CLE SEMINAR

The 2016-2017 Supreme Court Term

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Federal Public Defender's Office

Speaker:
AFPD T.J. Hester

Portland, Oregon
Live on September 20, 2017
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Medford, Oregon
Via video conference on September 20, 2017
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Eugene, Oregon
Live on September 21, 2017
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The 2016-2017 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]

Sept 20 & 21, 2017

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

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I. CONSTITUTIONAL ISSUES

A. Fourth Amendment

1. Historical Cell Phone Location Data

Carpenter v. United States, 137 S. Ct. 2211 (cert. granted June 5, 2017); decision below at 2013 WL 6385838 (6th Cir. Apr. 13, 2016)

As occurs with alarming frequency, the government sought and obtained the historical cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). As a result, the district court never made a probable cause finding before ordering Petitioner's service provider to disclose months' worth of Petitioner's cell phone location records. A divided panel of the Sixth Circuit held that there is no reasonable expectation of privacy in these location records, relying in large part on four-decade-old decisions of this Court. Question presented: *Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.*

2. § 1983 Suit for Fourth Amendment Violation

Manuel v. City of Joliet, Ill., 137 S. Ct. 911 (Mar. 21, 2017)

Police searched Manuel during a traffic stop, finding a vitamin bottle containing pills. Suspecting the pills to be illegal drugs, the officers conducted a field test, which came back negative for any controlled substance. Nevertheless, they arrested Manuel and took him to the police station. There, an evidence technician tested the pills and got the same negative result, but reported that one of the pills tested "positive for the probable presence of ecstasy." An arresting officer also reported that, based on his "training and experience," he "knew the pills to be ecstasy." On the basis of those false statements, another officer filed a sworn complaint charging Manuel with unlawful possession of a controlled substance. Relying exclusively on that complaint, a judge found probable cause to detain Manuel pending trial. Manuel was held in jail for seven weeks. Can Manuel bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement? In a 6-2 decision authored by Justice Kagan, the Court held that he may: "Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes 'the standards and procedures' governing pretrial detention. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). And those constitutional protections apply even after the start of 'legal process' in a

criminal case — here, that is, after the judge's determination of probable cause. *See Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion); *id.*, at 290 (Souter, J., concurring in judgment). Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim's timeliness, to the court below)." Justice Alito dissented with Justice Thomas joining. The dissent contends the majority failed to answer the question presented and should have decided the case differently: "[T]he Court's approach ... entirely ignores the question that we agreed to decide, *i.e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim. If a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause."[2]

3. Bivens Actions

a. Special Factor Analysis

Ziglar v. Abbasi, 137 S. Ct. 1843 (June 19, 2017)

This case relates to claims of abuse, and deliberate indifference, in violation of the Fourth and Fifth Amendments by aliens detained after 911. In a 4-2 opinion by Justice Kennedy (with Justice Thomas concurring in the plurality's judgment, and Breyer dissenting joined by Justice Ginsburg (Justices Sotomayor, Kagan, and Gorrsuch did not participate). Because the *Bivens* claim arose in a new context, the court reversed in part and remanded for a "special factors analysis" to determine if a suit for damages should proceed. Stressing the deterrent purpose of *Bivens* damages, the Court opined that allegations of a substantive due process violation as well Fourth Amendment search and seizure violations were adequately plead. On the claim of conspiracy to deny the prisoners civil rights, the plurality found the warden protected by qualified immunity. The case is infused with a strong separation of powers/national security focus. As Justice Breyer wrote at the close of his dissent: "As is well known, Lord Atkins, a British judge, wrote in the midst of World War II that 'amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'"

[2] It wouldn't feel like a Supreme Court review without mentioning Jeff Fisher, who was on the brief, but did not argue, in this case.

b. More Special Factors

Hernandez v. Mesa, 137 S. Ct. 2003 (June 26, 2017) (per curiam)

A border patrol agent shot across the border, killing a 15 year-old Mexican boy. Again citing the need for "special factors" analysis to determine whether a *Bivens* action and remedy was appropriate for the Fourth Amendment (seizure) violation, five justices punted the question to Fifth Circuit (which, sitting *en banc*, initially dismissed the action) for determination of whether special factors warranted *Bivens* relief based in part on *Abbasi, supra*. Justice Thomas dissented opining *Bivens* did not apply. Justice Gorsuch did not participate. Justice Breyer, joined by Justice Ginsburg dissented. They would reverse the Fifth Circuit and find there was an action and the fact that Hernandez was a Mexican citizen, on Mexican soil should not defeat the claim where a federal officer shot across the border, not knowing the citizenship of the boy at whom he shot. Writing of the geographic area as a "special border-related … limitrophe," Justice Breyer quoted President Johnson on the occasion of Mexico and the United States jointly moving a segment of the Rio Grande (border).

B. Due Process

1. Recusal

Rippo v. Baker, 137 S. Ct. 905 (Mar. 6, 2017) (per curiam)

Michael Damon Rippo was convicted of first-degree murder and sentenced to death. During his trial, Rippo received information that his trial judge was the target of a federal bribery probe, and he surmised that the district attorney's office that was prosecuting him had a role in that investigation. Rippo moved for the judge's disqualification under the Due Process Clause of the Fourteenth Amendment, contending that a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him. But the trial judge declined to recuse himself, and (after that judge's indictment on federal charges) a different judge later denied Rippo's motion for a new trial. The Nevada Supreme Court affirmed on direct appeal, reasoning in part that Rippo had not introduced evidence that state authorities were involved in the federal investigation. In a later application for state post-conviction relief, Rippo advanced his bias claim once more, this time pointing to documents from the judge's criminal trial indicating that the district attorney's office had participated in the investigation of the trial judge. The state post-conviction court denied relief, and the Nevada Supreme Court affirmed. It analogized Rippo's claim to the "camouflaging bias" theory that this Court discussed in *Bracy v. Gramley*, 520 U. S. 899 (1997). The *Bracy* petitioner had argued that a judge who accepts bribes to rule in favor of some defendants would seek to disguise that favorable treatment by ruling against defendants who did not bribe him. In *Bracy*, the Supreme Court explained that despite the "speculative" nature of that theory, the petitioner was entitled to discovery because he had also alleged specific facts suggesting that the judge may

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

2. Refunding Fees After Conviction is Reversed on Appeal

See Nelson v. Colorado, *infra* at 14 (it violated Due Process to require a successful appellant in a criminal case to affirmatively prove innocence before restoring costs and fees that were paid)

C. First Amendment

Packingham V. North Carolina, 137 U.S. 1730 (June 19, 2017)

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." When he was 21 years old, Lester Packingham was convicted of taking indecent liberties with a minor, and as a result is a registered sex offender. Packingham later got a traffic ticket quashed by a judge and went on Facebook and posted the message, "God is Good." He was indicted under the North Carolina law for going on a website where minors may be present. Packingham was convicted and given a suspended sentence. The court unanimously declared the North Carolina law unconstitutional. Justice Kennedy wrote the majority opinion. Justice Alito wrote an opinion concurring in the judgment, joined by Chief Justice Roberts and Justice Thomas.

