conduct an internal investigation. The question presented is: Whether Section 3663A(b)(4) covers costs that were "neither required nor requested" by the government, including costs incurred for the victim's own purposes and unprompted by any official government action.

VI. DEATH PENALTY

A. **Incompetency to be Executed.** *Madison v. Alabama,* 138 S. Ct. 1174 (cert. granted Feb. 26, 2018); decision below at *Order Denying Petition to Suspend Execution Pursuant to Alabama Code Section 15-16-23* (Mobile County Circuit Court, Jan. 16, 2018). Death row inmate Madison suffers vascular dementia, which prevents him from remembering the crimes for which he is scheduled to be executed. He previously obtained collateral relief that was reversed by the Supreme Court based on limitations in available remedies under AEDPA. The Supreme Court did not address the merits of his claims. On remand, his execution was scheduled on an expedited basis, but the defense learned for the first time that the psychologist on which the state and courts had been relying was recently been suspended from the practice of psychology due to narcotics abuse and selling fraudulent prescriptions. Madison applied to the state circuit court to suspend entry of the death penalty due to his incompetency. That effort was denied. With no available appeal in the Alabama state courts, Madison filed a petition for writ of certiorari in the Supreme Court directed to the state trial court, this time "outside of the AEDPA context," requesting that his execution be stayed and certiorari be granted to address the following two substantive questions: (1) Consistent with the Eighth Amendment, and this Court's decisions in *Ford v. Wainwright* and *Panetti v. Quarterman*, may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense? *See Dunn v. Madison*, 138 S. Ct. 9, 12 (Nov. 6, 2017) (Ginsburg, J., with Breyer, J., and Sotomayor, J., concurring); (2) Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted

or understanding the circumstances of his scheduled execution? The Court stayed the execution and granted certiorari.

B. IAC for Conceding Guilt Over Client's Objection. *McCoy v. Louisiana*, 137 S. Ct. 53 (cert. granted Sept. 28, 2017); decision below at 218 So.3d 535 (La. 2017). McCoy was convicted and sentenced to death after his counsel conceded his guilt over his repeated, timely and express objections. Throughout his representation by a public defender and his subsequent representation by retained counsel, McCoy steadfastly and adamantly maintained his innocence, and repeatedly stated his desire to plead not guilty, to go to trial, to advance his innocence claim and ultimately, to secure a complete acquittal. McCoy had moved for his public defender to be removed due to his belief that the public defenders were doing nothing to assist him in proving his innocence, resulting in a breakdown in their relationship. Instead, he sought to represent himself until he could retain counsel. Following a *Faretta* hearing, McCoy was permitted to represent himself on the understanding that he would represent himself through trial if he did not retain counsel. Eventually a retained lawyer appeared on his behalf, paid for by his parents. About a month prior to trial, defense counsel visited with McCoy to tell him that his case could not be won and that he needed to take a plea. McCoy adamantly refused to take a plea. Two weeks prior to trial, a hearing was held at which counsel stated that he would not offer any alibi evidence, despite McCoy's *pro se* alibi notice, and declined to adopt any of the subpoenas McCoy had filed. Immediately after the court hearing, counsel visited McCoy in jail and told him for the first time that he intended to concede that McCoy was the killer. McCoy emphatically opposed this course. The trial court denied McCoy's subsequent request to discharge counsel as untimely, given that substitute counsel were not present and trial was due to start in two days. McCoy immediately sought to represent himself but the trial court cut him off, refusing to entertain the request on the basis that it was untimely. Counsel then sought guidance from the trial court, advising that contrary to his intention, McCoy wished a defense to be presented in the guilt phase of his trial; the trial court ruled that as counsel was the attorney, it was for counsel to make the decision of what defense he would proceed with at trial. During his opening statement, counsel explicitly and repeatedly conceded that McCoy had murdered the three deceased: "I'm telling you, Mr. McCoy committed these crimes." Counsel argued for verdicts of second degree murder on a theory of diminished capacity, a theory that is seemingly foreclosed by Louisiana law. McCoy immediately interrupted defense counsel's opening statement and renewed his objection to being represented by him and to his concession of guilt. He reiterated his objection to being represented by this defense counsel, which was overruled. McCoy then exercised his right to testify

