

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 2017-19 TERMS
THRU APRIL 3, 2019**

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I. SEARCH & SEIZURE

A. Vehicles and Motorists

1. **Warrantless Search of Rental Car.** *Byrd v. United States*, 138 S. Ct. 1518 (May 14, 2018). Pennsylvania State Troopers pulled over a car driven by Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin. The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin with the intent to distribute, and possession of body armor by a prohibited person. Byrd moved to suppress the evidence as the fruit of an unlawful search. The district court denied the motion, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, both the district court and court of appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car. The Supreme Court granted cert. to address the question whether a driver has a reasonable expectation of privacy in a rental car when that person is not listed as an authorized driver on the rental agreement. In a decision authored by Justice Kennedy (9-0), the Court reversed and remanded, holding that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver. The Court concluded a remand is necessary, however, to address in the first instance the government's argument that this general rule is inapplicable because, in the

circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, the justices agreed, “our cases make clear he would lack a legitimate expectation of privacy. It is necessary to remand as well to determine whether, even if Byrd had a right to object to the search, probable cause justified it in any event.” Justice Thomas, joined by Gorsuch, concurred, but expressed “serious doubts about the ‘reasonable expectation of privacy’ test from *Katz v. United States*, 389 U.S. 347, 360–361 (1967) (Harlan, J., concurring). I join the Court’s opinion because it correctly navigates our precedents, which no party has asked us to reconsider. As the Court notes, Byrd also argued that he should prevail under the original meaning of the Fourth Amendment because the police interfered with a property interest that he had in the rental car. I agree with the Court’s decision not to review this argument in the first instance. In my view, it would be especially ‘unwise’ to reach that issue . . . because the parties fail to adequately address several threshold questions [such as the type of property interest involved and the body of law governing that property right].” The concurrence ends with an invitation: “In an appropriate case, I would welcome briefing and argument on these questions.” Justice Alito concurred, as well, with the specific understanding that the court of appeals can “reexamine the question whether petitioner may assert a Fourth Amendment claim or to decide the appeal on another appropriate ground.”

2. **Warrantless Search of Vehicle at Residence.** *Collins v. Virginia*, 138 S. Ct. 1663 (May 29, 2018). 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. The state courts upheld the search under the automobile exception to the warrant requirement. The Supreme Court reversed (8-1) in an opinion by Justice Sotomayor. "This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not." The Court held that where a vehicle is parked on the curtilage of a home, the automobile exception cannot justify the intrusion into protected areas necessary to conduct the vehicle search—in other words, the automobile exception yields. Reasoning that "the scope of the automobile exception extends no further than the automobile itself," the Court determined that the search of a vehicle on the curtilage of a home was no more permissible than the absurd suggestion that an officer could use the automobile exception to enter a living room and search a motorcycle he saw through the window. The Court emphasized that its own precedent has long guarded against allowing exceptions to the warrant requirement to "justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." Allowing the automobile exception to justify such an intrusion onto the curtilage threatened to "transform what was meant to be an exception into a tool with far broader application" and "unmoor[ed] the exception from its justifications." In reaching its conclusion, the Court rejected Virginia's arguments supporting the search. First, the Court rejected Virginia's assertion that the automobile exception was "categorical," permitting warrantless searches "anytime, anywhere." Second, the Court declined Virginia's invitation to draw the line somewhere other than curtilage—specifically, a bright line at "the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage." The Court rejected this argument in part because it "rests on a mistaken premise about the constitutional significance of visibility," and further because it would "automatically . . . grant constitutional rights to those

persons with financial means” to have such structures. Justice Thomas concurred, writing separately to question the Court’s authority to require that state courts apply the federal exclusionary rule. Justice Alito dissented in no uncertain terms.

- 3. Warrantless Blood Draw from Unconscious Motorist.** *Mitchell v. Wisconsin*, 139 S. Ct. 915 (cert. granted Jan. 11, 2019); decision below at 914 N.W.2d 151 (Wis. 2018). In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, the Supreme Court referred approvingly to “implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply” with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances—most commonly when the motorist is unconscious. State appellate courts have sharply divided on whether such laws comport with the Fourth Amendment. The question presented is: Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.
- 4. Reasonable Suspicion to Stop Motorist.** *Kansas v. Glover*, 139 S. Ct. ____ (cert. granted Apr. 1, 2019); decision below at 422 P.3d 64 (Kan. 2018). While on routine patrol, a Kansas police officer ran a registration check on a pickup truck with a Kansas license plate. The Kansas Department of Revenue’s electronic database indicated the truck was registered to Charles Glover, Jr. and that Glover’s Kansas driver’s license had been revoked. The officer stopped the truck to investigate whether the driver had a valid license because he “assumed the registered owner of the truck was also the driver.” The stop was based only on the information that Glover’s license had been revoked; the deputy did not observe any traffic infractions and did not identify the driver. Glover was in fact the driver, and was charged as a habitual violator for driving while his license was revoked. Though Glover admitted he “did not have a valid driver’s license,” he moved to suppress all evidence from the stop, claiming the stop violated the Fourth Amendment, as interpreted in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Delaware v. Prouse*, 440 U.S. 648 (1979), because the deputy lacked reasonable suspicion to pull him over. The trial court granted the

motion to suppress based only on the judge’s anecdotal personal experience that it is not reasonable for an officer to infer that the registered owner of a vehicle is the driver of the vehicle. The first state court of appeal reversed, but the state supreme court granted review and reinstated the order of suppression – Although it expressly rejected reliance on just “common sense,” it held that an officer lacks reasonable suspicion to stop a vehicle when the stop is based on the officer’s suspicion that the registered owner of a vehicle is driving the vehicle unless the officer has “more evidence” that the owner actually is the driver. The state petitioned for cert, contending: (1) The Kansas decision conflicts with state and federal precedent involving “12 other state supreme courts, 13 intermediate state appellate courts, and 4 federal circuit courts, including the Tenth Circuit, which covers Kansas. *See, e.g., United States v. Pyles*, 904 F.3d 422, 425 (6th Cir. 2018) (noting the split); *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1207-08 (10th Cir. 2007) (Gorsuch, J.)”; (2) The Kansas ruling adopted a more demanding standard than the “minimal” suspicion set forth in *United States v. Sokolow*, 490 U.S. 1, 7 (1989); and (3) The Kansas ruling defies common sense on an important and recurring Fourth Amendment question about “judgments and inferences” that law enforcement officers make every day. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).” The Supreme Court granted cert. to determine: “[W]hether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.”

B. Electronic Evidence

- 1. Historical Cell Phone Location Data.** *Carpenter v. United States*, 138 S. Ct. 2206 (June 22, 2018). 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. The historical data revealed the location and movements of Carpenter, a cell phone user, over the course of 127 days, and was used to prove his location in the vicinity at the time of multiple armed robberies. 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 Carpenter’s service provider to disclose months’ worth of his 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 the Supreme Court. Those decisions form what is known as the third-party doctrine, which exempts from the Fourth Amendment warrant clause records or information that someone voluntarily shares with someone or something else—here, the phone companies from which the records were obtained. The Supreme Court reversed, in a 5-4 decision authored by Chief Justice Roberts, holding that obtaining such historical cell site records was a Fourth Amendment search requiring a search warrant. The majority opinion holds that because of the “unique nature of cellphone location information,” the third party doctrine did not apply. The majority focused on the nature of the information at issue and the “seismic shifts in digital technology,” to justify carving out such records from the third party doctrine. The third-party doctrine was left intact as it originally applied to a telephone number and bank records, but was made inapplicable to cellphone location information. It should be noted that the opinion confines its holding to historical information of a week or more, and it specifically exempts the acquisition of information in an emergency setting, distinguishing “current” location information used to stop an ongoing crime, from historical information gathered to prosecute a completed crime. The four dissenting justices (Kennedy, Thomas, Alito & Gorsuch) wrote separate opinions, although sometimes interlocking.

