CLE SEMINAR

2015-16 Supreme Court Review

Presented by:
Federal Public Defender's Office

Speaker:
AFPD T. J. Hester

Eugene, Oregon
June 29, 2016
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Portland, Oregon
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Medford, Oregon
Video will be available

The 2015-2016 Supreme Court Term

A Summary and Discussion of Major Decisions and Cert Grants Affecting Federal Criminal Law and Habeas Corpus

Presented by AFPD T.J. Hester[1]

June 29-30, 2016

[1] Thanks and acknowledgement to AFPD appellate guru Paul Rashkind, in Miami, from whose materials I have borrowed shamelessly.

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I. SEARCH & SEIZURE

A. Motor Vehicles

1. Criminalizing Refusal to Submit to Alcohol Test.

Birchfield v. North Dakota, 136 S. Ct. ___ (cert. granted Dec. 11, 2015); decision below at 858 N.W.2d 302 (N.D. 2015), consolidated with *Beylund v. Levi*, 136 S. Ct. ___ (cert. granted Dec. 11, 2015); decision below at 859 N.W.2d 403 (N.D. 2015). North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. The question presented is: Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood. ***Consolidated with*** *Bernard v. Minnesota*, 136 S. Ct. ___ (cert. granted Dec. 11, 2015); decision below at 859 N.W.2d 762 (Minn. 2015): Minnesota law makes it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. Although the State acknowledges that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a "search incident to arrest." From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The question presented is: Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

2. Search after Unlawful Stop and Discovery of Warrant.

Utah v. Strieff, 136 S. Ct. ___ (June 20, 2016). Police were surveilling a home based upon an anonymous tip of drug dealing. Strieff was seen leaving the home and stopped by police for questioning. During the stop it was learned that there was an outstanding warrant for his arrest. In a search incident to arrest, police found Strieff in possession of methamphetamine, a glass pipe, and a mall scale with residue. The Utah Supreme Court determined that the initial stop was unlawful and suppressed the evidence found during the arrest on the pre-existing warrant. In a significant expansion of the attenuation of taint doctrine the Court reversed. Justice Thomas explained the attenuation doctrine: "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" The five (male) justice majority, applying the test prescribed in *Brown v. Illinois*, concluded that, while the temporal proximity between the stop and the search favored suppression of the drugs, the existence of a valid arrest warrant was entirely independent of the illegality, and the officer's unlawful stop was not flagrant, but instead, "at most negligent." Justice Thomas' explanation of the officers "two good-faith mistakes" is especially troubling. First, the officer did not observe when Strieff arrived at the suspected drug-house, therefore his suspicion that Strieff was involved in a drug transaction was diminished. Second, in light of that lesser suspicion, the officer should have asked Strieff if he would consent to speak with him, rather than ordering Strieff to do so. From these two facts, the majority concluded that the officer's "errors in judgment hardly r[o]se to a purposeful or flagrant violation of Strieff's Fourth Amendment rights." Justice Sotomayor, joined by Justice Ginsburg, dissented writing: "Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant." She explicitly rejected the majority's conclusion that the warrant check was an intervening circumstance. Justice Kagan authored a separate dissent, which Justice Ginsburg also joined; as she explained: "The majority's misapplication of *Brown*'s three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what [the officer] did here…. So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping

individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove."

B. Facial Challenges Allowed under Fourth Amendment.

City of Los Angeles, Cal. v. Patel, 135 S. Ct. ___ (June 22, 2015). Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels "[e]very operator of a hotel to keep a record" containing specified information concerning guests and to make this record "available to any officer of the Los Angeles Police Department for inspection" on demand. Los Angeles Municipal Code §§41.49(2), (3)(a), (4) (2015). Respondents prevailed below. The Supreme Court granted cert to consider two questions: whether facial challenges to statutes can be brought under the Fourth Amendment and, if so, whether this provision of the Los Angeles Municipal Code is facially invalid. The Court held (5-4) in an opinion by Justice Sotomayor, that facial challenges can be brought under the Fourth Amendment; and that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for pre-compliance review. Justice Scalia (RIP) (joined by Chief Justice Roberts and Justice Thomas) dissented.

II. RIGHT TO COUNSEL

A. Right to Use Untainted Funds for Defense.

Luis v. United States, 135 S. Ct. ___ (Mar. 30, 2016). Luis is an indicted defendant in a federal criminal case, charged with health care fraud offenses. She wishes to retain private counsel to defend her in that criminal case. The government estimates a criminal trial lasting 15 days. In this related, contemporaneous civil action brought by the government under 18 U.S.C. § 1345, a federal district judge entered a preliminary injunction prohibiting her from spending any of her own money, including undisputedly untainted funds that she needs to retain counsel in the criminal case. The federal judge in the civil case rejected her argument that the Constitution prohibits the pretrial restraint of untainted assets needed to pay counsel of choice, finding that "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." The Eleventh Circuit affirmed, concluding that the Supreme Court's jurisprudence addressing the pretrial restraint and forfeiture of tainted assets – *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989) – foreclosed a constitutional challenge to the restraint of untainted assets. The Supreme Court vacated the lower court order (5-3) in a

plurality decision authored by Justice Breyer: "A federal statute provides that a court may freeze before trial certain assets belonging to a criminal defendant accused of violations of federal health care or banking laws. *See* 18 U.S.C. §1345. Those assets include: (1) property 'obtained as a result of' the crime, (2) property 'traceable' to the crime, and (3) other 'property of equivalent value.' §1345(a)(2). In this case, the Government has obtained a court order that freezes assets belonging to the third category of property, namely, property that is untainted by the crime, and that belongs fully to the defendant. That order, the defendant says, prevents her from paying her lawyer. She claims that insofar as it does so, it violates her Sixth Amendment 'right . . . to have the Assistance of Counsel for [her] defence.' We agree." The plurality of four justices (including C.J. Roberts, and Justices Ginsburg and Sotomayor) used a balancing approach to arrive at its decision: "The constitutional right taken together with the nature of the assets lead to this conclusion." Justice Thomas's concurrence provided the deciding fifth vote: "I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. But I do not agree with the plurality's balancing approach. Rather, my reasoning rests strictly on the Sixth Amendment's text and common law backdrop."[2] His concurrence is laden with references to Justice Scalia and his originalist thinking. Justice Kennedy dissented, with Alito joining. Justice Kagan dissented separately because, although she is troubled by *Monsanto*, its continuing vitality was not before the court in this case. Moreover, ". . . given that money is fungible, the plurality's approach leads to utterly arbitrary distinctions as among criminal defendants who are in fact guilty. . . . The thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets is no more deserving of chosen counsel than the one who spends those two pots of money in reverse order. Yet the plurality would enable only the first defendant, and not the second, to hire

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[2] Along with the Supreme Court's cases, there is a "bonus case" in a "Misc." folder. On June 13, 2016, the Ninth Circuit, *en banc*, decided *United States v. Davis*, 2016 WL 3245043 (9th Cir. 2016). That case provides important guidance on how Supreme Court opinions in which there is not a majority concurrence on the legal rationale behind the result. The case involves the application of the Supreme Court's decision in *Freeman,* Judge Paez, writing for the majority, provides a clear explanation of the two main approaches: one focusing on the *reasoning* of the various opinions, and the other focusing on the ultimate *results*. *Id.* at *5. Judge Paez concedes that the Ninth's own decisions on the fractured-Supremes conundrum have "not been a model of clarity." *Id.* "To foster clarity," this en banc decision "explicitly adopt[s] the reasoning-based approach to applying *Marks*." *Id.* The Ninth imagines a Venn diagram with the plurality and concurring opinions: one can't envision overlapping circles with Justice Sotomayor's and the plurality opinion. *Id.* at *7. Your assignment, should you choose to accept it: What does *Davis* tell you about the legal force of the Court's decision in *Luis* in our Circuit.

the lawyer he wants. I cannot believe the Sixth Amendment draws that irrational line, much as I sympathize with the plurality's effort to cabin *Monsanto,* I would affirm the judgment below."

B. Ineffective Assistance

1. Must Be Evaluated under the Rule of Contemporary Assessment of Counsel's Performance.

Maryland v. Kulbicki, 577 U.S. ___ (2015)(per curium). The Maryland Court of Appeals found ineffective assistance of trial counsel based on a claim – abandoned on appeal – that trial counsel was ineffective in failing to challenge comparative bullet lead analysis evidence (CBLA), the discrediting of which, the state court found, was "presaged" by a report by the State's testifying expert that was published a few years before the underlying trial. The per curium Court held that under the contemporary assessment rule, counsel's performance was not deficient. "At the time of Kulbicki's trial in 1995, the validity of CBLA was widely accepted, and the courts regularly admitted CBLA evidence until 2003."

2. Failure to Object to Confrontation Clause Violation

Woods v. Etherton, 136 S. Ct. ___ (Apr. 4, 2016) (per curiam). Discussed *infra* at X. E. 4.