in his own defense, asserting his complete innocence, testifying to his alibi, refuting the State's evidence and describing a drug trafficking ring headed by law enforcement personnel that was responsible for the killings and for framing him. Yet, in closing argument, defense counsel once again repeatedly and emphatically argued that McCoy murdered the three victims ("He killed them") and explicitly stated that he had relieved the State of its burden of proof and the jury of its burden in this regard. Question presented: (1) Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection? (The Court did not grant cert. on Question 2, which raised a *Batson* claim)

C. **Reasonably Necessary Investigative Costs in Capital Collateral Review.** *Ayestas v. Davis, Dir. Tex. DCJ*, 138 S. Ct. 1080 (Mar. 21, 2018). Carlos Ayestas was convicted of murder and sentenced to death in a Texas court. While his federal habeas proceeding was pending, the Harris County District Attorney's Office accidentally disclosed a typewritten document memorializing the basis of its charging decision, which included "THE DEFENDANT IS NOT A CITIZEN." He sought funding under 18 U.S.C. § 3559(f) for investigative services needed to prove his entitlement to federal habeas relief. That section makes funds available if they are "reasonably necessary," but his motion was denied. The Fifth Circuit affirmed that denial by interpreting "reasonably necessary" to require an inmate to show "substantial need." Through the substantial-need standard, the Fifth Circuit withheld expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself. The Supreme Court reversed and remanded, in a unanimous decision authored by Justice Alito. "We hold that the lower courts applied the wrong legal standard, and we therefore vacate the judgment below and remand for further proceedings." As a threshold matter, the Court determined that the denial of funding is a judicial decision subject to appellate review. On the merits, the Court determined that the correct legal standard is set forth in the statute, not the Fifth Circuit's more demanding rule: "Section 3599 appears to use the term 'necessary' to mean something less than essential. The provision applies to services that are 'reasonably necessary,' but it makes little sense to refer to something as being 'reasonably essential.' What the statutory phrase calls for, we conclude, is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important." The Court set out considerations to guide the decision, but in simple terms it said: "To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks. But the 'reasonably necessary' test requires an assessment of the likely utility of the services

requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone." Justice Sotomayor concurred (joined by Ginsburg), explaining specifically how Ayestas met that standard.

VII. APPEALS

A. Fourth Prong of Plain Error Review. *Rosales-Mireles v. United States*, 137 S. Ct. 55 (cert. granted Sept. 28, 2017); decision below at 850 F.3d 246 (5th Cir.2017). Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The PSR calculated a total offense level of 21 and criminal history of 13 points, resulting in a criminal history category of VI = advisory guidelines range of 77 to 96 months' imprisonment. The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was V, yielding an advisory Guidelines range of 70 to 87 months. Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence would be a within-Guidelines sentence. The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment. On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double-counting the prior conviction in his criminal history. The government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error. The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. It also held that Rosales had satisfied the third prong of plain-error review. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. And the district court did not explicitly and unequivocally indicate that it would have imposed the same sentence irrespective of the Guidelines range. Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009)). Such errors, the court said, are "'ones that would shock the conscience of the common

man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "*no* discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." The court of appeals thus affirmed. Question presented: In *United States v. Olano*, the Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s]the fairness, integrity, or public reputation of judicial proceedings." 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the Fifth Circuit Court of Appeals required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge?"