2. **Suppression of Title III Wiretaps.** *Dahda v. United States*, 138 S. Ct. 1491 (May 14, 2018). 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 the wiretap evidence at their criminal trial arguing that 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 their motion to suppress the evidence and they 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 of appeals agreed 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 of appeals 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. The Supreme Court affirmed (8-0) on different grounds in an opinion delivered by Justice Breyer. Initially, the Court rejected the Tenth Circuit's application of the core concerns test to subsection (ii). “Like the Dahdas, we believe that the Tenth Circuit's interpretation of this provision is too narrow. The Tenth Circuit took the test it applied from this Court's decision in *United States v. Giordano*, . . . [b]ut *Giordano* involved a different provision.” The statute sets forth three grounds for suppression: (i) the communication was unlawfully intercepted; (ii) the order of . . . approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval. §2518(10)(a). *Giordano* focused not, as here, on the second subparagraph but on the first subparagraph, which calls for the suppression of ‘unlawfully intercepted’ communications. In *Giordano*, the Court held that the first subparagraph did cover certain statutory violations, such as those provisions that “implemented” the wiretap-related congressional concerns the Tenth Circuit mentioned in its opinion. So construed, the suppression provision left room for the second and third subparagraphs to have separate legal force. The Court went on to hold that a violation of the approval-by-the-Attorney-General provision implicated Congress' core concerns. Subparagraph (i) thus covered that particular statutory provision. And, finding the

provision violated, *Giordano* ordered the wiretap evidence suppressed. Here, by contrast, the Court focused upon subparagraph (ii), which requires suppression when an order is facially insufficient. And in respect to this subparagraph, the Supreme Court could find no good reason for applying *Giordano*'s test. The underlying point of *Giordano*'s limitation was to help give independent meaning to each of §2518(10)(a)'s subparagraphs. It thus makes little sense to extend the core concerns test to subparagraph (ii) as well. Doing so would “actually treat that subparagraph as ‘surplusage’—precisely what [this] Court tried to avoid in *Giordano*.” Thus, the Court concluded that subparagraph (ii) does not contain a *Giordano*-like “core concerns” requirement. The statute means what it says. That is to say, subparagraph (ii) applies where an order is “insufficient on its face.” §2518(10)(a)(ii). That said, the Court also disagreed with the Tenth Circuit’s conclusion about the illegality of the wiretap evidence at trial. The Court assumed the relevant sentence of the judge’s warrant exceeded the judge’s statutory authority. Yet, the Court noted that since none of the communications unlawfully intercepted outside the judge’s territorial jurisdiction were introduced at trial, the inclusion of the extra sentence had no significant adverse effect upon the Dahdas; after all, the remainder of each Order was itself legally sufficient, “so we conclude that the Orders were not ‘insufficient’ on their ‘face.’” (Justice Gorsuch was named to be on one of the Tenth Circuit 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.)

II. FIFTH AMENDMENT

A. Double Jeopardy

1. **Separate Sovereigns.** *Gamble v. United States*, 138 S. Ct. 2707 (cert. granted June 28, 2018); decision below at 694 F. App’x 750 (11th Cir. 2017). The Fifth Amendment states that “No person shall . . . be twice put in jeopardy” “for the same offence.” Yet, Terance Martez Gamble has been subjected to two convictions and two sentences—one in state court and one in federal court—for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of his life behind bars. Gamble argues that the Double Jeopardy Clause prohibits that result and that existing Supreme Court precedent should be overruled. The fact that

Gamble’s sentences were imposed by separate sovereigns—Alabama and the United States—should make no difference. He argues that the court-manufactured “separate sovereigns” exception—pursuant to which his otherwise plainly unconstitutional duplicative conviction was upheld—is inconsistent with the plain text and original meaning of the Constitution, and outdated in light of incorporation and a vastly expanded system of federal criminal law. For precisely these reasons, Justices Ginsburg and Thomas have called for “fresh examination” of the exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring); *see also id.* (“The [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.”). Question presented: Whether the Supreme Court should overrule the “separate sovereigns” exception to the double jeopardy clause.

2. **Double Jeopardy Following Acquittal at Severed Trial.** *Currier v. Virginia*, 138 S. Ct. 2144 (June 22, 2018). 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. 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, 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?” He was acquitted of breaking and entering and larceny charges. He then argued that he couldn’t be tried on the question of whether he had a gun during a burglary because, as the jury had found, he hadn’t taken part in the burglary. The trial court rejected his challenge. 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. Virginia courts rejected his challenge. The Supreme Court affirmed, rejecting his double jeopardy challenge (5-4) in an opinion written by Justice Gorsuch (joined by C.J. Roberts, Thomas, Alito, and Kennedy (in part)). The majority held that because Currier consented to have the charges tried separately, his trial and conviction on the felon-in-possession charge did not violate the Double Jeopardy Clause (Parts I and II of Gorsuch’s opinion). The majority determined that consenting to multiple trials waives not only the protection against multiple trials but also the protection against re-litigation of an issue following an acquittal (an *Ashe v. Swenson* issue). Justice Kennedy, who provided the deciding fifth vote, would have ended the inquiry there. A plurality of the Court went further, setting forth broader grounds for the ruling. In Part III of his opinion, Gorsuch (with Roberts, Thomas and Alito) questioned whether re-litigating an issue after acquittal violates double jeopardy at all—directly challenging *Ashe’s* constitutional issue-preclusion. For them, issue preclusion is a doctrine related to civil litigation that should not be imported into criminal cases. Justice Ginsburg dissented (with Breyer, Sotomayor, and

Kagan), providing a detailed background of the principles and protections involved, and the confusion caused by the majority/plurality decision.

- B. Shackling of Defendants in Court.** *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (May 14, 2018). Four criminal defendants objected to being bound by full restraints during pretrial proceedings in their cases, but the district court denied relief. On appeal the Ninth Circuit held that the use of such restraints was unconstitutional, even though each of the four criminal cases had ended prior to its decision: Three defendants had pleaded guilty and been sentenced, while the case against the fourth defendant was dismissed as part of a deferred prosecution agreement. The government petitioned for certiorari and the Supreme Court agreed to decide only whether the case was moot before it was decided by the Ninth Circuit, or to put it somewhat differently: Whether the appeals were saved from mootness either because the defendants sought “class-like relief” in a “functional class action,” or because the challenged practice was “capable of repetition, yet evading review.” In a unanimous decision authored by Chief Justice Roberts, the Court rejected the applicability of those mootness-saving analogies, holding instead that the defendants’ appeals challenging the use of full restraints during nonjury pretrial proceedings became moot when their underlying criminal cases came to an end before the Ninth Circuit could render its decision.