The Court's opinion began by recognizing the importance of the internet as a place for speech. Justice Kennedy wrote of the "vast democratic forums of the Internet" in

general, and social media in particular. He observed that seven in ten American adults use at least one internet social networking service and that more people are on Facebook than the entire population of North America. The opinion notes the unique importance of social media for free speech, opining: "[T]he court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." Even if the Court assumed that North Carolina law was content-neutral, it still was unconstitutional and vastly overbroad in barring access not just to Facebook, but to Washingtonpost.com, Amazon.com, and WebMD.com. The Court ruled that the state could have a narrower law, such as one preventing registered sex offenders from having contact with minors over social media. "In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." Justice Alito concurred in the judgment, but lamented the "undisciplined dicta" and "loose rhetoric" in the Court's opinion. It is, however, the Court's strong language regarding the special protection for the Internet as a medium of communication that makes this decision significant.

D. Equal Protection

1. Inquiry into Jury Deliberations

See Pena-Rodriguez v. Colorado, *infra* at 12

2. Different Rules for Derivative Citizenship Depending on Parent's Gender

See Sessions v. Morales-Santana, infra at 18 (the Court's *remedy* was to apply the more restrictive rule to both parents)

3. Employing Racial Consideration at Sentencing

See Buck v. Davis, *infra* at 26 (expert testimony that future dangerousness, in capital sentencing context, is greater because defendant is black, "poisons public confidence" in the courts)

E. Double Jeopardy

Bravo-Fernandez v. United States, 137 S. Ct. 352 (Nov. 29, 2016)

This case concerns the issue-preclusion component of the Double Jeopardy Clause, which was dilineated in three prior decisions of the Supreme Court. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. In *United States v. Powell*, 469 U.S. 57 (1984), the Court held that, in a single trial, the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if

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

inconsistent returns." Justice Thomas' concurrence contends that the doctrine of issue preclusion under the Double Jeopardy clause is incorrect, and the Court should revisit *Ashe* and *Yeager*.

F. *Brady* Material

Turner v. United States, 137 S. Ct. 1885 (June 22, 2017)

In *Brady v. Maryland*, the court held that prosecutors have a constitutional duty to disclose potentially exculpatory evidence to criminal defendants. This requirement is adopted as an ethical duty for prosecutors in the American Bar Association's Model Rules of Professional Conduct and in every state's ethical code. Yet there is a serious problem with many prosecutors not complying with their obligations under *Brady*. Below, Judge Kozinski warned: "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." Yet the Supreme Court appears reticent to address *Brady* issues. In *Turner v. United States*, the court considered and rejected a *Brady* claim, with the majority concluding that the defendants did not adequately show that they were prejudiced by the prosecution's withholding of information (Ethics/schmethics!). Here, seven men were convicted of the 1984 kidnaping, robbery and murder of a woman in Washington, D.C. At trial, the government's theory was that Fuller, a mother of six, had been attacked by a large group of individuals. The key evidence was the testimony of two witnesses who confessed to participating in a group attack and cooperated with the government in return for leniency. Several other witnesses corroborated aspects of their testimony. Many years after their convictions became final, the defendants learned that the government had failed to disclose important, potentially exculpatory evidence. This included the identity of a man seen running into the alley after the murder and stopping near the garage where the victim's body had already been found. In an opinion by Justice Breyer, the Court acknowledged that this evidence clearly would have been favorable to the defense, but it concluded that it was not "material" and therefore the convictions could stand. The court explained that "evidence is 'material' … when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." After reviewing the evidence, the court concluded that there was not a "'reasonable probability' that the withheld evidence would have changed the outcome of petitioners' trial." Justice Kagan, joined by Justice Ginsburg, dissented. She opined that the entire defense likely would have changed if the defendants knew of a possible alternative suspect: "With the undisclosed evidence, the whole tenor of the trial would have changed. Rather than relying on a "not me, maybe them" defense, all the defendants would have relentlessly impeached the government's (thoroughly impeachable) witnesses and offered the jurors a way to view the crime in a different light. In my view, that could well have flipped one or more jurors — which is all Brady requires." *Turner* does not alter the legal standard with regard to *Brady* violations, but it will likely make it more difficult to persuade judges that the prosecutor's failure to disclose evidence is "material." Thus, the epidemic of *Brady* violations, acknowledged by Judge Kozinski, may predictably worsen.

G. Vagueness

Sessions v. Dimaya, 137 S. Ct. 31 (cert. granted Sept. 29, 2016); decision below at 803 F.3d 1110 (2d Cir. 2016) (calendared for reargument during the Oct. 2017 term)

Whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague. This is a certiorari petition filed by the government, seeking to overturn the Ninth Circuit's holding that the provision — a residual clause similar to that found vague in *Johnson* — is also void for vagueness, following the Supreme Court's decision in *Johnson*. There is presently a circuit split on this question: The Sixth, Seventh, Ninth, and Tenth Circuits have held that § 16(b) is unconstitutionally vague under the reasoning in *Johnson*; the Fifth Circuit held that it is not. The residual clause in § 16(b) is identical to the residual clause in 18 U.S.C. § 924(c)(3)(B), so the outcome in this case will likely also decide whether the residual clause in § 924(c)(3)(B) is unconstitutionally vague.

II. SUBSTANTIVE LAW

A. Intimidating or Impeding an IRS Officer

Marienllo v. United States, 137 S. Ct. ___ (cert. granted June 27, 2017); decision below at 839 F3d 209 (2d Cir. 2016)

The Internal revenue Code at 26 U.S.C. § 7212(a) includes the following residual clause provision:

> Whoever corruptly or by force . . . endeavors to intimidate or impede any officer . . . of the United States acting in an official capacity under this title, ***or in any other way corruptly or by force . . . endeavors to obstruct or impede[] the due administration of this title***, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both . . . .

(emphasis added). The question presented is whether § 7212(a)'s residual clause, italicized above, requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct. The Sixth Circuit has limited the potentially broad sweep of the conduct criminalized under § 7212(a), holding that the clause is limited to cases in which the defendant knew of a pending IRS action. *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998); *United States v. Miner*, 774 F.3d 336, 342-45 (6th Cir. 2014). The Sixth Circuit is in the minority, however. The Second Circuit in this case followed three other circuits (First, Ninth, and Tenth) to uphold Mr. Marinello's conviction under the clause, which the jury could have found was based on any one of the following acts, but did not need to decide unanimously as to which:

"failing to maintain corporate books and records for Express Courier [his small business]"; "failing to provide [his] accountant with complete and accurate information related to [his] personal income and the income of Express Courier"; "destroying, shredding and discarding business records of ExpressCourier"; "cashing business checks received by Express Courier for services rendered"; and "paying employees of Express Courier with cash." Judges Jacobs and Cabranes dissented from the denial of rehearing en banc, warning that "[i]f this is the law, nobody is safe." They continued:

> The panel opinion in Marinello affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed. . . . The panel opinion likely took comfort in the *mens rea* requirement that the act or acts be done "corruptly." Any such comfort is surely an illusion, for two reasons. First, the risk of wrongful conviction, even with a *mens rea* requirement, is real: the line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active. Second, alleging a corrupt motive is no burden at all. Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is also the power to destroy people. How easy it is under the panel's opinion for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict anybody.
>
> The saving requirement that the Sixth Circuit added is that there must have been a pending IRS action of which the defendant was aware. That measure goes a good way toward setting some bounds. It construes the statute as a specialized tool for active IRS investigations, rather than a prosecutor's hammer that can be brought down upon any citizen.