C. Uncounseled Predicate Convictions.

United States v. Bryant, 579 U.S. ___ (June 13, 2016). Title 18 U.S.C. § 117(a) makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic violence offenses. The Ninth Circuit -- over the dissent of eight judges from the denial of rehearing en banc – found the statute unconstitutional as applied to recidivist domestic-violence offenders based upon uncounseled tribal court misdemeanor convictions. The Court disagreed. In a unanimous opinion written by Justice Ginsburg, the Court stressed precedent holding that because tribes are separate sovereigns, there is no Sixth Amendment right to counsel in tribal courts, *Plains Commerce Bank v. Long Family Land & Cattle Co*. Thus Congress, through the Indian Civil Rights Act (ICRA), has accorded procedural protections similar to, but not coextensive with, those contained in the Bill of Rights. If the tribal court imposes a sentence in excess of one year, then ICRA requires the tribe provide appointed counsel to indigent defendants. In Bryant's case, because his prior tribal convictions for domestic violence resulted in sentences of less than one year, he had no right to counsel under the ICRA. Thus, his prior

uncounseled convictions were valid when entered because they comported with the ICRA (and there is no Sixth Amendment right to counsel). As such, these convictions are unlike prior convictions that were invalid because obtained in violation of the Sixth Amendment right to counsel, which the Court held in *Burgett v. Texas* and *United States v. Tucker* may not be relied on to impose a longer term for subsequent convictions. Because Bryant's convictions were valid when entered, the Court held, they may be used to enhance his sentence. The ICRA also requires tribes to ensure "due process of law" -- as Bryant stressed -- but the Court quickly dispensed that argument holding that proceedings in compliance with the ICRA "sufficiently ensure the reliability of tribal-court convictions," and that "the use of those convictions in a federal prosecution does not violate a defendant's right to due process." Although the Court's legal opinion relies on the peculiar view of sovereignty infusing a body of arguably suspect precedent, the first sentence of the first section of Justice Gingsburg's Opinion for the Court may reveal the decision's emotional heart: "'Compared to all other groups in the United States,' Native American women 'experience the highest rates of domestic violence' (citing Congressional Record)." Justice Thomas concurred in the opinion, but separately opined that *Burgett* was wrongly decided.

III. JUDGES: Constitutional Right to Impartial Judge.

Williams v. Pennsylvania, 136 S. Ct. ___ (cert. granted Oct. 1, 2015); decision below at 105 A.3d 1234 (Pa. 2015). The Chief Justice of the Pennsylvania Supreme Court refused to recuse himself from a contentious death penalty appeal, in a case in which he had been the elected District Attorney who prosecuted the defendant, had personally authorized the death penalty, and had represented the state on appeal in the case. Moreover, the Justice ran for his judicial position on a law and order campaign, including specific reference to his work in prosecuting the defendant. The pending appeal included significant questions of whether his DA's office committed violations of *Brady v. Maryland*. The questions presented by the certiorari petition capture the existing law and its application to the Chief Justice in the context of a multijudge tribunal: "(1) In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009), this Court held that due process requires an 'objective' inquiry into judicial bias. The question presented is: Are the Eighth and Fourteenth Amendments violated where the presiding Chief Justice of a State Supreme Court declines to recuse himself in a capital case where he had personally approved the decision to pursue capital punishment against Petitioner in his prior capacity as elected District Attorney and continued to head the District Attorney's Office that defended the death verdict on appeal; where, in his State Supreme Court election campaign, the Chief Justice expressed strong support for capital punishment, with reference to the number of defendants he had "sent" to death row, including Petitioner; and where he then, as Chief Justice, reviewed a ruling by the state postconviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963),

when it prosecuted and sought death against Petitioner? (2) In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court left open the question whether the Constitution is violated by the bias, appearance of bias, or potential bias of one member of a multimember tribunal where that member did not cast the deciding vote. The circuits and states remain split on that question. The question presented is: Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?

IV. JURORS

A. *Batson* Jury Challenges.

Foster v. Chatman, 136 S. Ct. ___ (May 23, 2016). In this capital case involving a black defendant and a white victim, Georgia struck all four black prospective jurors and provided roughly a dozen "race-neutral" reasons for each of the four strikes. The prosecutor later argued that the jury should impose a death sentence to "deter other people out there in the projects." At the trial level and on direct appeal, Georgia's courts denied the defendant's claim of race discrimination under *Batson v. Kentucky*, 4 76 U.S. 79 (1986). In habeas proceedings, the defendant obtained the prosecution's notes from jury selection, which were previously withheld. The notes reflect that the prosecution (1) marked the name of each black prospective juror in green highlighter on four different copies of the jury list; (2) circled the word "BLACK"' next to the "Race" question on the juror questionnaires of five black prospective jurors; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors;" and (5) created strike lists that contradict the "race-neutral" explanation provided by the prosecution for its strike of one of the black prospective jurors. The Georgia courts again declined to find a *Batson* violation. The Supreme Court granted cert and reversed (7-1) in an opinion authored by Chief Justice Roberts. The Court held that (1) the Supreme Court had jurisdiction to hear the claim as a federal question, even though it was unable to ascertain if Georgia's unelaborated judgment might possibly have rested on an independent state ground; and (2) the Georgia decision that Foster failed to show purposeful discrimination was clearly erroneous. To this end, the Court held that under *Batson*'s step 3 the challenged party must respond with race-neutral reasons but here the record belies much of the prosecution's reasoning as to two of its strikes, and undermined the justification given for a third juror. Justice Thomas dissented because the Court did not seek to clarify whether a federal question was involved.

B. Post-Trial Inquiry of Prejudice.

Pena-Rodriguez v. Colorado, 136 S. Ct. ___ (cert. granted Apr. 4, 2016); decision below at 350 P.3d 287 (Col. 2015). A man entered a women's bathroom at a Denver horse-racing track and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him away. The man also grabbed the other girl's shoulder and buttocks. The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was another employee at the racetrack, who worked in the nearby horse barn. From that description, their father surmised they were referring to Mr. Pena-Rodriguez. At his criminal trial for unlawful sexual contact and harassment, a juror injected racial animus into the deliberations – urging, for example, that the jury convict petitioner "because he's Mexican and Mexican men take whatever they want," and that the jury disbelieve petitioner's alibi witness because the witness was Hispanic. The jury convicted the defendant after deliberating for 12 hours and being given an *Allen* charge. The jurors' comments were revealed to defense counsel by two other jurors in a post-trial informal discussion. After learning of these statements, Mr. Pena-Rodriguez sought a new trial, claiming a violation of his constitutional right to an impartial jury. But a bare majority of the Colorado Supreme Court–deepening a conflict over the issue–held that the Sixth Amendment allows a "no impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict. In fact, most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law. The Supreme Court has ruled, in *Warger v. Shauers,* 135 S. Ct. 521 (2014) and *Tanner v. United States*, 483 U.S. 107 (1987), that the Sixth Amendment posed no barrier to ignoring affidavits alleging, respectively, that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue and that jurors were intoxicated during trial; but it also cautioned that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. The Supreme Court granted cert here to decide if a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

C. Recalling Discharged Jurors.

Dietz v. Bouldin, 136 S. Ct. ___ (cert. granted Jan. 19, 2016); decision below at 794 F.3d 1093 (9th Cir. 2015). After an automobile accident that left Dietz with significant injuries, he sued Bouldin in Montana state court. The case was removed

to the U.S. District Court for the District of Montana. Although Bouldin admitted responsibility for the accident and accepted liability for medical expenses to date, the jury returned a verdict awarding Dietz $0 in damages. The judge discharged the jury, and the jurors left the courtroom; some of the jurors engaged in conversation with the court clerk, and at least one left the courthouse altogether. Upon realizing that the verdict was invalid in light of the facts and applicable law, the judge recalled the jurors, set aside their verdict, and instructed them to begin their deliberations anew. The reassembled jury returned a verdict awarding Dietz only $15,000 in damages. The district court denied his motion for a mistrial, and the Ninth Circuit affirmed, although recognizing that a split of authority exists among the federal courts of appeals regarding whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case. The Ninth Circuit aligned with the Second, Third, and Seventh Circuits and departed from the Fourth and Eighth Circuits. Question Presented: Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

D. Exclusion of Juror as Sixth Amendment Violation.

White v. Wheeler, 136 S. Ct. ___ (Dec. 14, 2015)(per curiam). Discussed *infra* at X. E. 3.

V. CRIMES

A. Insider Trading.

Salman v. United States, 136 S. Ct. ___ (cert. granted Jan. 19, 2016); decision below at 792 F.3d 1087 (9th Cir. 2015). Salman was indicted on four counts of insider trading, and one count of conspiracy, based on a theory that he was a remote tippee. The government claimed that a Citigroup investment banker passed confidential information to his own brother (who was not an insider), who in turn passed it on to Salman in the form of stock recommendations. Salman then traded on the recommendations in an account he shared with his own brother-in-law. The investment banker and his brother testified for the government at trial: The investment banker testified that he provided inside information to his brother on several occasions, but he did not say that he discussed stocks with Salman, and he denied knowing that his brother was passing the inside information on to others. The brother testified that he told Salman that his investment-banker sibling was the source of the recommendations, but he was heavily impeached and his testimony on this point was uncorroborated. The government also presented what it argued was circumstantial evidence of Salman's knowledge, including the fact that he traded through an account in the name of Salman's brother, rather than in his own name.