III. Fourteenth Amendment Incorporation of Bill of Rights

- A. Sixth Amendment: Unanimous Verdicts.** *Ramos v. Louisiana*, 139 S. Ct. ___ (cert. granted Mar. 18, 2019); decision below at 231 So.3d 44 (La. App. 2017). Evangelisto Ramos was charged with second-degree murder. He was tried by a twelve-member jury. The State’s case against Mr. Ramos was based on purely circumstantial evidence. The prosecution did not present any eyewitnesses to the crime. Some of the evidence was susceptible of innocent explanation. After deliberating, ten jurors found that that the government had proven its case against Ramos. However, two jurors concluded that the government had failed to prove Ramos guilty beyond a reasonable doubt. Notwithstanding the different jurors’ findings, under Louisiana’s non-unanimous jury verdict law, a guilty verdict was entered. Ramos was sentenced to spend the remainder of his life in prison without the possibility of parole. Ramos challenged the non-unanimous verdict law in state court. On appeal, the Court of Appeal noted that “some of the evidence may be susceptible of innocent explanation,” yet, it rejected his challenge, concluding that “non-unanimous twelve-person jury verdicts are constitutional,” Ramos petitioned the Supreme Court for cert, arguing that under the

Sixth Amendment, a unanimous jury is required and this right should be incorporated to the states under the Fourteenth Amendment: “The vast majority of the Bill of Rights have been fully incorporated and made applicable to the states through the Fourteenth Amendment. The Fourteenth Amendment should incorporate the Sixth Amendment’s guarantee of a unanimous jury because a) this Court has made clear that the guarantees in the Bill of Rights must be protected regardless of their current functional purpose; b) this Court has rejected the notion of partial incorporation or watered down versions of the Bill of Rights, and c) Louisiana’s non-unanimous jury rule was adopted as part of a strategy by the Louisiana Constitutional Convention of 1898 to establish white supremacy.” The Supreme Court granted cert. Question presented: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

B. Eighth Amendment: Excessive Fines Clause. *Timbs v. Indiana*, 139 S. Ct. 682 (Feb. 20, 2019). Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling \$1,203. At the time of Timbs’s arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about \$42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a private law firm to bring a civil suit for forfeiture of Timbs’s Land Rover, charging that the vehicle had been used to transport heroin. After Timbs’s guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs’s vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for \$42,000, more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs’s offense, hence unconstitutional under the Eighth Amendment’s Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. Timbs sought cert, arguing that the Eighth Amendment’s Excessive Fines Clause is an “incorporated” protection applicable to the States under the Fourteenth Amendment’s Due Process Clause. The Supreme Court granted certiorari and reversed in a unanimous opinion authored by Justice Ginsburg. “Like the Eighth

Amendment’s proscriptions of ‘cruel and unusual punishment’ and ‘[e]xcessive bail,’ the protection against excessive fines guards against abuses of government’s punitive or criminal law-enforcement authority. This safeguard, we hold, is ‘fundamental to our scheme of ordered liberty,’ with ‘dee[p] root[s] in [our] history and tradition.’ *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.”

- C. Eighth Amendment: Abrogation of Insanity Defense.** *Kahler v. Kansas*, 139 S. Ct. ___ (cert. granted Mar. 18, 2019); decision below at 410 P.3d 105 (Kan. 2018). In Kansas, along with four other states (Alaska, Idaho, Montana, and Utah), it is not a defense to criminal liability that mental illness prevented the defendant from knowing his actions were wrong. So long as he knowingly killed a human being—even if he did it because he believed the devil told him to, or because a delusion convinced him that his victim was trying to kill him, or because he lacked the ability to control his actions—he is guilty. Petitioner argues that this rule defies a fundamental, centuries-old precept of our legal system: “People cannot be punished for crimes for which they are not morally culpable. Kansas’s rule therefore violates the Eighth Amendment’s prohibition of cruel and unusual punishments and the Fourteenth Amendment’s due process guarantee.” Even a capital murder defendant need not be of sound mind. Yet, state statutes abolishing the M’Naughten Rule (or a variant of it) have been upheld by those five states. The Supreme Court granted cert. in response to Kahler’s petition asking the Supreme Court to determine the question reserved in *Clark v. Arizona*: Whether “the Constitution mandates an insanity defense.” 548 U.S. 735, 752 n.20 (2006); see *Delling v. Idaho*, 133 S. Ct. 504, 506 (2012) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting from denial of certiorari) (urging review of this question). Question presented: Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

IV. CRIMES

- A. Federal Preemption of State Prosecutions.** *Kansas v. Garcia, Morales and Ochoa-Lara* 139 S. Ct. ___ (cert. granted Mar. 18, 2019) (petition by Kansas as to three separate criminal prosecutions); decisions below at 401 P.3d 588 (Kan. 2017). In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a. Regulations implementing IRCA created a “Form I-9” that employers are required to

have all prospective employees complete—citizens and aliens alike. IRCA contains an “express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens,” *Arizona v. United States*, 567 U.S. 387, 406 (2012), but IRCA “is silent about whether additional penalties may be imposed against the employees themselves.” IRCA also provides that “[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18.” 8 U.S.C. § 1324a(b)(5). Here, Respondents used other peoples’ social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease. Kansas prosecuted Respondents for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions. This petition presents two questions: (1) Whether IRCA expressly preempts the States from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications; and (2) If IRCA bars the States from using all such information for any purpose, whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes.

B. Oklahoma Tribal Jurisdiction. *Carpenter, Interim Warden v. Murphy*, 138. S. Ct. 2026 (cert. granted May 21, 2018; Justice Gorsuch recused); decision below at 875 F.3d 896 (10th Cir. 2017). The Tenth Circuit held that Oklahoma lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore “Indian country” subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. In its cert. petition, the state argues that this holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions. To put this holding into perspective, the former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Moreover, other litigants have invoked the decision below to reincarnate the historical boundaries of all “Five Civilized Tribes”—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the state. According to the state, the decision thus threatens to effectively redraw the map of Oklahoma. The state also

contends that prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*; and that civil litigants are using the decision to expand tribal jurisdiction over non-members. Question presented: Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an “Indian reservation” today under 18 U.S.C. § 1151(a).

C. ACCA

1. **Florida Robbery as a “Violent Felony” Under ACCA.** *Stokeling v. United States*, 139 S. Ct. 544 (Jan. 15, 2019). Robbery under Florida law is a violent felony under the ACCA, even though Florida court decisions have virtually dispensed with a physical force requirement. In a 5-4 decision authored by Justice Thomas, the Court held: “This case requires us to decide whether a robbery offense that has as an element the use of force sufficient to overcome a victim’s resistance necessitates the use of ‘physical force’ within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). We conclude that it does.” The majority’s holding significantly diluted the Court’s earlier opinion in *Curtis Johnson*. In *Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined “physical force” as a quantity of “force capable of causing physical pain or injury,” adding words such as “severe,” “extreme,” “furious,” or “vehement” to define “physical force.” In its majority decision here the Court limited its reading of *Johnson*, holding that “*Johnson* [] does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality.” Applying this definition, the Court held that “the elements clause encompasses robbery offenses that require the criminal to overcome the victim’s resistance.” The Court ruled that Florida robbery is one of these offenses because it requires an “amount of force necessary to overcome a victim’s resistance,” even though Florida robbery only requires force “however slight” to overcome that resistance. The majority’s holding concludes that the term “physical force” in the ACCA was meant to “encompass[] the degree of force necessary to commit common-law robbery.” That included the quantity of force necessary to “pull a diamond pin out of a woman’s hair when doing so tore away hair attached to the pin.” Justice Thomas’s opinion was joined by Breyer, Alito, Gorsuch & Kavanaugh. Justice Sotomayor dissented (joined by Roberts, Ginsburg & Kagan). The dissent claims the majority “distorts” the “physical force” definition laid out earlier by the Court in

Johnson, as it requires “only slight force.” Noting that under Florida law “[i]f the resistance is minimal, the force need only be minimal as well,” the dissenting opinion cites to Florida cases where the “force element . . . is satisfied by a [thief] who attempts to pull free after the victim catches his arm,” “pulls cash from a victim’s hand by ‘peel[ing] [his] fingers back,’” “grabs a bag from a victim’s shoulder . . . , so long as the victim instinctively holds on to the bag’s strap for a moment,” and “caus[es] a bill to rip while pulling cash from a victim’s hand.” Furthermore, “as anyone who has ever pulled a bobby pin out of her hair knows, hair can break from even the most minimal force.” The dissenters would not predicate a 15-year mandatory minimum sentence on such conduct and find that by so doing the Court leaves in the dark a common-sense understanding of robbery, Congressional intent to impose an enhanced penalty on offenders with prior “violent” felonies, and its prior decision in *Johnson*.