B. Proof of Insider Trading

Salman v. United States, 137 S. Ct. 420 (Dec. 6, 2016)

Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b – 5 prohibits, under criminal penalty, undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage. These persons also may not provide inside information to others for trading. A tippee inherits the tipper's duty to disclose or abstain from trading if the tippee knows the information was disclosed in breach of the tipper's duty, and the tippee may commit securities fraud by trading in disregard of that knowledge. In *Dirks v. SEC*, 463 U.S. 646 (1983), the Supreme Court explained that a tippee's liability for trading on inside information hinges on whether the tipper breached a fiduciary duty by disclosing the information. A tipper breaches such a fiduciary duty when the tipper discloses the inside information for a personal benefit. A jury can

infer a personal benefit — and thus a breach of the tipper's duty — where the tipper receives something of value in exchange for the tip or "makes a gift of confidential information to a trading relative or friend." Salman challenged his convictions for conspiracy and insider trading. Salman received lucrative trading tips from an extended family member, who had received the information from Salman's brother-in-law. Salman then traded on the information. He argued that he cannot be held liable as a tippee because the tipper (his brother-in-law) did not personally receive money or property in exchange for the tips and thus did not personally benefit from them. The Court of Appeals disagreed, holding that *Dirks* allowed the jury to infer that the tipper here breached a duty because he made a "'gift of confidential information to a trading relative.'" The Supreme Court affirmed in a *unanimous decision* authored by Justice Alito, holding that the Court of Appeals properly applied *Dirks*. The jury could infer that the tipper here personally benefited from making a gift of confidential information to a trading relative: "Maher, the tipper, provided inside information to a close relative, his brother Michael. *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to 'a trading relative,' and that rule is sufficient to resolve the case at hand." Additionally, the Court rejected the argument that the gift giving standard is too vague as applied in this case and should fail under the rule of lenity—yet it left open the possibility that lenity might be applicable in a different case with a different benefit. "We also reject Salman's appeal to the rule of lenity, as he has shown 'no grievous ambiguity or uncertainty that would trigger the rule's application.' *Barber v. Thomas*, 560 U.S. 474, 492 (2010). To the contrary, Salman's conduct is in the heartland of *Dirks*'s rule concerning gifts. It remains the case that '[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts.' But there is no need for us to address those difficult cases today, because this case involves 'precisely the gift of confidential information to a trading relative that *Dirks* envisioned.'"

C. Proof of Bank Fraud

Shaw v. United States, 137 S. Ct. 462 (Dec. 12, 2016)

The bank fraud statute, 18 U.S.C. §1344(1), makes it a crime to *knowingly* execute a scheme ... to defraud a financial institution, such as a federally insured bank. Shaw was convicted of violating this provision. He argued that the provision does not apply to him because he intended to cheat only a bank depositor, not a bank. It was undisputed that Shaw schemed to steal a bank customer's money from the customer's bank account by deceiving the bank. However, Shaw maintained he did not intend to steal the bank's money. He argued that a conviction for bank fraud under 18 U.S.C. § 1344(1) required proof both that he deceived the bank and intended to cheat the bank. The Supreme Court rejected his argument in a unanimous decision authored by Justice Breyer. As to the primary argument, the Court held: "The basic flaw in this argument lies in the fact that the bank, too, had property rights in [the depositor's] bank account. When a customer deposits funds, the bank ordinarily

becomes the owner of the funds and consequently has the right to use the funds as a source of loans that help the bank earn profits (though the customer retains the right, for example, to withdraw funds). 5A Michie, Banks and Banking, ch. 9, §1, pp. 1–7 (2014) (Michie); id., §4b, at 54-58; id., §38, at 162; *Phoenix Bank v. Risley*, 111 U. S. 125, 127 (1884). Sometimes, the contract between the customer and the bank provides that the customer retains ownership of the funds and the bank merely assumes possession. Michie, ch. 9, §38, at 162; *Phoenix Bank, supra*, at 127. But even then the bank is like a bailee, say, a garage that stores a customer's car. Michie, ch. 9, §38, at 162. And as bailee, the bank can assert the right to possess the deposited funds against all the world but for the bailor (or, say, the bailor's authorized agent). 8A Am. Jur. 2d, Bailment §166, pp. 685-686 (2009). This right, too, is a property right. 2 W. Blackstone, Commentaries on the Laws of England 452-454 (1766) (referring to a bailee's right in a bailment as a 'special qualified property'). Thus, Shaw's scheme to cheat [the depositor] was also a scheme to deprive the bank of certain bank property rights." The Court also rejected a series of alternative arguments, including the rule of lenity. The Ninth Circuit's opinion was vacated, however, to address Shaw's claim in the Supreme Court that the jury instruction given at his trial was ambiguous or improper; the court of appeals was directed to consider (1) if that issue had been fairly presented to it on appeal; (2) if the instruction was lawful; and, if not, (3) if any error was harmless.

III. PROCEDURAL ISSUES

A. Venue

TC Heartland Llc v. Kraft Food Group Brands, 137 S. Ct. 1514 (May 20, 2017)

Unless you also engage in patent litigation, you may not be familiar with TC Heartland or appreciate its significance. The patent venue statute, 28 U.S.C. § 1400(b), provides that "any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." Consistent with other venue statutes, the U.S. Court of Appeals for the Federal Circuit long has interpreted where "the defendant resides" to include any place where there is personal jurisdiction over a defendant. As a result, more than 40 percent of all patent cases in recent years have been filed in the U.S. District Court for the Eastern District of Texas, which has been perceived as a favorable forum for plaintiffs in patent infringement suits. The Supreme Court, in an opinion by Justice Thomas, unanimously reversed the Federal Circuit and held that as applied to domestic corporations, "'reside[nce]' in §1400(b) refers only to the state of incorporation." This will have dramatic effects with regard to patent litigation. No longer will a significant percentage of all patent litigation occur in Tyler and Marshall, Texas. A great deal will shift to Delaware, the state where many businesses are incorporated. But the decision also leaves open crucial questions. The second clause of §1400(b) allows venue "where the defendant has committed acts of infringement and has a regular

and established place of business." What will be enough for a "regular and established place of business"? Also what about foreign companies? In a footnote, the court said that it was not addressing foreign corporation, which raises a major issue for future litigation. Justice Gorsuch did not take part in this case.

