UNITED STATES SUPREME COURT
REVIEW-PREVIEW-OVERVIEW

CRIMINAL CASES GRANTED REVIEW AND DECIDED DURING THE OCTOBER 2017-18 TERMS THRU SEPTEMBER 25, 2018

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I. SEARCH & SEIZURE

A. Historical Cell Phone Location Data. *Carpenter v. United States*, 138 S. Ct. ___ (June 22, 2018). In this case, as in thousands of cases each year, the government sought and obtained the historical cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. The historical data revealed the location and movements of Carpenter, a cell phone user, over the course of 127 days, and was used to prove his location in the vicinity at the time of multiple armed robberies. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). As a result, the district court never made a probable cause finding before ordering Carpenter's service provider to disclose months' worth of his cell phone location records. A divided panel of the Sixth Circuit held that there is no reasonable expectation of privacy in these location records, relying in large part on four-decade-old decisions of the Supreme Court. Those decisions form what is known as the third-party doctrine, which exempts from the Fourth Amendment warrant clause records or information that someone voluntarily shares with someone or something else—here, the phone companies from which the records were obtained. **The Supreme Court reversed, in a 5-4 decision authored by Chief Justice Roberts,** holding that obtaining such historical cell site records was a Fourth Amendment search requiring a search warrant. The majority opinion holds that because of the "unique nature of cellphone location information," the third party doctrine did not apply. The majority focused on the nature of the information at issue and the "seismic shifts in digital technology," to justify carving out such records from the third party doctrine. The third party doctrine was left intact as it originally applied to a telephone number and bank

records, but was made inapplicable to cellphone location information. It should be noted that the opinion confines its holding to historical information of a week or more, and it specifically exempts the acquisition of information in an emergency setting, distinguishing "current" location information used to stop an ongoing crime, from historical information gathered to prosecute a completed crime. The four dissenting justices (Kennedy, Thomas, Alito & Gorsuch) wrote separate opinions, although sometimes interlocking.

B. Government Subpoena of Email Records Held Abroad. *United States v. Microsoft*, 138 S. Ct. ___ (dismissed as moot Apr. 17, 2018). In December 2013, federal law enforcement agents obtained from the United States District Court for the Southern District of New York a warrant under §2703 of the Stored Communications Act requiring Microsoft to disclose all e-mails and other information associated with the account of one of its customers, who was suspected of drug crimes. The warrant directed Microsoft to disclose to the government the contents of a specified e-mail account and all other records or information associated with the account "[t]o the extent that the information . . . is within [Microsoft's] possession, custody, or control." Microsoft determined that the account's e-mail contents were stored in a sole location: Microsoft's datacenter in Dublin, Ireland. Microsoft moved to quash the warrant with respect to the information stored in Ireland. A magistrate judge and later a district judge denied Microsoft's motion. Acting on a stipulation submitted jointly by the parties, the district court held Microsoft in civil contempt for refusing to comply fully with the warrant. On appeal, the Second Circuit reversed the denial of the motion to quash and vacated the civil contempt finding, holding that requiring Microsoft to disclose the electronic communications in question would be an unauthorized extraterritorial application of §2703. The Supreme Court granted certiorari to decide whether, when the government has obtained a warrant under 18 U.S.C. §2703, a U.S. provider of e-mail services must disclose to the government electronic communications within its control even if the provider stores the communications abroad. While the case was pending, on March 23, 2018, Congress enacted the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), which added a provision requiring production under such a subpoena "regardless of whether such communication, record, or other information is located within or outside of the United States." Soon after, the government obtained, pursuant to the new law, a new §2703 warrant covering the information requested in the §2703 warrant at issue in this case. Both Microsoft and the government conceded that the newly-issued subpoena moots the present case. The Supreme Court

then dismissed this case as moot in a per curiam opinion, ordering the customary vacatur of the decision below.

C. Suppression of Title III Wiretaps. *Dahda v. United States*, 138 S. Ct. ___ (May 14, 2018). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes a judge to issue a wiretap order to intercept communications within the court's territorial jurisdiction and provides for suppression of communications intercepted pursuant to a facially insufficient order. Roosevelt Dahda and his brother Los Dahda (and 41 others) faced criminal charges involving the operation of a marijuana-distribution network centered in Kansas and extending to California. Much of the evidence introduced against them was obtained through wiretaps of cell phones used by Dahda and others. The wiretaps took place during the six months preceding the Dahdas' arrests and had been authorized by the U.S. District Court for the District of Kansas. Petitioners moved to suppress the wiretap evidence at their criminal trial arguing that the evidence was obtained pursuant to a series of facially insufficient wiretap orders that authorized interception of communications outside of the issuing court's territorial jurisdiction. The district court denied their motion to suppress the evidence and they were convicted. The Tenth Circuit concluded in their separate appeals that suppression was not warranted even though the orders had been facially deficient. The court of appeals agreed that the orders were extraterritorial and thus facially insufficient. But the court interpreted 18 U.S.C. § 2518(10)(a)(ii)—which provides for suppression of an intercepted communication if the authorizing order was "insufficient on its face"—to include an additional, unwritten requirement that, for suppression to occur, the facial insufficiency must result from a statutory violation that implicates a "core concern" underlying Title III. The court of appeals determined that Title III's territorial-jurisdiction limitation did not implicate a core concern of Congress in enacting the statute, and thus held that evidence obtained pursuant to the facially insufficient orders should not be suppressed. **The Supreme Court affirmed (8-0) on different grounds in an opinion delivered by Justice Breyer.** Initially, the Court rejected the Tenth Circuit's application of the core concerns test to subsection (ii). "Like the Dahdas, we believe that the Tenth Circuit's interpretation of this provision is too narrow. The Tenth Circuit took the test it applied from this Court's decision in *United States* v. *Giordano*, . . . [b]ut *Giordano* involved a different provision." The statute sets forth three grounds for suppression:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of . . . approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