The jury was given a willful blindness instruction, over defense objection. He was convicted. On appeal, Salman contended that the district court erred in giving the willful blindness instruction, because he did not take "deliberate actions" or "active steps" to avoid knowledge, as the Supreme Court required in *Global-Tech Appliances, Inc. v. SEE S.A.*, 131 S. Ct. 2060 (2011) (willful blindness exists only when the defendant takes "deliberate actions" or "active steps" to avoid knowledge. The Ninth Circuit rejected Salman's contention, holding that "at least under circumstances where a reasonable person would make further inquiries, '[a] failure to investigate can be a deliberate action.'" The panel concluded that a reasonable person in Salman's position would have sought to discover the source of the brother's information, and thus it found the evidence sufficient to warrant a willful blindness instruction. Question presented: Does the personal benefit to the insider that is necessary to establish insider trading under *Dirk s v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied* , No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case? The *Newman* holding is of note: In *Newman* the Second Circuit declared that the personal benefit to the insider necessary for an insider trading conviction requires "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Solicitor General filed a petition for writ of certiorari, highlighting the conflict between *Newman* and the Ninth Circuit's decision in this case and emphasized the importance of the Second Circuit's decision to the financial markets and the investing public. The respondents argued in opposition that *Newman* presented a poor vehicle for resolving the definition of "personal benefit," because the Second Circuit had rested its decision on an independent ground (the defendants' lack of knowledge of any personal benefit)—so even a ruling in the government's favor would not change the outcome. The Court denied the government's petition. *United States v. Newman*, No. 15-137 (U.S. Oct. 5, 2015). The Salman case, on the other hand, presents another vehicle for resolving the important question on which the Solicitor General sought review in *Newman*. Salman argued in his petition to the Supreme Court that here, unlike in *Newman*, resolution of the question is indisputably outcome-determinative. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses. But if there must be "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange here between the insider and the tippee.

B. ACCA Elements under Enumerated Clause: Use of Modified Categorical Approach.

Mathis v. United States, 136 S. Ct. ___ (cert. granted Jan. 19, 2016); decision below at 786 F.3d 1068 (8th Cir. 2015). Mathis pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pre-*Johnson,* the district court found that Mathis's five burglary convictions in Iowa were violent felonies and justified sentencing under the ACCA. The court found that the Iowa burglary statutes in question, Iowa Code §§ 713.1 and 713.5, were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Under *Descamps*, the trial court believed it could use the modified categorical approach to determine the particular elements of the specific burglary provision under which Mathis was convicted. Additionally–in a ruling that cannot survive *Johnson*—the trial court found that the burglaries were violent felonies under the ACCA's residual clause because they were substantially similar to generic burglary and posed the same risk of harm to others. Finally, the court found Mathis's prior conviction in Iowa for interference with official acts inflicting serious injury was also a violent felony for ACCA purposes. As a result of the ACCA enhancement, Mathis was sentenced to the mandatory minimum of 180 months' imprisonment with five years of supervised release. On appeal, Mathis argued that the district court erred by finding that the Iowa burglary statute was divisible and by applying the modified categorical approach to determine the nature of his convictions. This error, Mathis argued, led the district court to erroneously conclude that his five previous burglary convictions were violent felonies for ACCA purposes. Still pre-*Johnson*, the court of appeals affirmed under 18 U.S.C. § 924(e)(1)(ii) (enumerating burglary), even though the Iowa burglary statute is not generic. In the court's view, the non-generic statute is, however, divisible, which allows a court to utilize the modified categorical approach (using certain documents, such as the charging papers and jury instructions) to determine if the prior convictions are violent felonies. Relying on a jury instruction of a related statute that defined "occupied structure," and the underlying charging documents in Mathis's burglary cases, the court of appeals found that his convictions conformed to generic burglary. Mathis argued that the statute was not divisible because it does not provide alternative elements, but rather alternative means of committing the crime. The distinction between elements and means is the subject of a circuit split among the 4th, 9th and 6th circuits (a split furthered by the 8th Circuit's decision here). Another split of authority exists over whether a court may cross-reference a statute or subsection of a law other than the statute of conviction. Mathis petitioned for cert based on the elements/means distinction and the Solicitor General agreed that cert should be granted to resolve the circuit split. Question presented: Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(l), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the

means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense?

C. Hobbs Act: Conspiracy to Commit Extortion.

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

oral argument – Justice Breyer may well have been persuaded that the issue was ripe and joined in this view, forming an entirely different outcome to the case. Since Justice Breyer's concurrence recognizes the strength of the dissent, it is conceivable that a subsequent case that clearly presents the *Evans* case for reconsideration will lead to a different result.

D. Proof of Bank Fraud.

Shaw v. United States, 136 S. Ct. ___ (Apr. 22, 2016); decision below at 781 F.3d 1130 (9th Cir. 2015). *Loughrin v. United States*, 134 S. Ct. 2384 (2014), left open the question whether a scheme-to-defraud-a-financial-institution under 18 U.S.C. § 1344 requires proof of a specific intent to (1) deceive a bank, AND (2) cheat a bank. Here, it is undisputed that Shaw schemed to steal a bank-customer's money from the customer's bank account by deceiving the bank, BUT Shaw did not intend to steal the bank's money. Shaw argued that a conviction for bank fraud under 18 U.S.C. § 1344(1) required proof both that he deceived the bank and intended to cheat the bank. The Ninth Circuit disagreed, but this decision conflicts with every other circuit. The question presented is whether subsection (1)'s "scheme to defraud a financial institution" requires proof of a specific intent to (1) deceive a bank AND (2) cheat a bank (as opposed to its customer).

E. Hobbs Act Robbery.

Taylor v. United States, 136 S. Ct. ___ (cert. granted Oct. 1, 2015); decision below at 754 F.3d 217 (4th Cir. 2015). Taylor was a member of a local gang that ripped off drug dealers, believing they would not report the robberies. He was nevertheless charged with Hobbs Act robbery in federal court. He contended that the government did not prove the drugs were in interstate commerce and he sought to introduce defense evidence that the objects of the robberies were not in interstate commerce. The district court refused his defense evidence and found that illicit drugs are inherently in interstate commerce. Question presented: Whether, in a federal criminal prosecution under the Hobbs Act, 18 U.S.C. §1951, the Government is relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies, as a matter of law, the interstate commerce element of the offense.

F. Federal Bribery, Hobbs Act, & Honest Services Fraud.

McDonnell v. United States, 136 S. Ct. ___ (cert. granted Jan. 15, 2016); decision below at 792 F.3d 478 (4th Cir. 2015). Robert McDonnell is a former Virginia Governor, retired U.S. Army officer, and lifelong public servant who was convicted on federal corruption charges based on the theory that he accepted otherwise-lawful gifts

and loans in exchange for taking five supposedly "official acts." Yet those five acts—as alleged in the indictment, argued to the jury, and relied on by the courts below—were limited to routine political courtesies: arranging meetings, asking questions, and attending events. It is undisputed that Gov. McDonnell never exercised any governmental power on behalf of his benefactor, promised to do so, or pressured others to do so. Indeed, the only staffer to meet with the alleged bribe-payor during the supposed conspiracy testified that Gov. McDonnell never "interfere[d]" with her office's "decision-making process." The courts below nonetheless reasoned that arranging a meeting to discuss a policy issue, or inquiring about it, is itself "official" action "on" that issue—even if the official never directs any substantive decision. Moreover, the jury was never instructed that, to convict, it needed to find that Gov. McDonnell exercised (or pressured others to exercise) any governmental power. But the panel upheld the instructions as "adequat[e]" because they quoted a statute, while adding a host of improper elaborations that the government aggressively exploited. Question presented (cert was only granted on the first of two questions): Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value. Is "official action" limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and must the jury be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

G. SORNA: International Registration.

Nichols v. United States, 136 S. Ct. ___ (Apr. 4, 2016). Title 42 U.S.C. § 16913(a) requires a sex offender who moves to notify authorities in person in one of the jurisdictions where he resides, works, or is a student, and that jurisdiction notifies the others "involved." At issue is whether a jurisdiction from which a registrant moves to a foreign country remains involved under SORNA. Two men lived on opposite sides of the Missouri River in the Kansas City Metropolitan area, one in Missouri within the Eighth Circuit, the other in Kansas within the Tenth Circuit. Both men were convicted of sex offenses before the enactment of SORNA, but were required to register under SORNA. Both men traveled from their homes to the Kansas City International Airport, flew to the same foreign country—Manila—to reside, and thereafter did not update their registrations in the jurisdictions they had left. On these facts, the Eighth Circuit ruled in *United States v. Lunsford,* 725 F.3d 859 (8th Cir. 2013), that the failure to update a registration does not violate SORNA. The Tenth Circuit came to the opposite conclusion in Nichols' case. The Supreme Court reversed Nichols' conviction in a unanimous decision authored by Justice Alito. The decision reasons that "[a] person who moves from Leavenworth to Manila no longer

'resides' (present tense) in Kansas," thus SORNA "did not require Nichols to update his registration in Kansas once he no longer resided there."