B. Release Pending Immigration Proceedings

Jennings v. Rodriguez, 136 S. Ct. 2489 (cert. granted June 20, 2016); decision below at 804 F.3d 1060 (9th Cir. 2015) (returned to calendar for reargument during the Oct. 2017 term)

Under 8 U.S.C. 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. 1003.19(e). The questions presented are: (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. (3) Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

C. Inquiry into Jury Deliberations

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (Mar. 6, 2017)

A man entered women's bathroom at a Denver horse-racing track and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him away. The man also grabbed the other girl's shoulder and buttocks. The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was another employee at the racetrack, who worked in the nearby horse barn. From that description, their father surmised they were referring to Mr. Pena-Rodriguez. At his criminal trial for unlawful sexual contact and harassment, a juror injected racial animus into the

deliberations — urging, for example, that the jury convict petitioner "because he's Mexican and Mexican men take whatever they want," and that the jury disbelieve petitioner's alibi witness because the witness was Hispanic. The jury convicted the defendant after deliberating for 12 hours and being given an *Allen* charge. The jurors' comments were revealed to defense counsel by two other jurors in a post-trial informal discussion. After learning of these statements, Mr. Pena-Rodriguez sought a new trial, claiming a violation of his constitutional right to an impartial jury. But the Colorado Supreme Court held that the Sixth Amendment allows a "no impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict. In fact, most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law. The Supreme Court has ruled, in *Warger v. Shauers,* 135 S. Ct. 521 (2014), and *Tanner v. United States*, 483 U.S. 107 (1987), that the Sixth Amendment posed no barrier to ignoring affidavits alleging, respectively, that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue and that jurors were intoxicated during trial; but it also cautioned that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. The Supreme Court granted cert. here to decide if a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury. In an opinion by Justice Kennedy, the Supreme Court held (5-3) that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." The Court cautioned that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." Justice Alito dissented, joined by Chief Justice Roberts would have what's said in the jury room, stay in the jury room, regardless of how offensive. Justice Thomas dissented with a pragmatic, albeit problematic, view that the jury system is inherently imperfect. Gorsuch did not participate.

D. Rule 60 (b)(6) Motions

See Buck v. Davis, *supra* at 26 (denying defendant's Motion to Reopen was an abuse of discretion considering the inherent "risk of injustice" from overt racial prejudice).

E. Appeal of Deferred Restitution Judgment

Manrique v. United States, 137 S. Ct. 1266 (Apr. 19, 2017)

Sentencing courts are required to impose restitution as part of the sentence for specified crimes. But the amount to be imposed is not always known at the time of sentencing. When that is the case, the court may enter an initial judgment imposing certain aspects of a defendant's sentence, such as a term of imprisonment, while deferring a determination of the amount of restitution until entry of a later, amended judgment. Does a single notice of appeal filed after the initial sentence, but before the amended judgment including restitution, suffice, or must the appellant file two notices of appeal? In a 6-2 decision authored by Justice Thomas, the Supreme Court held that a single notice of appeal does not suffice, at least where, as here, the government objects to the defendant's failure to file a notice of appeal following the amended judgment. Fed. R. App. P. 4(b)(2), relating to premature notices of appeal, does not apply to mature the original notice of appeal since it was filed before restitution was actually ordered. The filing of a notice of appeal is required by a claim processing rule, so if the government objects to its timely filing, the appeal should be dismissed "We hold that a defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order." Justice Ginsburg dissented, joined by Justice Sotomayor, noting that appellate time limits are claim processing rules, not jurisdictional limits. Stressing that the trial court failed to meet its obligation to personally advise defendant of his right to appeal from the amended judgment, she would treat the clerk's forwarding the amended judgment to the Court of Appeals as an adequate substitute for a second notice of appeal.

F. Return of Fees, Costs after Appellate Reversal

Nelson v. Colorado, 137 S. Ct. 1249 (Apr. 19, 2017)

When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? In a 7-1 decision authored by Justice Ginsburg, the Court held, "Our answer is yes. Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's

guarantee of due process." Justice Alito concurred, while Justice Thomas dissented. Justice Gorsuch did not participate.

G. Immigration Consequences of Conviction

Lee v. United States, 137 S. Ct. 1958 (June 23, 2017)

In 1982, Jae Lee and his family moved from South Korea to the United States After completing high school, Lee moved to Memphis and became a successful restauranteur. He also started using—and sharing—ecstasy at parties and was charged in 2009 with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1). Because the evidence against Mr. Lee was considered quite strong, his attorney advised him to plead guilty in exchange for a shorter sentence. The attorney assured Mr. Lee that the plea would not subject him to deportation, but that advice was wrong. Possession of ecstasy with intent to distribute is an aggravated felony that results in mandatory and permanent deportation. *See* 8 U.S.C. §§ 1101(a)(43)(B), 1227 (a)(2)(A)(iii); 1182(a)(9)(A)(i). Upon learning of this consequence, Lee moved to vacate his conviction and sentence under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The government conceded that his attorney provided deficient performance, the first part of the two-part test under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The question presented was whether Lee can demonstrate prejudice under the second part of *Strickland* where he is deemed to be facing strong evidence of guilt. The Sixth Circuit held that Lee could not show prejudice because he had "no *bona fide* defense, not even a weak one," so he "stood to gain nothing from going to trial but more prison time." The Supreme Court reversed (6-2) n an opinion written by Chief Justice Roberts, holding that Lee was prejudiced by his attorney's bad advice. The question is not whether, had he gone to trial, the result of the trial would have been different than the result of the plea bargain. Rather, the question is whether Lee could show a reasonable probability that, but for counsel's bad advice, he would have insisted on going to trial rather than give up that right. Here, Lee was prejudiced under the proper standard despite that he "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that." The Court rejected the government's request that the Court, like the Sixth Circuit, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Justice Thomas dissented, joined by Justice Alito. Justice Thomas reasoned: "Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice.". . . "[A] defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the 'smallest chance of success at trial'—relying on nothing more than a 'Hail Mary'—may be able to satisfy it." "[A] challenge to a guilty plea will be a highly fact intensive, defendant-specific undertaking," requiring a hearing in every case.

H. Appeal Waiver

Class v. United States, 137 S. Ct. 1065 (cert. granted Feb. 21, 2017); decision below unreported (D.C. Cir. 2016)

The defendant had firearms in his car, which was parked and locked in a parking lot on the grounds of the U.S. Capitol. He was charged with violation of 40 U.S.C. § 5104(e), which prohibits carrying on, or having readily accessible, a firearm on the grounds of the U.S. Capitol building. In defense, he raised Second Amendment and due process challenges, but he ultimately pled guilty, conceding his factual guilt. The plea agreement did not contain an express waiver of his right to appeal his conviction. On appeal, he re-raised his constitutional challenges to the statute. The D.C. Circuit held that by pleading guilty, he waived all "claims of error on appeal, even constitutional claims." The Supreme Court granted cert. to decide if "a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction." The question implicates two prior Supreme Court decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), the Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does not depend on challenging his "factual guilt." In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime. In the years since those two cases were decided, the circuits have become deeply divided on whether a defendant's challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt. Two circuits (First and Tenth) agree with the D.C. Circuit that a guilty plea waives constitutional challenges to the statute of conviction. Other circuits (Third, Fifth, Sixth, Ninth, and Eleventh) hold that a guilty plea does not inherently waive such constitutional challenges. Three others (Fourth, Seventh, and Eighth) allow facial, but not as-applied, constitutional challenges to a conviction. Question presented: *Whether a guilty plea inherently waives a defendant's challenge to the constitutionality of his statute of conviction?*