VIII. IMMIGRATION

A. False Statement re Citizenship Application. *Maslenjak v. United States*, 137 S. Ct. 809 (June 22, 2017). Divna Maslenjak and her husband, Ratko, are ethnic Serbs who resided in Bosnia during the 1990's, when a civil war between Serbs and Muslims divided the new country. In 1998, she, her husband and two children met with an American immigration official to seek refugee status in the United States. Interviewed under oath, Maslenjak explained that the family feared persecution in Bosnia from both sides of the national rift. Muslims, she said, would mistreat them because of their ethnicity. And Serbs, she testified, would abuse them because her husband had evaded service in the Bosnian Serb Army by absconding to Serbia—where he remained hidden, apart from the family, for some five years. Persuaded of the Maslenjaks' plight, American officials granted them refugee status, and they immigrated to the United States in 2000. Six years later, Maslenjak applied for naturalization. Question 23 on the application form asked whether she had ever given "false or misleading information" to a government official while applying for an immigration benefit; question 24 similarly asked whether she had ever "lied to a[] government official to gain entry or admission into the United States." Maslenjak answered "no" to both questions, while swearing under oath that her replies were true. She also swore that all her written answers were true during a subsequent interview with an immigration official. In August 2007, Maslenjak was naturalized as a U.S. citizen. But Maslenjak's professions of honesty were false: In fact, she had made up much of the story she told to immigration officials when seeking refuge in this country. Her fiction began to unravel at around the same time she applied for citizenship. In 2006, immigration officials confronted

Maslenjak's husband Ratko with records showing that he had not fled conscription during the Bosnian civil war; rather, he had served as an officer in the Bosnian Serb Army. And not only that: He had served in a brigade that participated in the Srebrenica massacre—a slaughter of some 8,000 Bosnian Muslim civilians. Within a year, the government convicted Ratko on charges of making false statements on immigration documents. The newly naturalized Maslenjak attempted to prevent Ratko's deportation. During proceedings on that matter, Maslenjak admitted she had known all along that Ratko spent the war years not secreted in Serbia but fighting in Bosnia. As a result, the government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U.S.C. § 1425(a). According to the government's theory, Maslenjak violated § 1425(a) because, in the course of procuring her naturalization, she broke another law: 18 U.S.C. § 1015(a), which prohibits knowingly making a false statement under oath in a naturalization proceeding. The false statements the government invoked were Maslenjak's answers to questions 23 and 24 on the citizenship application (stating that she had not lied in seeking refugee status) and her corresponding statements in the citizenship interview. Those statements, the government argued to the district court, need not have affected the naturalization decision to support a conviction under § 1425(a). The court agreed: Over Maslenjak's objection, it instructed the jury that a conviction was proper so long as the government "prove[d] that one of the defendant's statements was false"—even if the statement was not "material" and "did not influence the decision to approve [her] naturalization." She was found guilty and the district court, based on that finding, stripped Maslenjak of her citizenship under 8 U.S.C. § 1451(e). Her conviction was affirmed on appeal, but reversed by the Supreme Court (9-0) in an opinion by Justice Kagan (with Justice Gorsuch concurring and concurring in the judgment—joined by Thomas—and with Justice Alito, concurring in the judgment). Justice Kagan's opinion for the majority interpreted § 1425(a) to contain a "requirement of causal influence. "To get citizenship unlawfully . . . is to get it through an unlawful means," which requires that the "illegality played some role in its acquisition." To meet this requirement in a prosecution predicated on a false statement, the government may show either that (1) "the facts the defendant misrepresented are themselves disqualifying"; or (2) that the truth would have prompted reasonable officials to undertake further investigation, which "would predictably have disclosed some legal disqualification."

B. **Derivative Citizenship.** *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (June 12, 2017). 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. Under the main rule, an unwed U.S. citizen father may transmit citizenship to his child if he had been present in the U.S. for five years before the child's birth. (The rule was previously ten years.) This rule applies also to married couples. Congress made an exception for unwed U.S. citizen mothers, who may transmit citizenship if she has lived in the U.S. for just one year pre-birth. In an opinion by Justice Ginsburg, the Court held (8-0) that the gender line Congress drew is incompatible with the requirement that the government accord to all persons "the equal protection of the laws." Nevertheless, the Court held, it cannot convert § 1409(c)'s exception for unwed mothers into the main rule displacing § 1401(a)(7) (covering married couples) and § 1409(a) (covering unwed fathers). "We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination." What this means is that until Congress changes the law, the current five-year rule for unwed fathers applies, rather than the one-year rule for unwed mothers. Importantly, this new rule applies only to children of unwed mothers who are born AFTER today, since citizenship is automatically acquired at birth and a later decision cannot strip the child of it. As the Court states: "In the interim [until Congress adopts a uniform rule], as the Government suggests, §1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers. See Brief for Petitioner 12, 51; Reply Brief 19, n.3." For ease of reference, here is what the government said in its Reply Brief:

> Respondent errs in suggesting (Br. 56) that the government's proposed remedy would withdraw citizenship from children born abroad between 1952 and 1986 who would qualify for citizenship under Section 1409(c). The government proposes (Gov't Br. 51) imposing the longer physical-presence requirement in Section 1401(a)(7) on children born abroad out of wedlock to U.S.-citizen mothers, but only on a prospective basis. The Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for a continuous period of one year before the birth (but less than the ten or five years of physical presence required by Section 1401(a)(7)). The

> Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. *Cf. Heckler v. Mathews*, 465 U.S. 728, 745-750 (1984) (upholding Congress's decision to continue for certain individuals a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests).

The full reply brief is available at 2016 WL 6472054 (U.S. 2016). If you are currently litigating a case for a child of an unwed mother, the physical presence requirement should still be one year. NOTE: This case was decided in the context of removal proceedings. Those who have closely followed this issue believe there is a good argument that footnote 24 means that for purposes of criminal prosecutions under 1325/1326, a client born out of wedlock to a U.S. citizen father would only have to prove one year of physical presence. Keep this in mind when screening clients for citizenship. Footnote 24 states:

> We note, however, that a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), for example, the defendant participated in a civil rights demonstration in front of a school. Convicted of violating a local "antipicketing" ordinance that exempted "peaceful picketing of any school involved in a labor dispute," he successfully challenged his conviction on equal protection grounds. *Id.*, at 107 (internal quotation marks omitted). It was irrelevant to the Court's decision whether the legislature likely would have cured the constitutional infirmity by excising the labor dispute exemption. In fact, the legislature had done just that subsequent to the defendant's conviction. *Ibid.*, and n.2. "Necessarily," the Court observed, "we must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted." *Id.*, at 107, n.2. *See also Welsh*, 398 U.S., at 361–364 (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would cure the unequal treatment by extending rather than invalidating the criminal proscription).

In *Grayned*, the Court held that an ordinance that violated the equal protection clause was unconstitutional, and thus invalid, on its face. As

a result, "Appellant's conviction under this invalid ordinance must be reversed." *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972). In *Welsh*, Justice Harlan would have held a statute violated the Establishment Clause. Because the petitioner was convicted under an unconstitutional statute that extended benefits to others not accorded to him, "this conviction must be reversed [ ] unless Welsh is to go remediless." *Welsh v. United States*, 398 U.S. 333, 361-62 (1970) (Harlan, J., concurring in the result). [Special thanks to SRC Jennifer Coffin and San Diego AFPD Kara Hartzler for preparing this in-depth summary and practice guide].

C. 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). **[NOTE – Restored to the calendar for reargument during the Oct. 2017 Term]** 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.

D. Categorical Approach to Sex Between 21-Year-Old and 17-Year-Old. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (May 30, 2017). 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. At issue here was whether Juan Esquivel-Quintana's conviction under a California statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old (almost 18 year old) qualified as "sexual abuse of a minor" under the Immigration and Nationality Act (INA). The Immigration and Nationality Act provides that "[a]ny alien who is convicted of an aggravated felony after admission" to the United States may be removed from the country by the Attorney General. 8 U.S.C. § 1227(a)(2)(A)(iii). One of the many crimes that constitutes an aggravated felony under the INA is "sexual abuse of a minor." § 1101(a)(43)(A). A conviction for sexual abuse of a minor is an aggravated

felony regardless of whether it is for a "violation of Federal or State law." § 1101(a)(43). The INA does not expressly define sexual abuse of a minor. The question presented was whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualifies as sexual abuse of a minor under the INA. In an 8-0 decision authored by Justice Thomas, the Supreme Court held that it does not. Employing the categorical approach from *Moncrieffe v. Holder* and *Johnson v. United States*, the Court explained that it must presume that Esquivel-Quintana's no contest plea and resulting conviction "'rested upon . . . the least of th[e] acts' criminalized by the statute, and then . . . determine whether that conduct would fall within the federal definition of the crime." It concluded that in order to fit within the definition of "sexual abuse of a minor" under INA, the minor had to be under the age of consent, which is 16 years old. Justice Gorsuch took no part in the decision.