VI. SENTENCING

A. Speedy Trial Right at Sentencing.

Betterman v. Montana, 136 S. Ct. ___ (May 19, 2016). Betterman missed a court date on a domestic assault charge. He turned himself in and was sentenced to 5 years imprisonment on that charge. He was also charged with bail jumping, to which he pleaded guilty, but was not sentenced for over 14 months. In the interim, he was kept at a local jail so he was denied early release and programs offered only in prison. He made repeated requests to be sentenced, but the trial judge refused to do so. When eventually sentenced on the bail jumping charge, he received an additional 7 year sentence. On appeal, he argued he was denied a speedy trial as to sentencing, but the Montana courts ruled that the speedy trial right does not extend to sentencing. The Supreme Court granted cert and affirmed, in an opinion written by Justice Ginsburg, which concluded: "the Sixth Amendment's speedy trial guarantee . . . does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges." "[B]etween conviction and sentencing, the Constitution's presumption-of-innocence-protective speedy trial right is not engaged." The Court left open the possibility that a defendant who suffers inordinate delay "may have other recourse, including, in appropriate circumstances, tailored relief under the Due Precess Clauses of the Fifth and Fourteenth Amendments." Because no due process claim was raised with the Court in this case, the majority "express[ed] no opinion on how he might fare under that more pliable standard," though a footnote indicated that relevant considerations for such a claim "may include the length of and reasons for the delay, the defendant's diligence in requesting expeditions sentencing, and prejudice." The majority also "reserve[d] the question [of] whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage facts that could increase the prescribed sentencing range are determined" as well as the question of "whether the right reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence." Justice Sotomayor, concurred separately to emphasize that the question of the standard to apply to a due process claim for delayed sentencing "is an open one." But she suggested that the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) may be appropriate: the "factors capture many of the concerns posed in the sentencing delay context" and "because the test is flexible it will allow courts to take account of any differences between trial and sentencing delays." Justices Thomas and Alito, also concurred, but wrote separately to argue against "prejudg[ing]" whether the Barker factors are the correct test for a due process claim relating to a delayed sentencing.

B. Uncounseled Predicate Convictions

United States v. Bryant, 579 U.S. ___ (June 13, 2016). Discussed *supra* at II. C.

C. Statutory Construction: Rule of Last Antecedent.

Lockhart v. United States, 136 S. Ct. ___ (Mar. 1, 2016). Defendants convicted of possessing child pornography in violation of 18 U.S.C. §2252(a)(4) are subject to a 10-year mandatory minimum sentence and an increased maximum sentence if they have "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." §2252(b)(2). The question before the Court was whether the phrase "involving a minor or ward" modifies all items in the list of predicate crimes ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct") or only the one item that immediately precedes it ("abusive sexual conduct"). The Second Circuit joined several other circuits in holding that it modifies only "abusive sexual conduct." The Eighth Circuit reached the contrary result. Relying on "the rule of the last antecedent," the Supreme Court resolved the split by affirming the Second Circuit's holding. In an opinion by Justice Sotomayor, the Court ruled (6-2) that the phrase "involving a minor or ward" in §2252(b)(2) modifies only "abusive sexual conduct," not the two earlier items on the list. Justice Kagan dissented, joined by Breyer. The dissent found plain English generally regards all items in a list to be modified by the last antecedent, and argued that this interpretation is supported by legislative history and, in the alternative, the rule of lenity.

D. Mistaken Calculation of U.S.S.G. Range Ordinarily Satisfies Harm Requirement for Plain Error Review.

Molina-Martinez v. United States, 136 S.Ct. ___ (April 20, 2016). For plain error review under Rule 52(b), the error must: (1) not be intentionally relinquished; (2) be clear and obvious; and, (3) affect the defendant's substantial rights. In this §1326 sentencing, the PSR's erroneous calculation of the advisory guideline range at 77-96 months went unnoted in the district court. The judge sentenced Molina-Martinez to 77 months as sought by the defense. On appeal, the 5th Circuit found the correct range was 70-87 months but concluded that, because the sentence imposed was in the middle of the correctly calculated range, an affect the defendant's substantial rights. Hence, the Circuit affirmed the sentence. The Court reversed 8-0 (with Justices Alito and Thomas concurring in part and in the judgment). The Court held that a defendant who shows that the district court mistakenly applied a higher guideline range will, ordinarily, have established a reasonable probability of a different outcome justifying plain error review. "The Guidelines are 'the framework

sentencing' and 'anchor the district court's discretion'" (quoting *Peugh v. United States*, 569 U.S. ___ (2013)).

E. Recklessness Misdemeanor as Crime of Domestic Violence under 922(g)(9).

Voisine v. United States, 136 S. Ct. ___ (cert. granted Oct. 30, 2015); decision below at 778 F.3d 176 (1st Cir. 2015). Two defendants, Armstrong and Voisine, were convicted of misdemeanor assault crimes of domestic violence in violation of Maine state law. Both were subsequently charged with possession of a firearm or ammunition by a prohibited person in violation of 18 U.S.C. § 922(g)(9). Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution. The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court's decision. The defendants argued that a misdemeanor assault on the basis of offensive physical contact, as opposed to one causing bodily injury, is not a "use of physical force," and, concordantly, not a "misdemeanor crime of domestic violence." They also made a Second Amendment challenge. The First Circuit consolidated their cases and affirmed. The defendants petitioned for certiorari in 2014 (cert I), which the Supreme Court granted, vacating the court of appeals' decision, and remanding for reconsideration in light of *United States v. Castleman*, 134 S. Ct. 1405 (2014). *Castleman* held that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" Thus, the "physical force" in § 921(a)(33)(A) required violence or could be satisfied by offensive touching. *Castleman* left open whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate. On remand, the First Circuit again affirmed, basing its decision on a categorical approach to the statute. Again, the defendants petitioned for cert, in 2015 (cert II), which the Supreme Court granted, agreeing to hear one question raised by their petition: Whether a misdemeanor crime with the mens rea of recklessness qualifies as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9).

VII. CAPITAL PUNISHMENT

A. Racial Bias.

Buck v. Stephens, 136 S. Ct. ___ (cert. granted June 6, 2016), decision below *Buck v. Dretke*, H-04-3965 (So. D. Tex., 2006) (COA denied by D Ct. and 5th Cir.). In Texas, a finding of future dangerousness is a legal prerequisite to imposition of the death penalty. In the sentencing phase, Buck's own lawyer introduced evidence, through a defense expert, that, as a statistical matter, Mr. Buck was more dangerous

because he was black. "There is no question that state-sponsored discrimination is not to be tolerated," wrote the Texas Attorney General in earlier briefs, but he maintained that the defense expert's testimony was not the only evidence against Buck. "Certainly the record does not establish that the assessment of the death penalty in this case was a result of Dr. Quijano's single statement that minorities are overrepresented in the criminal justice system." The legal issue upon which cert. was granted turns on the Fifth Circuit's finding that the procedurally defaulted (*but see Martinez v. Ryan*) ineffective assistance of counsel claim did not meet the legal standard for issuance of a certificate of appealability under the AEPDA.

B. Cruel and Unusual Punishment: Lethal Injection.

Glossip v. Gross, 135 S. Ct. ___ (June 29, 2015). In *Baze v. Rees*, 553 U.S. 35 (2008), the Court held that Kentucky's three-drug execution protocol was constitutional based on the uncontested fact that "proper administration of the first drug"– which was a "fast-acting barbiturate" that created "a deep, comalike unconsciousness" – will ensure that the prisoner will not experience the known pain of suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride. In this case, Oklahoma intends to execute petitioners using a three-drug protocol with the same second and third drugs addressed in *Baze*. However, the first drug to be administered (midazolam) is not a fast-acting barbiturate; it is a benzodiazepine that has no pain-relieving properties, and there is a well-established scientific consensus that it cannot maintain a deep, coma-like unconsciousness. For these reasons, it is uncontested that midazolam is not approved by the FDA for use as general anesthesia and is never used as the sole anesthetic for painful surgical procedures. Although Oklahoma admits that administration of the second or third drug to a conscious prisoner would cause intense and needless pain and suffering, it has selected midazolam because of availability rather than to create a more humane execution. The prisoners sought an injunction against execution, contending that the method of execution now used by the state violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argued that midazolam, the first drug employed in the state's current three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the district court denied their application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Tenth Circuit affirmed. The Supreme Court affirmed (5-4) in an opinion authored by Justice Alito, upholding the midazolam version of three-drug lethal injection for two independent reasons. "First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-ofexecution claims. *See Baze v. Rees*, 553 U. S. 35, 61 (2008) (plurality opinion). Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain."