IV. IMMIGRATION

A. False Statement re Citizenship Application

Maslenjak v. United States, 137 S. Ct. 809 (June 22, 2017)

Divna Maslenjak and her husband, Ratko, are ethnic Serbs who resided in Bosnia during the 1990's, when a civil war between Serbs and Muslims divided the new country. In 1998, she, her husband and two children met with an American immigration official to seek refugee status in the United States. Interviewed under oath, Maslenjak explained that the family feared persecution in Bosnia from both

sides of the national rift. Muslims, she said, would mistreat them because of their ethnicity. And Serbs, she testified, would abuse them because her husband had evaded service in the Bosnian Serb Army by absconding to Serbia — where he remained hidden, apart from the family, for some five years. Persuaded of the Maslenjaks' plight, American officials granted them refugee status, and they immigrated to the United States in 2000. Six years later, Maslenjak applied for naturalization. Question 23 on the application form asked whether she had ever given "false or misleading information" to a government official while applying for an immigration benefit; question 24 similarly asked whether she had ever "lied to a[] government official to gain entry or admission into the United States." Maslenjak answered "no" to both questions, while swearing under oath that her replies were true. She also swore that all her written answers were true during a subsequent interview with an immigration official. In August 2007, Maslenjak was naturalized as a U.S. citizen. But Maslenjak's professions of honesty were false: In fact, she had made up much of the story she told to immigration officials when seeking refuge in this country. Her fiction began to unravel at around the same time she applied for citizenship. In 2006, immigration officials confronted Maslenjak's husband Ratko with records showing that he had not fled conscription during the Bosnian civil war; rather, he had served as an officer in the Bosnian Serb Army. And not only that: He had served in a brigade that participated in the Srebrenica massacre — a slaughter of some 8,000 Bosnian Muslim civilians. Within a year, the government convicted Ratko on charges of making false statements on immigration documents. The newly naturalized Maslenjak attempted to prevent Ratko's deportation. During proceedings on that matter, Maslenjak admitted she had known all along that Ratko spent the war years not secreted in Serbia but fighting in Bosnia. As a result, the government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U.S.C. §1425(a). According to the government's theory, Maslenjak violated §1425(a) because, in the course of procuring her naturalization, she broke another law: 18 U.S.C. §1015(a), which prohibits knowingly making a false statement under oath in a naturalization proceeding. The false statements the government invoked were Maslenjak's answers to questions 23 and 24 on the citizenship application (stating that she had not lied in seeking refugee status) and her corresponding statements in the citizenship interview. Those statements, the government argued to the district court, need not have affected the naturalization decision to support a conviction under §1425(a). The court agreed: Over Maslenjak's objection, it instructed the jury that a conviction was proper so long as the government "prove[d] that one of the defendant's statements was false"—even if the statement was not "material" and "did not influence the decision to approve [her] naturalization." She was found guilty and the district court, based on that finding, stripped Maslenjak of her citizenship under 8 U.S.C. §1451(e). Her conviction was affirmed on appeal, but reversed by the Supreme Court (9-0) in an opinion by Justice Kagan (with Justice Gorsuch concurring and concurring the in the judgment -- joined by Thomas-- and with Justice Alito, concurring in the judgment). Justice Kagan's opinion for the majority interpreted section 1425(a) to contain a

"requirement of causal influence. "To get citizenship unlawfully . . . is to get it through an unlawful means," which requires that the "illegality played some role in its acquisition." To meet this requirement in a prosecution predicated on a false statement, the government may show either that (1) "the facts the defendant misrepresented are themselves disqualifying"; or (2) that the truth would have prompted reasonable officials to undertake further investigation, which "would predictably have disclosed some legal disqualification."

B. Derivative Citizenship

Sessions v. Morales-Santana, 137 S. Ct. 1678 (June 12, 2017)

In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. Under the main rule, an unwed U.S. citizen father may transmit citizenship to his child if he had been present in the U.S. for five years before the child's birth. (The rule was previously ten years.) This rule applies also to married couples. Congress made an exception for unwed U.S. citizen mothers, who may transmit citizenship if she has lived in the U.S. for just one year pre-birth. In an opinion by Justice Ginsburg, the Court held (8-0) that the gender line Congress drew is incompatible with the requirement that the government accord to all persons "the equal protection of the laws." Nevertheless, the Court held, it cannot convert §1409(c)'s exception for unwed mothers into the main rule displacing §1401(a)(7) (covering married couples) and §1409(a) (covering unwed fathers). "We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. Justice Thomas, joined by Justice Alito, concurred agreeing that no remedy was appropriate. Prospectively, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination." What this means is that until Congress changes the law, the current five-year rule for unwed fathers applies, rather than the one-year rule for unwed mothers. Importantly, this new rule applies only to children of unwed mothers who are born AFTER today, since citizenship is automatically acquired at birth and a later decision can't strip you of it. As the Court states: "In the interim [until Congress adopts a uniform rule], as the Government suggests, §1401(a)(7)'s now-five- year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers. *See* Brief for Petitioner 12, 51; Reply Brief 19, n.3." In its Reply Brief, the Government conceded:

> Respondent errs in suggesting (Br. 56) that the government's proposed remedy would withdraw citizenship from children born abroad between 1952 and 1986 who would qualify for citizenship under Section 1409(c). The government proposes (Gov't Br. 51) imposing the longer physical-presence requirement in Section 1401(a)(7) on children born abroad out

> of wedlock to U.S.citizen mothers, but only on a prospective basis. The Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for a continuous period of one year before the birth (but less than the ten or five years of physical presence required by Section 1401(a)(7)). The Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. *Cf. Heckler v. Mathews*, 465 U.S. 728, 745750 (1984) (upholding Congress's decision to continue for certain individuals a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests).

The full reply brief is available at 2016 WL 6472054 (U.S. 2016). This case was decided in the context of removal proceedings. There is a significant argument that footnote 24 means that for purposes of criminal prosecutions under 1325/1326, a client born out of wedlock to a U.S. citizen father would only have to prove one year of physical presence. Keep this in mind when screening clients for citizenship. Footnote 24 states:

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

In *Grayned*, the Court held that an ordinance that violated the equal protection clause was unconstitutional, and thus invalid, on its face. As a result, "Appellant's conviction under this invalid ordinance must be reversed." *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972). In *Welsh*, Justice Harlan would have held a statute violated the Establishment Clause. Because the petitioner was convicted

under an unconstitutional statute that extended benefits to others not accorded to him, "this conviction must be reversed [] unless Welsh is to go remediless." *Welsh v. United States*, 398 U.S. 333, 361-62 (1970) (Harlan, J., concurring in the result).