2. **Burglary of Nonpermanent or Habitable Mobile Structure as “Violent Felony” Under ACCA.** *United States v. Stitt*, 139 S. Ct. 399 (Dec. 10, 2018). Two defendants, Stitt and Sims, challenged state burglary convictions used as ACCA predicates that were bottomed on allegedly non-generic burglary laws. Stitt was convicted under a Tennessee statute defining burglary as “burglary of a habitation,” and defining “habitation” as any “structure” or “vehicle . . . designed or adapted for overnight accommodation.” Sims was convicted under an Arkansas statute prohibiting burglary of a residentially occupiable structure, including a “vehicle, building, or other structure . . . customarily used for overnight accommodation of persons.” In a decision authored by Justice Breyer, the Court unanimously rejected the claim that these statutes do not qualify as predicates: “The Armed Career Criminal Act requires a federal sentencing judge to impose upon certain persons convicted of unlawfully possessing a firearm a 15-year minimum prison term. The judge is to impose that special sentence if the offender also has three prior convictions for certain violent or drug-related crimes. 18 U.S.C. § 924(e). Those prior convictions include convictions for ‘burglary.’ § 924(e)(2)(B)(ii). And the question here is whether the statutory term ‘burglary’ includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. We hold that it does.” The Court held that Congress intended for ACCA to apply to generic burglaries as defined by most states at the time the law was passed; it found that a majority of states at that time applied it to vehicles adapted or customarily used for lodging. On

the other hand, the Court agreed that generic burglary does not apply to statutes covering *any* boat, vessel, or railroad car without the customary lodging caveat (laws that would apply whether or not the vehicle or structure is customarily used for overnight accommodations). Both defendants had been successful in the court of appeals and the Supreme Court reversed both cases, but Sims’s case was remanded for consideration of his additional claim that was never ruled on below: The statute in his case includes burglary of a vehicle “in which any person lives,” which seemingly covers an automobile in which a homeless person sleeps occasionally (a broader definition than “customarily used for overnight accommodations”).

3. Requisite Intent Under ACCA for Home Invasion. *Quarles v. United States*, 139 S. Ct. 914 (cert. granted Jan. 11, 2019); decision below at 850 F.3d 856 (6th Cir. 2017). The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory fifteen-year prison term upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any “violent felony or * * * serious drug offense.” The definition of a “violent felony” includes a burglary conviction that is punishable by imprisonment for a term exceeding one year. See § 924(e)(2)(B)(ii). In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term “burglary” in its generic sense, to cover any crime “having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Id.* at 598-599. The question presented is: Whether (as two circuits hold) *Taylor’s* definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether (as the court below and three other circuits hold) it is enough that the defendant formed the intent to commit a crime at any time while “remaining in” the building or structure.

D. *Johnson* and 924(c). *United States v. Davis*, 139 S. Ct. 782 (cert. granted Jan 4, 2019); decision below at 903 F.3d 483 (5th Cir. 2018). The Supreme Court has granted cert. to resolve the circuit conflict over the application of *Johnson’s* holding to 924(c)’s residual clause. Question presented: Whether the subsection-specific definition of “crime of violence” in 18 U.S.C. § 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

- E. Requisite Proof Under § 922(g)(5) for Undocumented Alien Knowingly Possessing Firearm.** *Rehaif v. United States*, 139 S. Ct. 914 (cert. granted Jan. 11, 2019); decision below at 868 F.3d 907 (11th Cir. 2017). Rehaif is a citizen of the UAE who overstayed his student visa. He was convicted under § 922(g)(5) for unlawful possession of a firearm and ammunition by an undocumented immigrant. At trial, the court instructed the jury that the government is not required to prove that the defendant knew that he was “illegally or unlawfully in the United States” at the time he possessed the firearm and ammunition. The Eleventh Circuit affirmed his conviction. Question presented: Whether the “knowingly” provision of 18 USC § 924(a)(2) applies to both the possession and status elements of an offense under § 922(g), or whether it applies only to the possession element.

V. SENTENCING

- A. Mandatory Career Offender Guidelines Post-*Johnson & Beckles*.** *Brown v. United States*, 139 S. Ct. 14 (cert. denied Oct. 15, 2018). Petitioners in a series of cases argued that the pre-*Booker* mandatory career offender guidelines suffered from the same unconstitutional vagueness that *Johnson* found in the residual clause of ACCA. The question had seemingly been left open by the Court’s decision in *Beckles*, which addressed the question as it relates to advisory guidelines, post-*Booker*. The Supreme Court denied cert. in each of the cases. Only two justices—Sotomayor and Ginsburg—dissented from the Court’s denial of certiorari. Justice Sotomayor’s dissent explains that the refusal to grant cert. “all but ensures that the question will never be answered”: “Today this Court denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences. They were sentenced under a then-mandatory provision of the U.S. Sentencing Guidelines, the exact language of which we have recently identified as unconstitutionally vague in another legally binding provision. These petitioners argue that their sentences, too, are unconstitutional. This important question, which has generated divergence among the lower courts, calls out for an answer.” The dissent explains the significant circuit conflict on the issue: “The question for a petitioner like Brown [] is whether he may rely on the right recognized in *Johnson* to challenge identical language in the mandatory Guidelines. Three Courts of Appeals have said no. See 868 F.3d 297 (CA4 2017) (case below); *Raybon v. United States*, 867 F.3d 625 (CA6 2017); *United States v. Greer*, 881 F.3d 1241 (CA10 2018). One Court of Appeals has said yes. See *Cross v. United States*, 892 F.3d 288 (CA7 2018). Another has strongly hinted yes in a different posture, after which point the Government dismissed at least one appeal that would have allowed the court to answer the question directly. See *Moore v. United States*, 871

F.3d 72, 80–84 (CA1 2017); *see also United States v. Roy*, 282 F.Supp.3d 421 (Mass. 2017); *United States v. Roy, Withdrawal of Appeal* in No. 17-2169 (CA1). One other court has concluded that the mandatory Guidelines themselves cannot be challenged for vagueness. *See In re Griffin*, 823 F.3d 1350, 1354 (CA11 2016).” The dissent strongly suggests that one reason cert. was denied is a related timeliness concern for these underlying 2255 petitions for collateral relief, a concern that the dissent refutes: “Federal law imposes on prisoners seeking to mount collateral attacks on final sentences ‘[a] 1-year period of limitation . . . from the latest of several events. *See* 28 U.S.C. § 2255(f). One event that can reopen this window is this Court ‘newly recogniz[ing]’ a right and making that right ‘retroactively applicable to cases on collateral review.’ §2255(f)(3). The right recognized in the ACCA context in *Johnson*, we have held, is retroactive on collateral review. *Welch v. United States*, 578 U.S. ___, ___ (2016) (slip op., at 9).” Although the dissent rejects this timeliness concern, it seemingly lies at the heart of the cert. denial by the balance of the justices.