NOTE: Although the Court granted certiorari on the substantive question on Jan. 23, 2015 (requiring only four votes), it denied a stay of execution (5-4) for the first petitioner in this case, Charles Warner, on Jan. 15. The stay of execution was denied based on *Baze*, which says a stay should not be granted absent a showing of a "demonstrated risk of severe pain" that was "substantial when compared to the known and available alternatives." As a result, Warner was executed before the Court agreed to hear the petition. Justice Sotomayor dissented from the denial of a stay (joined by Ginsburg, Breyer and Kagan). After cert was granted, however, Oklahoma agreed to voluntarily abstain from further executions with midazolam, pending disposition of the case by the Supreme Court.

C. Florida's Capital Scheme Unconstitutional.

Hurst v. Florida, 136 S. Ct. ___ (Jan. 12, 2016). The Supreme Court held (8-1) that Florida's capital sentencing scheme violates the Sixth Amendment, in light of *Ring v. Arizona*, 536 U.S. 584 (2002), because it authorizes a judge – not the jury – to make the critical findings necessary to impose the death penalty. The Court held that the fact that Florida provides an advisory jury is immaterial. *Ring* requires the jury to make the necessary factual finding. The Court expressly overruled its prior precedent that had held that the Sixth Amendment does not require that the jury make the specific findings authorizing the imposition of the sentence of death because that conclusion is "irreconcilable with *Apprendi*." "Time and subsequent cases have washed away the logic [of prior precedent]." The Court did not reach Florida's argument that the error was harmless. (Alito, J., dissenting, argued that the error was harmless because the jury, though not told its recommendation was binding, found two aggravating factors warranting the imposition of the death penalty, and the evidence supporting these factors was "overwhelming."). Also left undecided is the constitutionality of Florida's unusual allowance of a non-unanimous jury finding in the penalty phase.

D. Burden of Proof on Mitigation and the Right to Sever Defendants at Sentencing.

Kansas v. Carr, 136 S. Ct. ___ (Jan. 20, 2016). "The Supreme Court of Kansas vacated the death sentences of Sidney Gleason and brothers, Reginald and Jonathan Carr. Gleason killed one of his co-conspirators and her boyfriend to cover up the robbery of an elderly man. The Carrs' notorious Wichita crime spree culminated in the brutal rape, robbery, kidnaping, and execution-style shooting of five young men and women." In an 8-1 decision authored by Justice Scalia (RIP), the Supreme Court reversed, holding, (1) sentencing courts are not required by the Eighth Amendment to instruct juries that mitigating circumstances need not be proved beyond a reasonable doubt, and (2) the Constitution does not require the severance of the Carrs' joint sentencing proceedings, even where, as here, the testimony of one brother

implicated the other as the corrupting older brother, and cross-examination of a sister by one brother revealed an equivocal confession. Justice Sotomayor dissented because she did not believe that the Supreme Court should have intervened in the decision of the Kansas Supreme Court: "I respectfully dissent because I do not believe these cases should ever have been reviewed by the Supreme Court. I see no reason to intervene in cases like these—and plenty of reasons not to. Kansas has not violated any federal constitutional right. If anything, the State has overprotected its citizens based on its interpretation of state and federal law. For reasons ably articulated by my predecessors and colleagues and because I worry that cases like these prevent States from serving as necessary laboratories for experimenting with how best to guarantee defendants a fair trial, I would dismiss the writs as improvidently granted." The majority rejected this view, asserting that the Kansas decision rested on federal constitutional grounds.

E. Future Dangerousness: Where the Only Judicially Imposed Alternative to Death is Life without Parole.

Lynch v. Arizona, 578 U.S. ___ (May 31, 2016)(per curium). Where trial prosecutor succeeded in preventing defense counsel from mentioning that parole was not available if jury, weighing future dangerousness, did not impose death in penalty phase, and Arizona Supreme Court recognized that an "instruction that parole is not currently available would be correct," that court's conclusion that the failure to so instruct was not error because, after 25 years, executive clemency was theoretically possible. The per curium Court reversed, holding that Arizona's Courts decision conflicted with *Simmons v. South Carolina*, 512 U.S. 154 (1994)(as well as *Ramdass*, *Shafer*, and *Kelly*). Justice Thomas, joined by Justice Alito dissented, protesting the court's "magic-words requirement" and relying on his own dissents in *Simmons* and *Shafer*.

F. Intellectual Disability.

See multiple cases *infra* at X. C. 1.

VIII. APPEALS

A. Perfecting Appeal of Restitution Order Deferred at Sentencing.

Manrique v. United States, 136 S. Ct. ___ (cert. granted Apr. 22, 2016); decision below at 618 F. App'x 579 (11th Cir. 2015). Fed. R. App. P. 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment – is treated as filed on the date of and after entry." The rule incorporates the Supreme Court's decision in *Lemke v. United States*, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits that a premature notice of appeal

matures or springs forward when the judgment under review is entered. The interaction of this rule with deferred restitution judgments has become a source of circuit conflict, particularly following this Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010), which allows a sentencing court to retain jurisdiction after sentencing to award restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5). At the time *Dolan* was decided, the Court acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have consequences", but it "le[ft] all such matters for another day." 560 U.S. at 618. The *Manrique* decision, below, exemplifies those consequences and highlights the significant circuit split that exists concerning the jurisdictional prerequisites for appealing a deferred restitution award. At Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that "restitution is mandatory." The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second final judgment was entered, identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award. The Court of Appeals ruled, *sua sponte*, that it did not have jurisdiction over the restitution award because Manrique did not file a second notice of appeal designating the amended judgment setting forth the restitution amount. The Eleventh Circuit's decision conflicts with the Court's decision in *Lemke*, the ripening clause of Rule 4(b)(2), and the jurisdictional determinations of the First, Second, Sixth and Ninth Circuits. Confusing that circuit split, two of the four circuits that acknowledge their jurisdiction over deferred restitution judgments have failed to give effect to the ripening clause of Rule 4(b)(2). Uncertain about the interaction of appellate rules, the First Circuit recommends, prospectively, that a second notice of appeal should be filed as to restitution awards, while the Ninth Circuit will dismiss such an appeal if the government simply objects to the timeliness of the premature notice. Question presented: Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in *Dolan v. United States*, 560 U.S. 605, 618 (2010)? [Disclosure – The Office of the Federal Public Defender for the Southern District of Florida serves as counsel for Mr. Manrique.]

B. Double Jeopardy Following Appellate Win.

Bravo-Fernandez v. United States, 1360 S. Ct. ___ (cert. granted Mar. 28, 2016); decision below at 722 F.3d 1 (1st Cir. 2013). In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the

defendant's favor by an earlier acquittal. In *United States v. Powell*, 469 U.S. 57 (1984), the Court held that, in a single trial, the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if the conviction is logically inconsistent with the acquittal. And in *Yeager v. United States*, 557 U.S. 110 (2009), the Court held that when a jury acquits on one count and hangs on another, the acquittal retains preclusive effect under *Ashe* and prevents retrial of the hung count—even if the acquittal was logically inconsistent with the hung count. The question here is whether, for purposes of *Ashe*'s collateral estoppel analysis, a vacated conviction that is logically inconsistent with an accompanying acquittal is more like the valid conviction in *Powell* or the hung count in *Yeager*. Here, the defendants were charged with conspiring and traveling to violate 18 U.S.C. § 666, in an alleged program bribery based on a single weekend trip to see a boxing match in Las Vegas. The jury acquitted petitioners of conspiracy, but convicted them of violating § 666. The convictions were vacated on appeal because they rested on incorrect jury instructions, and it is undisputed that the acquittals depended on the jury's finding that petitioners did not violate § 666. The government nonetheless sought to retry petitioners on the § 666 charges. Widening an acknowledged split, the First Circuit held that the acquittals have no preclusive effect under *Ashe* because they were inconsistent with the vacated, unlawful convictions. The First Circuit distinguished *Yeager v. United States*, 557 U.S. 110 (2009), which held that an acquittal retains its preclusive effect even when it is inconsistent with a hung count, on the theory that juries "speak" through vacated convictions, but not through hung counts. Of the two questions presented, the Supreme Court granted review on only the first: (1) Whether, under *Ashe* and *Yeager*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause. The second question presented (on which cert was not granted) was: (2) Whether, under *Evans v. Michigan*, 133 S. Ct. 1069 (2013), the Double Jeopardy Clause permits a district court to retract its "judgment of acquittal" entered on remand as an interpretation of the Court of Appeals mandate.