C. Crime of Violence

See Sessions v. Dimaya supra at 8 (18 USC 16(b)'s residual clause in Immigration Aggravated Felony context – *i.e. Johnson* reprise)

D. Consensual Sexual with a 17 Year Old "Minor"

Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (May 30, 2017)

Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct. At issue here was whether Juan Esquivel-Quintana's conviction under a California statute criminalizing consensual sexual intercourse between a 21-yearold and a 17-year-old (almost 18 year old) qualified as "sexual abuse of a minor" under the Immigration and Nationality Act (INA). The Immigration and Nationality Act provides that "[a]ny alien who is convicted of an aggravated felony after admission" to the United States may be removed from the country by the Attorney General. 8 U.S.C. §1227(a)(2)(A)(iii). One of the many crimes that constitutes an aggravated felony under the INA is "sexual abuse of a minor." §1101(a)(43)(A). A conviction for sexual abuse of a minor is an aggravated felony regardless of whether it is for a "violation of Federal or State law." §1101(a)(43). The INA does not expressly define sexual abuse of a minor. The question presented as whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualifies as sexual abuse of a minor under the INA. In an 8-0 decision authored by Justice Thomas, the Supreme Court held that it does not. Employing the categorical approach from *Moncrieffe v. Holder* and *Johnson v. United States*, the Court explained that it must presume that Esquivel-Quintana's no contest plea and resulting conviction "'rested upon . . . the least of th[e] acts' criminalized by the statute, and then . . . determine whether that conduct would fall within the federal definition of the crime." It concluded that in order to fit within the definition of "sexual abuse of a minor" under INA, the minor had to be under the age of consent, which is 16 years old. Justice Gorsuch took no part in the decision.

E. Consequences of Conviction

See Lee v. United States, *supra* at 15 (it is ineffective assistance to misadvise about the immigration consequences of a plea)

V. SENTENCING

A. Charges Accompanying 924(c) Conviction (subtitle: Vary This)

Dean v. United States, 137 S. Ct. 368 (Apr. 3, 2017)

Levon Dean and his brother were charged and convicted of various counts relating to two Hobbs Act robberies of different drug dealers, and possession of a firearm in furtherance of the robberies. Dean was sentenced to 400 months for the robberies, including consecutive terms of 60 and 300 months for the § 924(c) violations. At sentencing, Dean requested a variance to 1 day from the advisory guideline range of 84105 months on the guidelines counts that did not carry mandatory minimum or consecutive terms, but U.S. District Judge Mark Bennett declined, stating that he had no authority to do so under Eighth Circuit precedent, because 924(c) did not permit it. He did state, however, that if he did have such authority he would have sentenced Dean to 360 months on the § 924(c) convictions, and a one-day sentence on the remaining convictions. Instead, he departed downward somewhat from the guidelines range, sentencing Dean to 40 months in addition to his mandatory 360 month sentence. The Eighth Circuit affirmed the 400-month sentence, holding that its decision in *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), controlled. The panel did not address Dean's argument that the Court's decision in *Pepper v. United States,* 562 U.S. 476 (2011), overruled *Hatcher*. *Pepper* held that 18 U.S.C. § 3661 states "no limitation" may be placed on a court's power to consider information about a defendant's "background, character, and conduct" when seeking to fashion an appropriate sentence. Dean argued that by failing to consider the sentences imposed on the §924(c) charges, a court is essentially barred from considering an entire category of information about a defendant and risks contravening express Congressional intent in 18 U.S.C. § 3661. The Supreme Court reversed the Eighth Circuit in a unanimous decision written by Chief Justice Roberts, holding that a district court is free to consider the mandatory minimum and mandatory consecutive sentence required by 18 U.S.C. § 924(c) in determining the sentence for the underlying predicate offense. "Nothing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count." In other words, "nothing . . . prevents a district court from imposing a 30-year mandatory minimum sentence under § 924(c) and a one-day sentence for the predicate violent or drug trafficking crime, provided those terms run one after the other." In the present case of Levon Dean, who was 23 years old when he committed the two robberies, the fact "[t]hat he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether—in connection with his predicate crimes—still more incarceration is necessary to protect the public. Likewise, in considering 'the need for the sentence imposed . . . to afford adequate deterrence,' § 3553(a)(2)(B), the District Court could not reasonably ignore the deterrent effect of Dean's 30-year mandatory minimum."

B. Collateral Application of *Johnson* to Federal Sentencing Guidelines

Beckles v. United States, 137 S. Ct. 886 (Mar. 6, 2017)

Johnson v. United States, 135 S. Ct. 2551 (2015), recognized unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony"). The residual clause invalidated in *Johnson* is identical to the residual clause in the career offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2). But the Supreme Court ruled (7-0) that *Johnson*'s holding does not apply to the post *Booker* federal sentencing guidelines, which are only advisory. In an opinion written by Justice Thomas, the Court held that "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause" and that § 4B1.2's residual clause is not void for vagueness. The majority reasoned that the advisory guidelines do not "fix the permissible sentences" for the defendant, but "merely guide the exercise of the court's discretion." According to the Court's majority, the advisory guidelines do not "implicate the twin concerns underlying vagueness doctrine"—notice and preventing arbitrary enforcement. Even if a person regulates his or her conduct to avoid a guideline enhancement, such as the career offender enhancement, the sentencing court has the discretion to impose the same enhanced sentence. And the district court "did not 'enforce' the career offender Guideline" against Beckles; it merely enforced the statutory penalty range for Beckles' conviction under § 922(g). Justice Ginsburg concurred in the judgment only. In her view, Beckles' case should have been decided on the narrow ground that the Sentencing Commission identified possession of a sawed-off shotgun as a "crime of violence" in the commentary to § 4B1.2, which she says was "authoritative" under *Stinson*. She would have deferred "any more encompassing ruling" on the vagueness issue. Justice Sotomayor also concurred in the judgment only. She agreed with Justice Ginsburg that Beckles' particular case falls on the commentary issue (stating simply that "the commentary under which he was sentenced was not unconstitutionally vague"), but wrote a lengthy opinion explaining why the majority's vagueness analysis is wrong. She recognized that the advisory guidelines involve legal "rules" that set the "baseline" from which defendants must negotiate, and that "[y]ears of Beckles' life thus turned solely on whether the career-offender Guideline applied." Justice Kagan recused herself from participation in this case. The Court's holding is limited to the advisory guidelines only, leaving open the possibility that those sentenced under the mandatory guidelines may raise vagueness challenges to their sentence. Justice Sotomayor expressly notes that the issue regarding the mandatory guidelines was not decided and was left open. Neither Justices Ginsburg nor Sotomayor fully analyzed the commentary issue. Justice Ginsburg summarily dispatched it in a single footnote, and Justice Sotomayor offered no analysis at all. Additionally, the majority emphasized that its holding does "not render the advisory Guidelines immune from constitutional scrutiny." Among other things, it specifically pointed out that "in the Eighth Amendment context," "a district court's reliance on a vague sentencing factor in a capital case, even indirectly, 'can taint the sentence.'"

(*See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992)). Justice Sotomayor, too, pointed to the Eighth Amendment and *Espinosa*, stating that "the Guidelines carry sufficient legal weight to warrant scrutiny under the Eighth Amendment." Those who have already been resentenced after *Johnson* without the career offender or § 2K2.1 enhancement, Deputy Solicitor General Michael Dreeben stated during oral argument "They will keep their sentences," (OA Tr. at 43), implying the government will not appeal those cases (at least those decided by the oral argument date in November 2016).[3]

C. Do Bogart that Joint Liability (of Criminal Forfeiture)

Honeycutt v. United States, 137 S. Ct. 1626 (June 5, 2017)

Under 21 U.S.C. § 853(a)(1), any person convicted of a federal drug crime must forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." This case concerned the application of § 853(a)(1) to individuals convicted of participating in a drug conspiracy who did not personally receive proceeds of that conspiracy. The trial judge had refused to apply to defendant, a salaried employee of his brother's meth vending hardware store because he did not profit. The Sixth Circuit reversed applying joint liability to all. In an 8-0 decision, the Supreme Court held that § 853(a)'s limitation of forfeiture to tainted property acquired or used by the defendant, together with the plain text of § 853(a)(1), foreclose joint and several liability for coconspirators. Justice Gorsuch did no inhale (or at least he did not participate in this decision).