B. 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. 1765 (June 4, 2018). 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 § 3582(c)(2)? In a 6-3 decision authored by Justice Kennedy, the Court held that such a defendant is eligible for § 3582(c) relief, clarifying confusion about its prior plurality opinion in *Freeman v. United States*. “The proper construction of federal sentencing statutes and the Federal Rules of Criminal Procedure can present close questions of statutory and textual interpretation when implementing the Federal Sentencing Guidelines. Seven Terms ago the Court considered one of these issues in a case involving a prisoner’s motion to reduce his sentence, where the prisoner had been sentenced under a plea agreement authorized by a specific Rule of criminal procedure. *Freeman v. United States*, 564 U.S. 522 (2011). The prisoner maintained that his sentence should be reduced under 18 U.S.C. § 3582(c)(2) when his Guidelines sentencing range was lowered retroactively. 564 U.S., at 527–528 (plurality opinion). No single interpretation or rationale in *Freeman* commanded a majority of the Court. The courts of appeals then confronted the question of what principle or principles considered in *Freeman* controlled when an opinion by four Justices and a concurring opinion by a single Justice had

allowed a majority of this Court to agree on the judgment in *Freeman* but not on one interpretation or rule. 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.”” For further guidance on similar questions involving the same statute and rule, courts turned to this Court’s opinion in *Marks v. United States*, 430 U.S. 188 (1977). Some courts interpreted *Marks* as directing them to follow the ‘narrowest’ opinion in *Freeman* that was necessary for the judgment in that case; and, accordingly, they adopted the reasoning of the opinion concurring in the judgment by JUSTICE SOTOMAYOR.” The *Marks* rule, though, has been subject to great criticism because it seemingly allows the Court’s holding to be determined by a single justice with whom eight other justices disagree. The Court found no need to alter the *Marks* rule for construing plurality opinions in this case. Instead, the majority here found that the district court accepted Hughes’s Type-C agreement after concluding that a 180-month sentence was consistent with the Sentencing Guidelines. The court then calculated Hughes’ sentencing range and imposed a sentence that the court deemed “compatible” with the Guidelines. Thus, the sentencing range was a basis for the sentence that the district court imposed. That range has “subsequently been lowered by the Sentencing Commission,” so Hughes is eligible for relief under § 3582(c)(2). In so ruling, the majority rejected the government’s “recycled” *Freeman* arguments to the contrary. Justice Sotomayor concurred, adhering to her *Freeman* concurrence, but acknowledging that her concurrence in that case led to unsettled law, so she now joins the majority decision in full in order to settle the legal precedent. Chief Justice Roberts dissented, joined by Thomas and Alito, and in the end recommended that the government can obviate this holding by obtaining waivers of future § 3582(c) relief as a condition of a Type-C plea agreement.

2. **Ineligibility Following Substantial Assistance Sentence.** *Koons v. United States*, 138 S. Ct. 1783 (June 4, 2018). In a unanimous decision, written by Justice Alito, the Court held that a defendant is not eligible for § 3582(c) relief in a drug case with a mandatory minimum sentence even if he was sentenced lower

based upon substantial assistance. “Under 18 U.S.C. § 3582(c)(2), a defendant is eligible for a sentence reduction if he was initially sentenced ‘based on a sentencing range’ that was later lowered by the United States Sentencing Commission. The five petitioners in today’s case claim to be eligible under this provision. They were convicted of drug offenses that carried statutory mandatory minimum sentences, but they received sentences below these mandatory minimums, as another statute allows, because they substantially assisted the Government in prosecuting other drug offenders. We hold that petitioners’ sentences were ‘based on’ their mandatory minimums and on their substantial assistance to the Government, not on sentencing ranges that the Commission later lowered. Petitioners are therefore ineligible for § 3582(c)(2) sentence reductions. The government had asked the Court to go further in its ruling, applying it to any sentence with a mandatory minimum, but the Court declined, in footnote 1: “The Government argues that defendants subject to mandatory minimum sentences can never be sentenced ‘based on a sentencing range’ that the Commission has lowered, 18 U.S.C. § 3582(c)(2), because such defendants’ ‘sentencing range[s]’ are the mandatory minimums, which the Commission has no power to lower. . . . We need not resolve the meaning of ‘sentencing range’ today.”

3. **Explanation for Denial of Relief.** *Chavez-Meza v. United States*, 138 S. Ct. 1959 (June 18, 2018). This case concerns a criminal drug offender originally sentenced in accordance with the Federal Sentencing Guidelines. Subsequently, the Sentencing Commission lowered the applicable Guidelines sentencing range; the offender asked for a sentence reduction in light of the lowered range; and the district judge reduced his original sentence from 135 months’ imprisonment to 114 months. Believing he should have obtained a yet greater reduction, Chavez-Meza argued that the district judge did not adequately explain why he imposed a sentence of 114 months rather than a lower sentence. The Tenth Circuit held that the judge’s explanation was adequate. In a 5-3 decisions authored by Justice Breyer (Gorsuch recused), the Supreme Court agreed with the court of appeals. The Court noted that at the defendant’s initial sentencing he sought a variance from the Guidelines range (135 to 168 months) on the ground that his history and family circumstances warranted a lower sentence. The judge denied his request. In doing so, the judge noted that he had “consulted the sentencing factors of 18 U.S.C. 3553(a)(1).” He explained that the

“reason the guideline sentence is high in this case, even the low end of 135 months, is because of the [drug] quantity.” He pointed out that the defendant had “distributed 1.7 kilograms of actual methamphetamine,” a “significant quantity.” And he said that “one of the other reasons that the penalty is severe in this case is because of methamphetamine.” He elaborated this latter point by stating that he had “been doing this a long time, and from what [he] gather[ed] and what [he had] seen, methamphetamine, it destroys individual lives, it destroys families, it can destroy communities.” This record was before the judge when he considered petitioner’s request for a sentence modification. He was the same judge who had sentenced petitioner originally. Petitioner asked the judge to reduce his sentence to 108 months, the bottom of the new range, stressing various educational courses he had taken in prison. The government pointed to his having also broken a moderately serious rule while in prison. The judge certified (on a form) that he had “considered” petitioner’s “motion” and had “tak[en] into account” the relevant Guidelines policy statements and the § 3553(a) factors. He then reduced the sentence to 114 months. The Court’s majority held that the record as a whole strongly suggests that the judge originally believed that, given petitioner’s conduct, 135 months was an appropriately high sentence. “So it is unsurprising that the judge considered a sentence somewhat higher than the bottom of the reduced range to be appropriate. As in *Rita*, there was not much else for the judge to say.” Justice Kennedy dissented (joined by Sotomayor and Kagan) because merely checking a box on the current form AO-247 does not allow for meaningful appellate review of the decision, and he recommended changes to expand on that form. “My disagreement with the majority is based on a serious problem—the difficulty for prisoners and appellate courts in ascertaining a district court’s reasons for imposing a sentence when the court fails to state those reasons on the record; yet, in the end, my disagreement turns on a small difference, for a remedy is simple and easily attained. Just a slight expansion of the AO–247 form would answer the concerns expressed in this dissent in most cases, and likely in the instant one.”