C. Plain Error.

1. Sentenced Based on Factual Error is Plain Error.

Carlton v. United States, 135 S. Ct. ___ (*cert. denied* June 22, 2015). Although certiorari was denied in this case, Justice Sotomayor, joined by Justice Breyer, wrote an interesting explanation in a statement respecting the denial of cert, which is best denominated a "punt." The defendant was convicted of possessing pot while incarcerated, and challenged the enhancement of his sentence based on a false government allegation about the circumstances surrounding the possession. The government claimed his girlfriend had testified at trial that Carlton intended to use the proceeds of a pot sale to pay off a prison debt. In fact, the girlfriend said no such thing. The misrepresentation continued into sentencing (and the district court was

under the same misapprehension about her trial testimony), leading to a 2-point enhancement because Carlton allegedly intended to distribute a controlled substance in prison. There was no objection at sentencing, but the error was raised on appeal as plain error. The Fifth Circuit has a categorical rule against considering such error, holding such factual errors are never plain error. Noting that the Fifth Circuit is alone in its view (a footnote cites the contrary cases of the other circuits), Justice Sotomayor's statement finds the Fifth's categorical rule against plain error to be unjustified. The Court denied cert, it turns out, because the Solicitor General has informed the Supreme Court that even the Fifth Circuit is inconsistent in applying its categorical rule. Despite the cert denial, Justice Sotomayor's statement explains that "[w]hen that sort of inconsistency exists, the ordinary course of action is to allow the court of appeals the first opportunity to resolve the disagreement." All well and good, except this cert denial seemingly leaves no avenue for Carlton himself to have the rule corrected for consideration of his own case. Perhaps an out-of-time petition for rehearing in the Fifth Circuit?

2. Sentenced Based on Erroneous Guideline Calculation as Plain Error.

Molina-Martinez v. United States, 136 S. Ct. ___ (Apr. 20, 2016). Discussed *supra* at III. C.

3. Law of the Case Is Not Plain Error.

Musacchio v. United States, 136 S. Ct. ___ (Jan. 25, 2016). This is a case about the failure of the parties to pay attention. The government failed to object to a jury instruction that erroneously added an element that it had to prove. Mussachio, on the other hand, failed to press a statute-of limitations defense until his appeal. Also on appeal, Mussachio wanted his sufficiency-of-evidence challenge decided under the erroneous instruction, which held the government to an additional element of proof. In a unanimous opinion written by Justice Thomas, the Court addressed both instances of the parties' failures to raise timely challenges, ruling in favor of the government on both points. First, the Court held that the sufficiency of the evidence should be assessed against the elements of the charged crime, not the erroneous instruction that erroneously added an element. Second, the Court held that a statute of limitations defense not raised before the trial court may not be raised for the first time on appeal because it can never be a plain error. This is because, the Court says, when the defendant does not press the defense, the government is not put to the burden of proving that it filed a timely indictment, so there is no error for an appellate court to correct, much less plain error

IX. COLLATERAL CONSEQUENCES

A. Return of Firearms.

Henderson v. United States, 135 S. Ct. ___ (May 18, 2015). "The general rule is that seized property, other than contraband, should be returned to its rightful owner once . . . criminal proceedings have terminated." *Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States v. La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977)). 18 U.S.C. § 922(g) makes it "unlawful for any person . . . who has been convicted in any court of [] a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm." Mr. Henderson's firearms were surrendered as a condition of his bail bond. After his conviction of a qualifying crime, he sought to have the weapons turned over to a qualified buyer. The government claimed the court had no authority to order such return. The question presented was whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allowed lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, barred them. The Supreme Court rejected the government's position, unanimously, in an opinion authored by Justice Kagan. A court may approve the transfer of a felon's guns consistently with §922(g) if, but only if, the recipient will not grant the felon control over those weapons. One way to ensure that result is to order that the guns be turned over to a firearms dealer, himself independent of the felon's control, for subsequent sale on the open market. But that is not the only option; a court, with proper assurances from the recipient, may also grant a felon's request to transfer his guns to a person who expects to maintain custody of them. Either way, once a court is satisfied that the transferee will not allow the felon to exert any influence over the firearms, the court has equitable power to accommodate the felon's transfer request.

B. Immigration Consequences

1. Removal Based on State Drug Conviction.

Mellouli v. Lynch, 135 S. Ct. ___ (June 1, 2015). Mellouli was detained for driving under the influence of alcohol. Jail personnel discovered four tablets hidden in his sock, which he admitted were Adderall, a controlled substance under both federal and Kansas state law. He was initially charged with trafficking contraband

in a jail under Kansas law, but he eventually pleaded guilty to a lesser state charge of possession of drug paraphernalia—specifically, a sock used to store a controlled substance. He was sentenced to 359 days in jail and 12 months probation. Under 8 U.S.C. § 1227(a)(2)(B)(i), a noncitizen may be removed if he has been convicted of . . . violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." After the completion of his probation, Mellouli was ordered deported and the deportation order was affirmed by the BIA. The Supreme Court reversed 7-2, in an opinion by Justice Ginsburg, holding that the paraphernalia conviction did not trigger removal under the statute. Using the categorical approach applied to such cases, the Court found that his conviction for concealing unnamed pills in his sock did not trigger removal under §1227(a)(2)(B)(i), because the drug paraphernalia possession law under which he was convicted, Kan. Stat. Ann. §21–5709(b), by definition, related to a controlled substance: The Kansas statute made it unlawful "to use or possess with intent to use any drug paraphernalia to . . . store [or] conceal . . . a controlled substance." But it was immaterial under that law whether the substance was *defined in 21 U. S. C. §802*. Nor did the state charge, or seek to prove, that Mellouli possessed a substance on the § 802 schedules. Federal law (§1227(a)(2)(B)(i)), therefore, did not authorize Mellouli's removal. Justice Thomas dissented (joined by Alito).

2. Removal Based on State Arson Crime as Aggraviated Felony.

Luna Torres v. Lynch, 135 S. Ct. ___ (May 19, 2016). After records disclosed that Torres, an alien, had been convicted of attempted third degree arson in violation of New York Penal Law §§ 110.00 and 150.10, the Department of Homeland Security instituted removal proceedings against him. An immigration judge found that Torres was inadmissible to enter the country based on his conviction and that his conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. The Board of Immigration Appeals affirmed that ruling, and the court of appeals upheld the Board's decision. Luna Torres contended that a state offense, such as arson, does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43), as "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks. The Supreme Court disagreed with Luna Torres and affirmed (5-3) in an opinion authored by Justice Kagan. The majority opinion holds that a state offense counts as a §1101(a)(43) "aggravated felony" when it has every element of a listed federal crime except one requiring a connection to interstate or foreign commerce. Justice Sotomayor (joined by Thomas and Breyer) dissented: "There is one more element in the federal offense than in the state offense—(5), the interstate or foreign commerce element. Luna thus was not convicted of an offense 'described in' the federal statute. Case closed."

X. HABEAS CORPUS

A. Adequacy of State Procedural Rule.

Johnson v. Lee, 578 U.S. ___ (2016) (per curium). Reversing the Ninth Circuit the Court concluded that California's *Dixon* Rule, requiring that claims be raised on direct appeal where possible (the *Palmer* Rule in Oregon). Appealing the denial of her federal habeas petition, Lee claimed that California's Dixon rule was not regularly followed so as to constitute an adequate procedural bar. To establish inadequacy, Lee sampled a single days' summary denials of state habeas petitions (there were 210 cases in the sample and, in 9 cases where Dixon should have applied but was not cited by the state court; on limited remand, California submitted evidence of 500 denials -- 12% of total for period – in which *Dixon* was cited, but without any analysis of the number of those 500 cases in which Dixon should have applied. Noting the questionable relevance of the state's offering, the Ninth Circuit, relying on Lee's evidence, found California's application of the Dixon rule was irregular and therefore did not constitute an adequate state procedural bar. The per curium Court chided: "The Ninth Circuit's decision profoundly misapprehends what makes a state procedural bar 'adequate.'" The Court concluded that the *Dixon* rule was "firmly established and regularly followed." In dissing the Ninth, the Court went on to cite *Kindler*, but nothing *Gentler* was referenced.

B. *Johnson* is Retroactively Applicable.

Welch v. United States, 136 S. Ct. ___ (Apr. 18, 2016). Welch was sentenced to 15 years imprisonment under the ACCA, pre-*Johnson*. He had entered a conditional plea, reserving his right to challenge reliance on one of his prior convictions. His sentence was affirmed on appeal. After the Supreme Court's decision in *Johnson* struck down ACCA's residual clause as unconstitutionally vague, he filed a 2255 proceeding challenging his sentence under ACCA, but the district court denied relief and Certificate of Appealability. The Eleventh Circuit also refused to grant a COA on this first 2255 because the Eleventh Circuit held that *Johnson* is not retroactively applicable in collateral review, a position at variance with most other circuits. The Supreme Court reversed 7-1, in an opinion written by Justice Kennedy, holding that *Johnson* is retroactively applicable on collateral review because it is a new rule of substantive law under *Teague v.* Lane, 489 U.S. 288 (1989), rather than a procedural rule. The ruling in *Johnson* alters "the range of conduct or the class of persons that the law punishes." It is not procedural because procedural rules "regulate only the manner of determining the defendant's culpability," and Johnson "had nothing to do with that." The decision does not comment on whether the *Johnson* decision applies retroactively to the guidelines or any other statute. Justice Thomas dissented.