VI. DEATH PENALTY

A. *Atkins* Issues

Moore v. Texas, 137 S. Ct. 1039 (Mar. 28, 2017)

Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed fact findings and determined that, under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. ___ (2014), Moore qualified as intellectually disabled. For that reason, the court concluded, Moore's death sentence violated the Eighth Amendment's proscription of "cruel and unusual punishments." The habeas court therefore recommended that Moore be granted relief. The Texas Court of Criminal Appeals declined to adopt the judgment recommended by the state habeas court. In the court of appeal's view, the habeas court erroneously employed intellectual-disability guides *currently used in the medical community rather than the 1992 guides*

[3] Thanks Steve Sady and Liz Daily!

adopted by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (2004). The appeals court further determined that the evidentiary factors announced in *Briseno* "weigh[ed] heavily" against upsetting Moore's death sentence. In a 5-3 decision authored by Justice Ginsburg, the Supreme Court vacated the Texas appellate judgment. "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' . . . That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors 'creat[e]an unacceptable risk that persons with intellectual disability will be executed,' . . . Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled." Chief Justice Roberts dissented, joined by Justices Thomas and Alito. The dissent alternates between touting deference to the Texas legislature and criticizing reliance on judicial assessments of societal standards of decency rather than medical consensus (which it later argues does not exist).

B. Reasonably Necessary Investigation in Collateral Review

Ayestas v. Davis, Dir. Tex. DCJ, 137 S. Ct. 1433 (cert. granted Apr. 3, 2017); decisions below at 817 F.3d 888 and 826 F.3d 214 (5th Cir. 2016)

While Carlos Ayestas' federal habeas proceeding was pending, the Harris County District Attorney's Office ("HCDA") accidentally disclosed a document memorializing the basis of its charging decision. The author of that HCDA charging memo had provided as one of two typewritten reasons for seeking the death penalty "THE DEFENDANT IS NOT A CITIZEN." The lower federal courts have denied the routine stay-and-amendment procedure necessary to exhaust the claims associated with the HCDA memo in state court. The lower courts have also denied Mr. Ayestas' motion, under 18 U.S.C. § 3599, for "investigative, expert, [and] other services" that were "reasonably necessary" to develop facts associated with a separate Sixth Amendment ineffective assistance- of-counsel ("IAC") claim that had been forfeited by his state habeas lawyer. The Fifth Circuit interprets "reasonably necessary" to require an inmate to show "substantial need," an interpretation of § 3599(f) that forms an express circuit split with other federal courts of appeal. Through the substantial-need standard, the Fifth Circuit withholds expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself. Ayestas raised two claims in his cert petition, one involving anticipatory procedural default, and the second addressing reasonably necessary investigative costs. The Supreme Court granted cert on only the second question: (2) Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an IAC claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.

C. Independent Expert (*Ake v. Oklahoma*)

McWilliams v. Dunn, 137 S. Ct. 1790 (June 19, 2017)

Thirty-one years ago, McWilliams was convicted of capital murder by an Alabama jury and sentenced to death. The defendant's mitigation in the penalty phase of his case was based on severe mental health disorders that resulted from multiple head injuries. In response to the defense motion for a mental health expert, the trial judge appointed an expert who reported his findings simultaneously to the court, the prosecution, and the defense just two days before the sentencing hearing. Defense counsel had no opportunity to consult with the expert or have him review voluminous medical and psychological records that were not made available to the defense until the start of the sentencing hearing. McWilliams challenged his sentence on appeal, arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. Thus, as the dissent in the circuit court noted, "McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts." McWilliams petitioned for cert, arguing that this expert assistance violated his rights under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which held that when an indigent defendant's mental health is a significant factor at trial, the State must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." The Supreme Court reversed (5-4), in an opinion authored by Justice Breyer. "We now consider, in this habeas corpus case, whether the Alabama courts' refusal was 'contrary to, or involved an unreasonable application of, *clearly established* Federal law.' 28 U.S.C. §2254(d)(1). We hold that it was. Our decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.' *Id.* at 83. Petitioner in this case did not receive that assistance." The Court noted that *Ake* is triggered by a three-part test that is not disputed in this case: First, McWilliams is and was an "indigent defendant." Second, his "mental condition" was "relevant to . . . the punishment he might suffer," And, third, his "mental condition," i.e., his "sanity at the time of the offense," was "seriously in question." Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with "access to a competent psychiatrist who would conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S., at 83. The Court rejected Alabama's claim that the State was exempted from its obligations because McWilliams already had the assistance of a volunteer psychologist at the University of Alabama who "volunteer[ed]" to help defense counsel "in her spare time" and suggested the defense ask for further testing, Even if this episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower

court has held or suggested that the volunteer was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. The Court also rejected Alabama's argument that *Ake*'s requirements are irrelevant because McWilliams "never asked for more expert assistance" than he got, "even though the trial court gave him the opportunity to do so." The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed "to have someone else review" the court-appointed expert's report and medical records. Justice Alito dissented, joined by C.J. Roberts, and Justices Thomas and Gorsuch. In Justice Alito's view, the *Ake* Court was "deliberately ambiguous" as to, and therefore did not clearly establish that "the defendant is entitled to an expert who is part of the defense team." *But cf.* S. Ct. R. 10 ("Considerations Governing Review on Certiorari").

D. Victim Impact Statements

Bosse v. Oklahoma, 137 S. Ct. 1 (Oct. 11, 2016) (per curiam)

The opinion in *Booth v. Maryland*, 482 U.S. 496 (1987), barring victim impact evidence not directly related to the crime was overruled in part by *Payne v. Tennessee*, 501 S. Ct. 808 (1991), but that holding was expressly limited to "evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." The Oklahoma Court of Criminal Appeals erred in finding *Payne* overruled *Boothe* as to the victim's family's opinions about appropriate punishment. Thomas, with Alito, concurred on this dispositive point.

VII. HABEAS

A. Certificate of Appealability Standard for IAC Claim

Buck v. Davis, 137 S. Ct. 759 (Feb. 22, 2017)

A Texas jury convicted Duane Buck of capital murder. Under state law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Buck's attorney called a psychologist, Dr. Quijano, to offer his opinion on that issue. The psychologist testified that Buck probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person's propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black. The jury sentenced Buck to death. Buck contended that his attorney's introduction of this evidence violated his Sixth Amendment right to the effective assistance of counsel. This claim was never heard on the merits in any court, because the attorney who represented Buck in his first state post-conviction proceeding failed to raise it. In 2006, a federal district court relied on that failure — properly, under then-governing law — to hold that Buck's claim was procedurally defaulted and unreviewable. In 2014, Buck sought to reopen that 2006 judgment by filing a motion under Federal Rule of Civil Procedure 60(b)(6).