C. Supervised Release

1. **Mandatory Minimum Sentence for Supervised Release Violation.** *United States v. Haymond*, 139 S. Ct. 398 (cert. granted Oct. 26, 2018); decision below at 69 F.3d 1153 (10th Cir. 2017). Haymond was originally convicted of one count of

possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. Following his release from prison, Haymond was charged with violating his supervised release by viewing child pornography. The determination was made by a preponderance of evidence, not beyond a reasonable doubt. The district court applied 18 U.S.C. § 3583(k) to Haymond's violation, requiring revocation of supervised release and reimprisonment for at least five years on a finding that a defendant like Haymond has violated supervised release. Finding "no factor present that warrant[ed]" reimprisonment beyond the required five years, the district court ordered Haymond to return to prison for five years, to be followed by five years of supervised release. *See* 18 U.S.C. § 3583(h) (allowing for a term of supervised release to follow reimprisonment). However, the court noted its "serious concerns about" the requirement that Haymond return to prison for at least five years. The court of appeals affirmed the revocation of supervised release, but vacated the order of reimprisonment and remanded. A majority of the appellate panel concluded that the case should be remanded for further proceedings in which only 18 U.S.C. § 3583(e)(3), and not § 3583(k), would apply to the district court's imposition of additional consequences for the supervised release violation. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment for at least five years on a finding that a particular type of defendant has violated. In the majority's view, § 3583(k) "violates the Fifth and Sixth Amendments" for two reasons: (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt. The majority concluded that § 3583(k) "violates the Sixth Amendment" under *United States v. Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines. The majority reasoned that "[b]y requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant may be subjected." The court of appeals observed that "when [respondent] was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years."

(citing 18 U.S.C. § 2252(b)(2)). The court further observed that “[a]fter the judge found, by a preponderance of the evidence” that respondent had violated a condition of his supervised release, Section 3583(k) required respondent to serve “a term of reincarceration of at least five years.” In the majority’s view, “[t]his unquestionably increased the mandatory minimum sentence of incarceration to which Haymond was exposed from no years to five years,” thereby “chang[ing] his statutorily prescribed sentencing range” without a jury finding beyond a reasonable doubt. As to the second rationale for its constitutional holding, the court of appeals did not dispute that “committing any crime” could permissibly result in respondent’s reimprisonment for up to two years under Section 3583(e)(3). But the court took the view that § 3583(k) “impermissibly requires a term of imprisonment based * * * on the commission of a new offense—namely ‘any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed.’” (quoting 18 U.S.C. § 3583(k)). The majority reasoned that “[b]y separating [certain] crimes from other violations, § 3583(k) imposes a heightened penalty” that does not depend on the original offense, and “must be viewed, at least in part, as” imposing “punishment for the subsequent conduct” rather than the original offense. Viewed in that manner, the court concluded, Section 3583(k) invites the double-jeopardy and jury-trial concerns that the Supreme Court has previously avoided by treating supervised-release revocation as punishment for the original offense. The government petitioned for cert, arguing that the majority’s holding that the invalidated provisions cannot constitutionally be applied is premised on a novel interpretation of the Fifth and Sixth Amendments (and the supervised-release statute itself) at odds with their text and history, the precedents of the Supreme Court, and the statements of other courts of appeals. “Nothing in the Constitution requires jury findings beyond a reasonable doubt as a prerequisite to the implementation or administration of a previously imposed sentence.” Question presented: Whether the court of appeals erred in holding unconstitutional and unenforceable the portions of 18 U.S.C. § 3583(k) that required the district court to revoke respondent’s ten-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by knowingly possessing child pornography.

2. **Tolling Supervised Release Term.** *Mont v. United States*, 139 S. Ct. 451 (cert. granted Nov. 2, 2018); decision below at 723 F. App'x 325 (6th Cir. 2018). BOP and the Executive Branch interpret 18 U.S.C. § 3624(e) as allowing it to unilaterally suspend a term of supervised release pending pretrial detention for a new state arrest. The statute in question allocates authority to BOP during the custodial portion of the sentence, but does not cover the supervised release portion of a sentence. A different statute, 18 U.S.C § 3583, allocates to the district court the authority or impose a new term of supervised release. Nevertheless, Sixth Circuit precedent holds that a directive from BOP as to calculations of a prisoner's release also controls that release after being placed under the supervision of the Judicial Branch. The Fourth, Fifth, and Eleventh Circuits agree. The Ninth and DC Circuits disagree, holding instead that § 3624(e) does not toll or affect the running of a supervised release term after the releasee is placed under the supervision of United States Probation. Question Presented: Is a district court required to exercise its jurisdiction in order to suspend the running of a supervised release sentence as directed under 18 U.S.C. § 3583(i) prior to expiration of the term of supervised release, when a supervised releasee is in pretrial detention, or does 18 U.S.C. § 3624(e) toll the running of supervised release while in pretrial detention?

D. **Extent of Mandatory Restitution.** *Lagos v. United States*, 138 S. Ct. 1684 (May 29, 2018). 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). The Fifth Circuit held that this provision covers the costs of private 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. The Supreme Court reversed, in a unanimous opinion authored by Justice Breyer: “We must decide whether the words ‘investigation’ and ‘proceedings’ are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings.”

VI. DEATH PENALTY

A. Incompetency to be Executed

1. **Vascular Dementia.** *Madison v. Alabama*, 139 S. Ct. 718 (Feb. 27, 2019). 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 in the first case. On remand, his execution was scheduled on an expedited basis. 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. **In a 6-3 decision authored by Justice Kagan, the Court answered the two questions (“No” and “Yes”—consistent with the parties’ newfound agreement in the Supreme Court), but remanded to the state court to apply those answers to the ultimate resolution of whether Madison can be executed.** “The Eighth Amendment, this Court has held, prohibits the execution of a prisoner whose mental illness prevents him from “rational[ly] understanding” why the State seeks to impose that punishment. *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). In this case, Vernon Madison argued that his memory loss and dementia entitled him to a stay of execution, but an Alabama court denied the relief. We now address two questions relating to

the Eighth Amendment’s bar, disputed below but not in this Court. First, does the Eighth Amendment forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime? We (and, now, the parties) think not, because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence. Second, does the Eighth Amendment apply similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions? We (and, now, the parties) think so, because either condition may—or, then again, may not—impede the requisite comprehension of his punishment. The only issue left, on which the parties still disagree, is what those rulings mean for Madison’s own execution. We direct that issue to the state court for further consideration in light of this opinion.” Justice Alito dissented, joined by Thomas and Gorsuch; Kavanaugh did not participate in the decision.

2. **Intellectual Disability.** *Moore v. Texas*, 139 S. Ct. 666 (Feb. 19, 2019) (per curiam). Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed fact findings and determined that, under the Supreme Court’s decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. ___ (2014), Moore qualified as intellectually disabled. For that reason, the court concluded, Moore’s death sentence violated the Eighth Amendment’s proscription of “cruel and unusual punishments.” The habeas court therefore recommended that Moore be granted relief. The Texas Court of Criminal Appeals declined to adopt the judgment recommended by the state habeas court. In the court of appeals’ view, the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (2004). The appeals court further determined that the evidentiary factors announced in *Briseno* “weigh[ed] heavily” against upsetting Moore’s death sentence. The U.S. Supreme Court vacated that ruling in 2017 in a 5-3 decision authored by Justice Ginsburg: “As we instructed in *Hall*, adjudications of intellectual disability should be ‘informed by the views of medical experts.’ . . . That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community’s consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of