C. Certain Classes of Individuals.

1. Intellectual Impairment

a) Habeas Review of Adequacy of Opportunity to Establish Intellectual Impairment.

Brumfield v. Cain, 135 S. Ct. ___ (June 18, 2015). Kevan Brumfield was sentenced to death for the 1993 murder of off-duty Baton Rouge police officer. Brumfield, accompanied by another individual, shot and killed Officer Smothers while she was escorting the manager of a grocery store to the bank. At the time of Brumfield's trial, the Supreme Court's precedent permitted the imposition of the death penalty on intellectually disabled persons. But in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court subsequently held that "in light of . . . 'evolving standards of decency,'" the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." This case presented the extraordinary circumstance in which petitioner faced imminent execution, despite the fact that the sole court to conduct a hearing on his *Atkins* claim concluded that he was in fact mentally retarded. Promptly after Atkins was decided, he presented his mental retardation claim to the state courts. His request was denied without a hearing, however, on the ground that his mental retardation was not apparent from his pre-*Atkins* trial transcripts – at which he did not even attempt to, and had no reason to, establish that he was mentally retarded. Brumfield then sought habeas relief. The federal district court recognized the grave error in denying a hearing on his *Atkins* claim, holding that the state court's conclusion was an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), because the state court mistakenly – and unreasonably – considered the record from petitioner's pre-*Atkins* penalty phase as determinative of his mental retardation claim under *Atkins*. The court conducted a seven-day trial, at which several experts testified regarding Brumfield's severe mental deficiencies. Based on the evidence presented, the court concluded that he was mentally retarded. The Fifth Circuit reversed. Without engaging with the district court's reasoning or acknowledging any of the relevant case law, the Fifth Circuit concluded that the state court acted reasonably in denying a hearing. The Supreme Court reversed the Fifth (5-4) in a decision authored by Justice Sotomayor, holding that he is entitled to have his *Atkins* claims heard in federal court on the merits. "In *Atkins v. Virginia*, 536 U. S. 304 (2002), this Court recognized that the execution of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment. After *Atkins* was decided, petitioner, a Louisiana death-row inmate, requested an opportunity to prove he was intellectually disabled in state court. Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner's claim. That decision, we hold, was "based on an unreasonable determination of the facts in

light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court. Justice Thomas dissented (joined in part by Chief Justice Roberts, and Justices Scalia (RIP) and Alito) and Justice Alito dissented in an opinion joined by the Chief Justice.

b) Current Standards or those at Time of Sentencing

Moore v. Texas, 136 S. Ct. ___ (cert. granted June 6, 2016); decision below, *Ex Parte Moore*, 470 S.W.3d 481 (Tex. Crim. App., 2015). In *Hall v. Florida*, 134 S.Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment bars the execution of individual who are intellectually disabled. Bobby Moore was convicted and sentenced to death row in 1980 and has been on death row since. He is now 56 years old and was first sentenced to death over 35 years ago. The Court originally granted cert. on two questions: his claim of intellectual disability and the fact that he had been subject to prolonged confinement including time spent in solitary confinement. However, two and a half hours after granting cert., the Court amended its original order and it will now only hear the first question concerning intellectual disability. Moore's lawyer argued that a lower court determined that Moore was "intellectually disabled and constitutionally ineligible" for the death penalty, but the Texas Court of Criminal Appeals reversed that decision. Moore's lawyers argue that the appeals court used an "outdated" definition of intellectual disability that they say "sharply conflicts" with Supreme Court precedent. The Texas Attorney General has asserted that the Supreme Court "specifically left to the individual states the task of developing appropriate ways to enforce the constitutional [prohibition] against executing intellectually disabled offenders." In Texas' view, this apparently extends to deciding who is intellectually disabled. *See also Blumfield v. Cain & Montgomery in Louisiana*, *infra*, at § XI.

2. Juveniles: Retroactivity of Miller – Reprise.

Montgomery v. Louisiana, 136 S. Ct. ___ (Jan. 25, 2016). Henry Montgomery has been incarcerated since 1963, serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age. Montgomery filed a state district court motion to correct his illegal sentence in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which holds that mandatory sentencing schemes "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole" . . . violate the Eighth Amendment's ban on cruel and unusual punishment. The Louisiana state courts denied Montgomery relief, relying on *State v. Tate*, 2012-2763 (La. 11/5/13), *cert. denied*, 134 S. Ct. 2663 (2014), which held that *Miller* is not retroactive on collateral review to those incarcerated in Louisiana. The Supreme Court reversed in a 6-3 decision, authored by Justice Kennedy, holding that

Miller is a substantive rule to which federal and state courts must both apply retroactively. The Court reaffirmed that "substantive" rules are not subject to the bar of *Teague v. Lane*, and that "substantive" rules "include" those that forbid "criminal punishment of certain primary conduct" or prohibit "a certain category of punishment for a class of defendants because of their status or offense." The fact that a rule has a procedural component (in this case, the fact that "Miller requires a sentencer to consider a juvenile's youth and attendant characteristics before determining that life without parole is a proportionate sentence") does not transform the substantive change in the law into a procedural rule. Here, it merely "gives effect to Miller's substantive holding," which "rendered life without parole an unconstitutional penalty for a 'class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Nor is Miller's rule procedural because a court could, in the uncommon case, lawfully impose life without parole on a juvenile convicted of a homicide offense, after proper consideration of the relevant factors. The rule in Miller "raises a grave risk that many are being held in violation of the Constitution. Justice Scalia (RIP) dissented, joined by Justices Thomas and Alito. Justice Thomas also wrote a separate dissenting opinion.

D. Prosecution Failure to Disclose Exculpatory Evidence.

Wearry v. Cain, 136 S. Ct. ___ (Mar. 7, 2016) (per curiam). Wearry was on Louisiana's death row, convicted of murder following a trial that relied heavily on a jail-house snitch, Sam Scott, who told multiple conflicting tales. Wearry's alibi defense was rejected by the jury. After his conviction became final, it emerged that the prosecution had withheld three pieces of exculpatory evidence: (1) Undisclosed police reports revealed that two of Scott's fellow inmates made statements casting doubt on Scott's credibility – he told one inmate he wanted to "make sure [Wearry] gets the needle because he jacked over me"; he unsuccessfully tried to orchestrate another inmate to lie about Weaary at trial; (2) Police failed to disclose that Scott had sought a plea deal seeking to reduce his sentence in return for testimony; and (3) Medical evidence undermined Scott's testimony about the way the crime occurred – a knee injury and recent surgery to an alleged accomplice made it impossible for the accomplice to have run, lifted substantial weight, and crawled into a space, as Scott claimed. Based on this new evidence, Wearry alleged violations of his due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and of his Sixth Amendment right to effective assistance of counsel. Acknowledging that the State "probably ought to have" disclosed the withheld evidence, and that Wearry's counsel provided "perhaps not the best defense that could have been rendered," the postconviction court denied relief. Even if Wearry's constitutional rights were violated, the court concluded, he had not shown prejudice. In turn, the Louisiana Supreme Court also denied relief. The U.S. Supreme Court reversed (6-2) in a per curiam disposition based solely on the *Brady/Giglio* violations. Procedurally the case is interesting because it directly and summarily reversed the state court's decision denying habeas

relief – before the commencement of federal habeas corpus proceedings – noting that the Supreme Court has jurisdiction over final judgments of state post-conviction courts, *see* 28 U.S.C. § 1257(a) and has used that authority in another case this Term, *Foster v. Chatham* (raising *Batson* claim). The merits of the decision reiterate the standard for reversal based on *Brady/Giglio* violations, which is much more favorable to the accused than traditional ineffective-assistance-of-counsel review. "Because we conclude that the Louisiana courts' denial of Wearry's *Brady* claim runs up against settled constitutional principles, and because a new trial is required as a result, we need not and do not consider the merits of his ineffective-assistance-of-counsel claim. '[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, *supra*, at 87. *See also Giglio* v. *United States*, 405 U.S. 150, 153–154 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility). Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." *Giglio*, *supra*, at 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. *Smith* v. *Cain*, 565 U.S. 73, ___–___ (2012) (slip op., at 2–3) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict. *Ibid.* Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi. *See United States* v. *Agurs*, 427 U.S. 97, 113 ('[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.')." In a footnote, the Court held: "Given this legal standard, Wearry can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury's verdict." In another footnote, the Court reminded that *Brady* requires disclosure even if the prosecution is unaware of evidence in the possession of police: "'*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.' *Youngblood* v. *West Virginia*, 547 U.S. 867, 869–870 (2006) (*per curiam*) (internal quotation marks omitted). *See also Kyles* v. *Whitley*, 514 U.S. 419, 438 (1995) (rejecting Louisiana's plea for a rule that would not hold the State responsible for failing to disclose exculpatory evidence about which prosecutors did not learn until after trial when that evidence was in the possession of police investigators at the time of trial)." Justice Alito dissented, joined by Thomas, due to the summary nature of the decision, arguing that the state did not have a fair opportunity to fully brief the issues.