He argued that this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. ___ (2013), had changed the law in a way that provided an excuse for his procedural default, permitting him to litigate his claim on the merits. In addition to this change in the law, Buck's motion identified ten other factors that, he said, constituted the "extraordinary circumstances" required to justify reopening the 2006 judgment under the Rule. *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The district court denied the motion, and the Fifth Circuit declined to issue the Certificate of Appealability requested by Buck to appeal that decision. The Supreme Court granted cert. to decide the question: "Whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an 'expert' who testified that Mr. Buck was more likely to be dangerous in the future because he is black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?" In a 6-2 decision authored by Chief Justice Roberts, the Court held that (1) the Fifth Circuit exceeded the limited scope of proper COA analysis; (2) Buck demonstrated ineffective assistance of counsel under *Strickland*; and (3) denial of the Rule 60(b) motion was an abuse of discretion. As to the first part of the holding, the Court held that the COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U.S.C. § 2253. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327. Here, the Fifth Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the case on the merits, repeatedly faulting Buck for having failed to demonstrate extraordinary circumstances. The question for the court of appeals was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. Second**,** the Court held that Buck demonstrated ineffective assistance of counsel under *Strickland*. To satisfy *Strickland*, a defendant must first show that counsel performed deficiently. Buck's trial counsel knew that Dr. Quijano's report reflected the view that Buck's race predisposed him to violent conduct and that the principal point of dispute during the penalty phase was Buck's future dangerousness. Counsel nevertheless called Dr. Quijano to the stand, specifically elicited testimony about the connection between race and violence, and put Dr. Quijano's report into evidence. *No competent defense attorney would introduce evidence that his client is liable to be a future danger because of his race. Strickland* further requires a defendant to demonstrate prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The Court held that it is reasonably probable that without Dr. Quijano's

testimony on race and violence, at least one juror would have harbored a reasonable doubt on the question of Buck's future dangerousness. This issue required the jury to make a predictive judgment inevitably entailing a degree of speculation. *But Buck's race was not subject to speculation, and according to Dr. Quijano, that immutable characteristic carried with it an increased probability of future violence.* Dr. Quijano's testimony appealed to a powerful racial stereotype and might well have been valued by jurors as the opinion of a medical expert bearing the court's imprimatur. For these reasons, the district court's conclusion that any mention of race during the penalty phase was *de minimis* was rejected by the Supreme Court. So was the state's argument that Buck was not prejudiced by Dr. Quijano's testimony because it was introduced by his own counsel, rather than the prosecution. Jurors understand that prosecutors seek convictions and may reasonably be expected to evaluate the government's evidence in light of its motivations. When damaging evidence is introduced by a defendant's own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value. Third, the Supreme Court held that the district court's denial of Buck's Rule 60(b)(6) motion was an abuse of discretion. Relief under Rule 60(b)(6) is available only in "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535. Determining whether such circumstances are present may include consideration of a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–864. The district court's denial of Buck's motion rested largely on its determination that race played only a *de minimis* role in his sentencing. But there is a reasonable probability that Buck was sentenced to death in part because of his race. This is a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are. That it concerned race amplifies the problem. Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process, *Davis v. Ayala*, 576 U.S. ___, a concern that supports Rule 60(b)(6) relief. The extraordinary nature of this case is confirmed by the remarkable steps the state itself took in response to Dr. Quijano's testimony in other cases. Although the state attempted to justify its decision to treat Buck differently from the other five defendants also subject to Dr. Quijano's testimony in other cases, the Supreme Court found that justification suspect. Finally, the Supreme Court rejected as "waived" the state's argument that *Martinez* and *Trevino* should not govern Buck's case because they announced a "new rule" under *Teague v. Lane*, 489 U.S. 288, that does not apply retroactively to cases (like Buck's) on collateral review. Justices Thomas and Alito dissented, arguing that the finding of abuse of discretion in denying the Rule 60(b) motion amounted to de novo review. Beyond that, the dissent criticized the decision as being error correction in the specific case, rather than the promulgation of meaningful legal standards.

B. Overcoming Procedural Default by IAC

Davila v. Davis, 137 S. Ct. 2058 (June 26, 2017)

The Court granted cert. in this death penalty case to decide if the rule established in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) – that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial claim of ineffective-of-assistance-ofcounsel by trial counsel – also applies to a procedurally defaulted, but substantial, claim of ineffective assistance by appellate counsel. The Court answered "no" (5-4), in an opinion by Justice Thomas. The Court held that ineffective assistance of counsel in state post-conviction proceedings does not qualify as cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims. Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan.

C. Ineffective Assistance of Counsel

1. As Structural Error

Weaver v. Massachusetts, 137 S. Ct. 1899 (June 22, 2017)

Because "most constitutional errors can be harmless," the Supreme Court has "adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction" and instead is subject to a "harmless-error analysis." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). At the same time, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 309. The consequences of such errors are "necessarily unquantifiable and indeterminate" and are therefore not susceptible to a harmless-error inquiry. *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993). Here the question presented was whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness. The underlying structural error was closure of the courtroom to the public during jury selection because prospective jurors filled all seats -- a matter to which defense counsel did not object and that appellate counsel did not raise on appeal. The juvenile defendant was convicted of murder and sentenced to life in prison. In post-conviction proceedings, the defendant argued that his trial counsel provided ineffective assistance because he did not object to the closure of the courtroom during jury voir dire. In an opinion by Justice Kennedy, the Court affirmed (6-2). The opinion first explained why a violation of the right to a public trial is a structural error, but concluded that "while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." In the case of

an unpreserved claim of violation of the public trial right, raised in the context of a claim based on ineffective assistance of counsel, "the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or [] to show the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." In this case, the petitioner failed to meet that burden. The court was careful to note that "[n]either the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." Justice Thomas, joined by Justice Gorsuch, concurred. Justice Alito also concurred, also joined by Justice Gorsuch. Justice Breyer, joined by Justice Kagan, dissented opining that a habeas petitioner showing IAC resulted in structural error should not be required to prove prejudice.

2. Prejudice

See Lee v. United States, *supra* at 15 (prejudice, in a plea case, does not require petitioner to show he would have likely been acquitted with adequate advice, only that he would have proceeded to trial)

D. Deference: "Looking Through" Summary State Decisions.

Wilson v. Sellers, 137 S. Ct. 1203 (cert. granted Feb. 27, 2017); decision below at 834 F.3d 1227 (11th Cir. 2016) (en banc)

Question presented: D*id the Supreme Court's decision in Harrington v. Richter, 562 U.S. 86 (2011), silently abrogate the presumption set forth in Ylst v. Nunnemaker, 501 U.S. 797 (1991) that a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc Eleventh Circuit held in this case—despite the agreement of both parties that the Ylst presumption should continue to apply?* Due to the government's concession, the court has appointed amicus counsel to argue that the *Ylst* rule has been abrogated.

THAT'S ALL FOLKS