E. Cancellation of Removal. *Pereira v. Sessions*, 138 S. Ct. 735 (cert. granted Jan. 12, 2018); decision below at 866 F.3d 1 (1st Cir. 2017). The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b (a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id*. § 1229b(a)(2), (b)(l)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id*. § 1229b(d)(l). Section 1229(a) defines a "notice to appear" as "written notice . . . specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id*. § 1229(a)(l). The First Circuit held, disagreeing with the Third Circuit but agreeing with the Board of Immigration Appeals and other circuits, that the stop-time rule is triggered when the government serves a document that is labeled "notice to appear" but that lacks the "time and place" information required by the definition of a qualifying "notice to appear." The question presented is: Whether, to trigger the stop-time rule by serving a "notice to appear," the government must "specify" the items listed in the definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

IX. COLLATERAL CONSEQUENCES

A. Sex Offender Registration & Notification Act – Nondelegation. *Gundy v. United States*, 138 S. Ct. ___ (cert. granted Mar. 5, 2018); decision below at 695 Fed. Appx. 639 (2d Cir. 2017). Congress did not determine SORNA's applicability to individuals convicted of a sex offense prior to its enactment. Instead, 42 U.S.C. § 16913(d) delegated

to the Attorney General the "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . ." The authority to legislate is entrusted solely to Congress. U.S. Const. Art. I §§ 1, 8. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). While the nondelegation doctrine does not prevent Congress from "obtaining the assistance of its coordinate Branches," it can do so only if it provides clear guidance. *Id.* at 372-73. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.'" Question presented: Whether Congress violated the nondelegation doctrine by delegating to the Attorney General the authority to determine if SORNA's registration requirements apply to offenders convicted prior to SORNA's enactment.

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

A. *Brady* Violations.

1. ***Brady* Violations**. *Turner v. United States* and *Overton v. United States,* 137 S. Ct. 1885 (June 22, 2017). 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 murder case involving seven convicted petitioners, the District of Columbia Court of Appeals required a post-conviction 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 Supreme Court affirmed (6-2) in an opinion by Justice

Breyer. The Supreme Court held that certain evidence possessed by the government but not disclosed to the defense was not "material" for purposes of *Brady v. Maryland*. The Court "examine[d] the trial record, evaluat[ed] the withheld evidence in the context of the entire record, and determine[d] in light of that examination" that there was no "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Justice Kagan dissented, joined by Ginsburg. Justice Gorsuch did not participate.

XI. AEDPA

A. Certificate of Appealability (COA)

1. **COA for Juror's Alleged Racial Bias.** *Tharpe v. Sellers*, 138 S. Ct. 545 (Jan. 8, 2018) (per curiam). Tharpe moved to reopen his federal habeas corpus proceedings under Fed, R. Civ. P. 60(b) regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. The district court denied the motion on the ground that, among other things, Tharpe's claim was procedurally defaulted in state court. The district court also noted that Tharpe could not overcome that procedural default because he had failed to produce any clear and convincing evidence contradicting the state court's determination that Gattie's presence on the jury did not prejudice him. Tharpe sought a certificate of appealability, which the Eleventh Circuit denied after deciding that jurists of reason could not dispute that the district court's procedural ruling was correct. The Eleventh Circuit's decision, as the Supreme Court read it, was based solely on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Supreme Court reversed (6-3). It noted that Tharpe had produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." The Court held

that Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. Thus, the Court held, the Eleventh Circuit erred when it concluded otherwise. The Court also noted the ground on which the Eleventh Circuit chose to dispose of Tharpe's application—prejudice—is not the only question relevant to the broader inquiry whether Tharpe should receive a COA. The district court denied Tharpe's Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit. As to those additional issues, the majority expressed no view. It also noted that under the applicable standard for relief from judgment under Rule 60(b)(6), which is available only in " 'extraordinary circumstances,' " *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), Tharpe faces a high bar in showing that jurists of reason could disagree whether the district court abused its discretion in denying his motion. It may be that, at the end of the day, Tharpe should not receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the Court of Appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe. Justice Thomas dissented, joined by Alito and Gorsuch. In their view Tharpe will not be able to meet the procedural requirements for relief and the remand is therefore is an unnecessary do-over.

B. **Overcoming Procedural Default by IAC.** *Davila v. Davis***,** 137 S. Ct. 2058 (June 26, 2017). The Court granted cert. in this death penalty case to decide if 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 applies to a procedurally defaulted, but substantial, claim of ineffective assistance by appellate counsel. The Court answered "no" (5-4), in an opinion by Justice Thomas. The Court held that ineffective assistance of counsel in state post-conviction proceedings does not qualify as cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims. Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan.

C. Clearly Established Precedent re Independent Expert Assistance. *McWilliams v. Dunn*, 137 S. Ct. 1790 (June 19, 2017). Thirty-one years ago, McWilliams was convicted of capital murder by an Alabama jury and sentenced to death. The defendant's mitigation in the penalty phase of his 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. McWilliams challenged his sentence on appeal, arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. Thus, as the dissent on the Eleventh Circuit 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." The Supreme Court reversed (5-4), in an opinion authored by Justice Breyer. "We now consider, in this habeas corpus case, whether the Alabama courts' refusal was 'contrary to, or involved an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1). We hold that it was. Our decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.' *Id.* at 83. Petitioner in this case did not receive that assistance." The Court noted that *Ake* is triggered by a three-part test that is not disputed in this case: First, McWilliams is and was an "indigent defendant." Second, his "mental condition" was "relevant to . . . the punishment he might suffer," And, third, his "mental condition," i.e., his "sanity at the time of the offense," was "seriously in question." Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with "access to a competent psychiatrist who would conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S.,

at 83. The Court rejected Alabama's claim that the State was exempted from its obligations because McWilliams already had the assistance of a volunteer psychologist at the University of Alabama who "volunteer[ed]" to help defense counsel "in her spare time" and suggested the defense ask for further testing, Even if this episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower court has held or suggested that the volunteer was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. The Court also rejected Alabama's argument that *Ake*'s requirements are irrelevant because McWilliams "never asked for more expert assistance" than he got, "even though the trial court gave him the opportunity to do so." The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed "to have someone else review" the court-appointed expert's report and medical records. Justice Alito dissented, joined by C.J. Roberts, and Justices Thomas and Gorsuch.

D. Ineffective Assistance of Counsel as to Structural Error. *Weaver v. Massachusetts*, 137 S. Ct. 1899 (June 22, 2017). 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). Here the question presented was 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. The underlying structural error was closure of the courtroom to the public during jury selection because prospective jurors filled all seats—a matter to which defense counsel did not object and that appellate counsel did not raise on appeal. The juvenile defendant was convicted of murder and sentenced to life in prison. In post-conviction proceedings, the defendant argued that his trial counsel provided ineffective assistance because he did not object to the closure of the courtroom during jury voir dire. In an opinion by Justice Kennedy, the Court affirmed (6-2). The opinion first explained why a violation of

the right to a public trial is a structural error, but concluded that "while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." In the case of an unpreserved claim of violation of the public trial right, raised in the context of a claim based on ineffective assistance of counsel, "the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or [] to show the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." In this case, the petitioner failed to meet that burden. The Court was careful to note that "[n]either the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." Justice Thomas, joined by Justice Gorsuch, concurred. Justice Alito also concurred, also joined by Justice Gorsuch. Justice Breyer, joined by Justice Kagan, dissented.

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. 1203 (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.