E. Deference to State Court Determinations in Absence of Clearly Established Supreme Court Precedent.

1. Absence of Counsel during Batson Hearing.

Davis v. Ayala, 135 S. Ct. ___ (June 18, 2015). At Hector Ayala's trial, the prosecution exercised its peremptory strikes to dismiss all seven of the potential black and Hispanic jurors. In his federal habeas petition, Ayala challenged the state trial court's failure to permit his attorneys to participate in hearings regarding the legitimacy of the prosecution's alleged race-neutral reasons for its strikes. *See Batson v. Kentucky*, 476 U. S. 79, 97–98 (1986). A quartercentury after a California jury convicted Hector Ayala of triple murder and sentenced him to death, the Court of Appeals for the Ninth Circuit granted Ayala's application for a writ of habeas corpus and ordered the State to retry or release him. The Ninth Circuit's decision was based on the procedure used by the trial judge in ruling on Ayala's objections under *Batson v. Kentucky*, 476 U. S. 79 (1986), to some of the prosecution's peremptory challenges of prospective jurors. The trial judge allowed the prosecutor to explain the basis for those strikes outside the presence of the defense so as not to disclose trial strategy. On direct appeal, the California Supreme Court found that if this procedure violated any federal constitutional right, the error was harmless beyond a reasonable doubt. In his federal habeas petition, he argued that the *ex* parte proceedings and the subsequent loss of the jury questionnaires deprived him of his rights under the 6th, 8th and 14th Amendments. The district court ruled against him, accepting the harmless error determination and making its own finding that the record was ample to decide the case, even without the questionnaires. The Ninth Circuit reversed, holding that the error was harmful. Applying *de novo* review, the panel held that the *ex parte* proceedings violated the Federal Constitution, and that the loss of the questionnaires violated Ayala's federal due process rights if that loss deprived him of "the ability to meaningfully appeal the denial of his Batson claim." The Supreme Court reversed (5 - 4) in an opinion by Justice Alito, (Sotomayor dissenting, joined by Ginsburg, Breyer Kagan). The majority held that the Ninth Circuit's decision was based on the misapplication of basic rules regarding harmless error. Assuming without deciding that a federal constitutional error occurred, the error was harmless under *Brecht v. Abrahamson,* 507 U. S. 619 (1993), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d). Reiterating the harmless error standard, the majority wrote: "The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman* [*v. California*], 386 U.S. [at] 18: '[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' *Id.*, at 24. In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual

prejudice.' *Brecht,* 507 U.S., at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."' *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). There must be more than a 'reasonable possibility' that the error was harmful. *Brecht, supra*, at 637. The *Brecht* standard reflects the view that a 'State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error.'" Justice Kennedy concurred in all respects, but noted on an unrelated point the incivility of the petitioner's 25-years imprisonment in solitary confinement, to which Justice Thomas took umbrage since the defendant's cell is substantially larger than that of his victims. The dissenters, led by Justice Sotomayor, would have found harmful error: "The Court assumes that defense counsel's exclusion from these proceedings violated Ayala's constitutional rights, but concludes that the Ninth Circuit erred in granting habeas relief because there is insufficient reason to believe that counsel could have convinced the trial court to reject the prosecution's proffered reasons." "Given the strength of Ayala's *prima facie* case and the comparative juror analysis his attorneys could have developed if given the opportunity to do so, little doubt exists that counsel's exclusion from Ayala's *Batson* hearings substantially influenced the outcome."

2. Unsupported Judicial Finding of Motive.

Duncan v. Owens, 136 S. Ct. ___ (cert. granted Oct. 1, 2015); decision below at 781 F.3d 360 (7th Cir. 2015). ***Cert Dismissed As Improvidently Granted*** (Jan. 20, 2016). Owens claimed that the judge at his bench trial made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. Indeed, motive is not an element of the offense of which he was charged. The state appellate court upheld Owen's conviction, holding that the trial court's speculation regarding motive was harmless. The Seventh Circuit overturned respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, and that the error was not harmless. The state petitioned for cert, arguing that no clearly established precedent of the Supreme Court holds that it violates the Constitution for a finder of fact to infer a criminal defendant's motive when the motive is a non-element of the offense and is not directly established by the evidence at trial. Question presented before cert was dismissed as improvidently granted: Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of the Supreme Court's decisions by awarding habeas relief in the absence of clearly established precedent from the Supreme Court?

3. Exclusion of Juror as Sixth Amendment Violation.

White v. Wheeler, 136 S. Ct. ___ (Dec. 14, 2015) (per curiam). A death sentence imposed by a Kentucky trial court and affirmed by the Kentucky Supreme Court was overturned on habeas corpus review by the Sixth Circuit. During the jury selection process, the state trial court excused a juror after concluding he could not give sufficient assurance of neutrality or impartiality in considering whether the death penalty should be imposed. "The Sixth Circuit, despite the substantial deference it must accord to state-court rulings in federal habeas proceedings, determined that excusing the juror in the circumstances of this case violated the Sixth and Fourteenth Amendments. That ruling contravenes controlling precedents from this Court, and it is now necessary to reverse the Court of Appeals by this summary disposition." The Supreme Court's per curiam opinion reiterated that AEDPA deference applies even in death penalty cases (a caution that seems unnecessary considering that the acronym stands in part for "Effective Death Penalty Act"), expressing continuing frustration with what it sees as the Sixth Circuit's cavalier approach to AEDPA deference: "As a final matter, this Court again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty. See, *e.g., Parker* v. *Matthews*, 567 U.S. ___ (2012) (*per curiam*); *Bobby* v. *Dixon*, 565 U.S. ___ (2011) (*per curiam*); *Bobby* v. *Mitts*, 563 U. S. 395 (2011) (*per curiam*); *Bobby* v. *Van Hook*, 558 U.S. 4 (2009) (*per curiam*).

4. IAC - Failure to Object to Confrontation Clause Violation

Woods v. Etherton, 136 S. Ct. ___ (Apr. 4, 2016) (per curiam). Law enforcement received an anonymous tip that two white males were traveling on I–96 between Detroit and Grand Rapids in a white Audi, possibly carrying cocaine. Officers spotted a vehicle matching that description and pulled it over for speeding. Etherton was driving; Pollie was in the passenger seat. A search of the car uncovered 125.2 grams of cocaine in a compartment at the bottom of the driver side door. Both Etherton and Pollie were arrested. Etherton was tried in state court on a single count of possession with intent to deliver cocaine. At trial the facts reflected in the tip were not contested. The central point of contention was instead whether the cocaine belonged to Etherton or Pollie. Pollie testified for the prosecution pursuant to a plea agreement. He claimed that he had accompanied Etherton from Grand Rapids to Detroit, not knowing that Etherton intended to obtain cocaine there. According to Pollie, once the pair arrived in Detroit, Etherton left him alone at a restaurant and drove off, returning some 45 minutes later. It was only after they were headed back to Grand Rapids that Etherton revealed he had obtained the drugs. The prosecution also called several police officers to testify. Three of the officers described the content of the anonymous tip leading to Etherton's arrest. On the third recounting of the tip, trial counsel objected based on hearsay, but the objection was not resolved because the prosecutor agreed to move on. Etherton was convicted. In postconviction proceedings, in state and federal court,

Etherton argued that admission of the anonymous tip violated his Confrontation Clause rights under the Sixth Amendment, and that his trial and appellate counsel were ineffective for not objecting or appealing that issue. The state courts rejected his claims (on procedural and substantive grounds), as did the federal district court. But the Sixth Circuit reversed, finding that Etherton's Confrontation right had been violated and he was prejudiced by his counsels' failures to object or appeal the issue. The Supreme Court reversed, in a per curiam opinion, finding that the Sixth Circuit violated the limited standard of review allowed by AEDPA. "Etherton's underlying complaint is that his appellate lawyer's ineffectiveness meant he had 'no prior opportunity to cross-examine the anonymous tipster.' . . . But it would not be objectively unreasonable for a fairminded judge to conclude—especially in light of the deference afforded *trial* counsel under *Strickland*— that the failure to raise such a claim was not due to incompetence but because the facts in the tip were uncontested and in any event consistent with Etherton's defense. *See Harrington[v. Richter]*, 562 U.S., at 105 ('Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.'). A fairminded jurist could similarly conclude, again deferring under *Strickland*, that *appellate* counsel was not incompetent in drawing the same conclusion. And to reach the final point at issue before the Sixth Circuit, a fairminded jurist—applying the deference due the *state court* under AEDPA— could certainly conclude that the court was not objectively unreasonable in deciding that appellate counsel was not incompetent under *Strickland*, when she determined that trial counsel was not incompetent under *Strickland*. Given AEDPA, both Etherton's appellate counsel and the state habeas court were to be afforded the benefit of the doubt. *Burt [v. Titlow]*, [571 U.S.] *supra*, at ___. Because the Sixth Circuit failed on both counts, we grant the petition for certiorari and reverse the judgment of the Court of Appeals."