the [Texas Court of Criminal Appeals] untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors 'creat[e]an unacceptable risk that persons with intellectual disability will be executed,' . . . Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled." Chief Justice Roberts dissented, joined by Justices Thomas and Alito. *Moore v. Texas*, 581 U. S. ___, ___ (2017) (slip op., at 18). The state appeals court subsequently reconsidered the matter on remand but reached the same conclusion. *Ex parte Moore*, 548 S. W. 3d 552, 573 (Tex. Crim. App. 2018) (*Ex parte Moore II*). Moore filed a second cert. petition, challenging that conclusion. Notably, the prosecutor, the district attorney of Harris County, agreed with Moore that he is intellectually disabled and cannot be executed. Moore also had amicus support from the American Psychological Association, the American Bar Association, and other amici. The Texas Attorney General persisted, however, filing a motion to intervene in the current cert. proceeding, and arguing that relief should be denied. The Supreme Court reversed the second determination (and denied the Attorney General's motion to intervene) in a per curiam decision from which three justices dissented (Alito, Thomas and Gorsuch). The Chief Justice, who dissented from the Court's original decision, this time filed a concurrence to the reversal, explaining his apparent change of heart. "When this case was before us two years ago, I wrote in dissent that the majority's articulation of how courts should enforce the requirements of *Atkins v. Virginia*, 536 U.S. 304 (2002), lacked clarity. *Moore v. Texas*, 581 U.S. ___, ___–___ (2017) (slip op., at 10–11). It still does. But putting aside the difficulties of applying *Moore* in other cases, it is easy to see that the Texas Court of Criminal Appeals misapplied it here. On remand, the court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance. The court repeated its improper reliance on the factors articulated in *Ex parte Briseno*, 135 S.W. 3d 1, 8 (Tex. Crim. App. 2004), and again emphasized Moore's adaptive strengths rather than his deficits. That did not pass muster under this Court's analysis last time. It still doesn't."

- B. Method of Execution.** *Bucklew v. Precythe*, 139 S. Ct. ___ (Apr. 1, 2019). Russell Bucklew was scheduled for execution on March 20 by a method that he alleged is very likely to cause him needless suffering because he suffers from a rare disease, cavernous hemangioma. The disease is progressive, and has caused unstable, blood-filled tumors to

grow in his head, neck, and throat. Those highly sensitive tumors easily rupture and bleed. The tumor in his throat often blocks his airway, requiring frequent, conscious attention from Bucklew to avoid suffocation. His peripheral veins are also compromised. That means that the lethal drug cannot be administered in the ordinary way, through intravenous access in his arms. An expert who examined Bucklew concluded that while undergoing Missouri's lethal injection protocol, Bucklew is "highly likely to experience . . . the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway." As he struggles to breathe through the execution procedure, Bucklew's throat tumor will likely rupture. "The resultant hemorrhaging will further impede Mr. Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood during the lethal injection process." Bucklew's execution will very likely be gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection execution. He proposed an alternative lethal gas method of execution, which was rejected by the district court. In a 2-1 decision, a panel of the Eighth Circuit concluded that this execution is not cruel and unusual solely because, in its view, Bucklew failed to prove that his alternative method would substantially reduce his risk of needless suffering. **The Supreme Court granted cert. and a stay of execution, but then affirmed the Eighth Circuit in a 5-4 decision authored by Justice Gorsuch (joined by Roberts, Thomas, Alito and Kavanaugh).** The majority summarized its holding in the opening paragraph of Justice Gorsuch's opinion: "Russell Bucklew concedes that the State of Missouri lawfully convicted him of murder and a variety of other crimes. He acknowledges that the U.S. Constitution permits a sentence of execution for his crimes. He accepts, too, that the State's lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him. Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end neither the district court nor the Eighth Circuit found it supported by the law or evidence. Now, Mr. Bucklew asks us to overturn those judgments. We can discern no lawful basis for doing so." The majority held that two of its prior decisions govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain. In *Baze v. Rees*, 553 U.S. 35 (2008) (plurality), the Court had held that a state's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." And, in *Glossip v. Gross*, 576 U.S. ____ (2015)—which also held that the *Baze* plurality is controlling law—the

Court held that an inmate must show his proposed alternative method of execution is not just theoretically feasible, but also readily implemented. The majority here held that Bucklew failed to satisfy the *Baze-Glossip* tests. In addition, the majority held that Bucklew failed to provide a detailed alternative means of execution that is both viable and likely to significantly reduce the substantial risk of severe pain. Justice Thomas concurred, but noted in a separate opinion his belief that punishment violates the Eighth Amendment only if it is deliberately designed to inflict pain. Justice Kavanugh concurred and in a separate opinion noted that a valid alternative means of execution need not necessarily be authorized by a state's law—"all nine Justices today agree on that point." Justice Breyer dissented (joined by in part by Ginsburg, Sotomayor and Kagan), and Justice Sotomayor filed her own dissent as well. The portion of Justice Breyer's dissent in which he stands alone (part III) reasserts his oft-stated belief that the excessive delays caused by a condemned inmate's legitimate constitutional challenges make it impossible for capital punishment to be constitutionally imposed.

- C. **Florida Death Penalty.** *Reynolds v. Florida*, 139 S. Ct. 27 (cert. denied Nov. 13, 2018). Justices Breyer and Sotomayor wrote statements critical of the Court's denial of certiorari. Justice Breyer's statement begins: "This case, along with 83 others in which the Court has denied certiorari in recent weeks, asks us to decide whether the Florida Supreme Court erred in its application of this Court's decision in *Hurst v. Florida*, 577 U.S. ___ (2016). In *Hurst*, this Court concluded that Florida's death penalty scheme violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court now applies *Hurst* retroactively to capital defendants whose sentences became final after this Court's earlier decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which similarly held that the death penalty scheme of a different State, Arizona, violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court has declined, however, to apply *Hurst* retroactively to capital defendants whose sentences became final before *Ring*. *Hitchcock v. State*, 226 So.3d 216, 217 (2017). As a result, capital defendants whose sentences became final before 2002 cannot prevail on a "*Hurst*-is-retroactive" claim." After some discussion of Justice Breyer's general concerns about the death penalty and its administration, he identified the key issue he and Justice Sotomayor believe is at the heart of these cases and that should be preserved and raised in future cases: **"Although these cases do not squarely present the general question whether the Eighth Amendment requires jury sentencing, they do present a closely related question: whether**

the Florida Supreme Court’s harmless-error analysis violates the Eighth Amendment because it ‘rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.’ *Caldwell v. Mississippi*, 472 U.S. 320, 328–329 (1985). For the reasons set out in JUSTICE SOTOMAYOR’s dissent, post, at 3–7, I believe the Court should grant certiorari on that question in an appropriate case. That said, I would not grant certiorari on that question here. In many of these cases, the Florida Supreme Court did not fully consider that question, or the defendants may not have properly raised it. That may ultimately impede, or at least complicate, our review.”

- D. Conceding Guilt Over Client’s Objection.** *McCoy v. Louisiana*, 138 S. Ct. 1500 (May 14, 2018). In *Florida v. Nixon*, 543 U.S. 175 (2004), the Supreme Court considered whether the Constitution bars defense counsel from conceding a capital defendant’s guilt at trial “when [the] defendant, informed by counsel, neither consents nor objects.” In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. The Court held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel’s proposed concession strategy, “[no] blanket rule demand[s] the defendant’s explicit consent” to implementation of that strategy. In contrast to *Nixon*, McCoy vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant “committed three murders. . . . [H]e’s guilty.” He was convicted and his conviction affirmed. The Supreme Court reversed (6-3) in a decision authored by Justice Ginsburg. “We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right ‘to have the Assistance of Counsel for his defence,’ the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.” Justice Alito dissented, joined by Thomas and Gorsuch, contending that the trial lawyer never really admitted his client’s guilt to first-degree murder, so this was not an apt case to decide the fundamental right set forth by the majority. “Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, [the defense lawyer] admitted that petitioner

committed one element of that offense, i.e., that he killed the victims. But [the lawyer] strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense. So the Court’s newly discovered fundamental right simply does not apply to the real facts of this case.”

VII. APPEALS

A. Fourth Prong of Plain Error Review. *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (June 18, 2018). 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. **But, the Supreme Court reversed, 7-2** in an opinion by Justice Sotomayor. “Federal Rule of Criminal Procedure 52(b) provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns the bounds of that discretion, and whether a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant’s substantial rights, calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant’s sentence. The Court holds that such an error will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.” Justice Thomas dissented (joined by Alito) because he sees the holding, as applied to an ordinary case, goes far beyond the specific question presented and contravenes what he sees as long-established principles of appellate review. The majority opinion, together with the dissent, clarify the burden of plain error review, making it a far less onerous standard of review.

VIII. IMMIGRATION

- A. Cancellation of Removal.** *Pereira v. Sessions*, 138 S. Ct. 2105 (June 21, 2018). Nonpermanent residents who are subject to removal proceedings and have accrued 10 years of continuous physical presence in the United States, may be eligible for a form of discretionary relief known as cancellation of removal. 8 U.S.C. § 1229b(b)(1). Under the so-called “stop-time rule” set forth in § 1229b(d)(1)(A), however, that period of continuous physical presence is “deemed to end . . . when the alien is served a notice to appear under section 1229(a).” Section 1229(a), in turn, provides that the government shall serve noncitizens in removal proceedings with “written notice (in this section referred to as a ‘notice to appear’) . . . specifying” several required pieces of information, including “[t]he time and place at which the [removal] proceedings will be held.” § 1229(a)(1)(G)(i). The narrow question before the Supreme Court in this case lies at the intersection of those statutory provisions. If the government serves a noncitizen with a document that is labeled “notice to appear,” but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule? The First Circuit held 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.” Its ruling disagreed with the Third Circuit but agreed with the Board of Immigration Appeals and other circuits. **The Supreme Court reversed (8-1) in an opinion written by Justice Sotomayor.** As to the question presented—Does the incomplete document stop-time?—the Court held that “[t]he answer is as obvious as it seems: No. A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a ‘notice to appear under section 1229(a)’ and therefore does not trigger the stop-time rule. The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.” Justice Kennedy concurred, agreeing with the majority opinion in full, but questioning the manner in which *Chevron* deference to administrative determinations has come to be understood and applied. Justice Alito dissented, at length, because he believes *Chevron* deference requires the Court to accept the government’s and BIA’s interpretation.

IX. COLLATERAL CONSEQUENCES

- A. Sex Offender Registration & Notification Act – Nondelegation.** *Gundy v. United States*, 138 S. Ct. 1260 (cert. granted Mar. 5, 2018); decision below at 695 Fed. App’x 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. Retroactivity: Mandatory Life Without Parole for Juveniles.** *Mathena v. Malvo*, 139 S. Ct. ___ (cert. granted Mar. 18, 2019); decision below at 893 F.3d 265 (4th Cir. 2018). This case involves the notorious serial murderers committed by the D.C. snipers. One of the two snipers, Lee Malvo was originally sentenced in 2004 to life without parole, even though he was a juvenile when the crime occurred. The life sentence was not mandatory under the sentencing statute. Eight years later, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” Four years after that, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that “*Miller* announced a substantive rule of constitutional law” that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given “retroactive effect” in cases where direct review was complete when *Miller* was decided. The Fourth Circuit concluded that Virginia must resentence Malvo for crimes for which he was sentenced in 2004. The basis of that decision was the Fourth Circuit’s conclusion that *Montgomery* expanded the prohibition against “mandatory life without parole for those under the age of 18 at the time of their crimes” announced in *Miller v. Alabama* to include discretionary life sentences as well. Virginia’s highest court has adopted a diametrically opposed interpretation of *Montgomery*. In its view, *Montgomery* did not extend *Miller* to include discretionary sentencing schemes but rather held only that the new rule of constitutional law announced in *Miller* applied retroactively to cases on collateral review. See *Jones v. Commonwealth*, 795 S.E.2d 705, 721, 723 (Va.), cert. denied, 138 S. Ct. 81 (2017). The Supreme Court of Virginia acknowledged that prohibiting discretionary life sentences for juvenile homicide offenders may be the next step in the Supreme Court’s Eighth Amendment jurisprudence, but it concluded that both *Montgomery* and *Miller* “addressed mandatory life sentences without possibility of parole.” The question presented is: Did the Fourth Circuit err in concluding—in direct conflict with Virginia’s highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?
- B. Prosecutor as Career *Batson* Offender.** *Flowers v. Mississippi*, 139 S. Ct. 451 (cert. granted Nov. 2, 2018); decision below at 240 So.3d 1082 (Miss. 2018). Curtis Flowers has been tried six times for the same offense in Mississippi state court. Through the first four trials,

prosecutor Doug Evans relentlessly removed as many qualified African American jurors as he could. He struck all ten African Americans who came up for consideration during the first two trials, and he used all twenty-six of his allotted strikes against African Americans at the third and fourth trials. (The fifth jury hung on guilt-or-innocence and strike information is not in the available record). Along the way, Evans was twice adjudicated to have violated *Batson v. Kentucky*—once by the trial judge during the second trial, and once by the Mississippi Supreme Court after the third trial. At the sixth trial Evans accepted the first qualified African American, then struck the remaining five. When Flowers challenged those strikes on direct appeal, a divided Mississippi Supreme Court affirmed, reviewing Evans’ proffered explanations for the strikes deferentially and without taking into account his extensive record of discrimination in this case. Flowers then sought review, asking: “Whether a prosecutor’s history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?” The Supreme Court responded by granting certiorari, vacating the Mississippi Supreme Court’s judgment, and remanding “for further consideration in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016).” On remand, a divided Mississippi Supreme Court again affirmed. Over three dissents, the state court majority emphasized deference to the trial court, and insisted both that the “[t]he prior adjudications of the violation of *Batson* do not undermine Evans’ race neutral reasons,” and that “the historical evidence of past discrimination . . . does not alter our analysis” The state court majority then repeated, nearly word-for-word, its previous, history-blind evaluation of Evans’ strikes. Because a prosecutor’s personal history of verified, adjudicated discrimination is highly probative of both his propensity to discriminate and his willingness to mask that discrimination with false explanations at *Batson*’s third step, the barely altered question presented to the Supreme Court here is, “Whether a prosecutor’s history of adjudicated purposeful race discrimination may be dismissed as irrelevant when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?” In granting cert., the Supreme Court shortened and “limited” the question presented: “Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U.S. 79 (1986) in this case.”

- C. IAC: Failure to Appeal Following Plea Waiver.** *Garza v. Idaho*, 139 S. Ct. 738 (Feb. 27, 2019). In a 6-3 decision authored by Justice Sotomayor, the Court held that the presumptive prejudice standard applies where counsel fails to appeal following a guilty plea in which the defendant waives the right to appeal. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court held that when an attorney’s deficient

performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed “with no further showing from the defendant of the merits of his underlying claims.” This case asks whether that rule applies even when the defendant has, in the course of pleading guilty, signed what is often called an “appeal waiver”—that is, an agreement forgoing certain, but not all, possible appellate claims. “We hold that the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver.”

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