§2518(10)(a). *Giordano* focused not, as here, on the second subparagraph but on the first subparagraph, which calls for the suppression of 'unlawfully intercepted' communications. In *Giordano*, the Court held that the first subparagraph did cover certain statutory violations, such as those provisions that "implemented" the wiretap-related congressional concerns the Tenth Circuit mentioned in its opinion. So construed, the suppression provision left room for the second and third subparagraphs to have separate legal force. The Court went on to hold that a violation of the approval-by-the-Attorney-General provision implicated Congress' core concerns. Subparagraph (i) thus covered that particular statutory provision. And, finding the provision violated, *Giordano* ordered the wiretap evidence suppressed. Here, by contrast, the Court focused upon subparagraph (ii), which requires suppression when an order is facially insufficient. And in respect to this subparagraph, the Supreme Court could find no good reason for applying *Giordano*'s test. The underlying point of *Giordano*'s limitation was to help give independent meaning to each of §2518(10)(a)'s subparagraphs. It thus makes little sense to extend the core concerns test to subparagraph (ii) as well. Doing so would "actually treat that subparagraph as 'surplusage'—precisely what [this] Court tried to avoid in *Giordano*." Thus, the Court concluded that subparagraph (ii) does not contain a *Giordano*-like "core concerns" requirement. The statute means what it says. That is to say, subparagraph (ii) applies where an order is "insufficient on its face." §2518(10)(a)(ii). That said, the Court also disagreed with the Tenth Circuit's conclusion about the illegality of the wiretap evidence at trial. The Court assumed the relevant sentence of the judge's warrant exceeded the judge's statutory authority. Yet, the Court noted that since none of the communications unlawfully intercepted outside the judge's territorial jurisdiction were introduced at trial, the inclusion of the extra sentence had no significant adverse effect upon the Dahdas; after all, the remainder of each Order was itself legally sufficient, "so we conclude that the Orders were not 'insufficient" on their "face.'" (Justice Gorsuch was named to be on one of the Tenth Circuit Dahda appellate panels before his confirmation, although the case was decided by a quorum of two judges in his absence. He elected to not participate in this case, which was heard by eight justices.)

D. Search of Premises: Disputed Claim of Invitee. *District of Columbia v. Wesby,* 138 S. Ct. 577 (Jan. 22, 2018). Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers

claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. A civil suit followed, brought by 16 of the arrestees against the police. The Court of Appeals for the District of Columbia Circuit held that there was not probable cause to arrest the partygoers, and that the officers were not entitled to qualified immunity. The Supreme Court reversed on both grounds (9-0) in an opinion authored by Justice Thomas. His opinion noted that there was no dispute the partygoers entered the house against the will of the owner. And the opinion disagreed with the partiers' contention that the officers lacked probable cause to arrest them because the officers had no reason to believe that they "knew or should have known" their "entry was unwanted." Considering the totality of the circumstances – a long vacant home with no real furniture and without any sign it had been recently inhabited – the officers made an "entirely reasonable inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. Justice Sotomayor concurred in part (on qualified immunity only) and in the judgment. Justice Ginsburg concurred in the judgment, but notably questioned whether the Court should continue to ignore why the police actually act when evaluating the totality of circumstances for an arrest. "The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren v. United States*, 517 U. S. 806 (1996), and follow-on opinions, holding that 'an arresting officer's state of mind . . . is irrelevant to the existence of probable cause,' *Devenpeck v. Alford*, 543 U. S. 146, 153 (2004*). See, e.g.*, 1 W. LaFave, Search and Seizure §1.4(f), p. 186 (5th ed.2012) ('The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality.'). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents was not warranted by 'settled law.' The defendants-petitioners are therefore sheltered by qualified immunity." This concurrence is a primer for a new issue to be raised by defense counsel challenging arrests as violating the Fourth Amendment.

E. Warrantless Search of Vehicle at Residence. *Collins v. Virginia*, 138 S. Ct. ___ (May 29, 2018). County police officers were looking for the person who eluded them on a motorcycle in two high-speed incidents. Although the rider's helmet had obscured his face, the

officers suspected Ryan Collins. A few months after the eluding incidents, the officers encountered Collins at the DMV. During their conversation, one officer visited Collins's Facebook page and spotted a picture of a motorcycle, covered by a tarp, parked at a house. Collins told the officers he did not know anything about the motorcycle. After leaving the DMV, one of the officers located the house in the photograph. Collins's girlfriend (and mother to his child) lived there, as did Collins himself at least several nights each week. A dark-colored car was parked about halfway up the driveway, where a visitor might pass to reach the front door. A motorcycle covered in a white tarp sat behind that car. The motorcycle rested on the part of the driveway running past the house's front perimeter. This portion of the driveway was enclosed on three sides: the home on one side, a brick retaining wall on the opposite side, and a brick wall in the back. The motorcycle was no more than a car's length away from the side of the dwelling. Seeing the motorcycle covered in a tarp, the officer walked onto the driveway. He did not have permission to go onto this property. The officer then entered the partially enclosed parking space alongside the home, removed the tarp, and obtained the license tag and VIN number. After running the VIN number, the officer learned the motorcycle was flagged as stolen. He knocked at the front door, and Collins was arrested for possession of stolen goods after admitting that he owned the motorcycle. The state courts upheld the search under the automobile exception to the warrant requirement. The Supreme Court reversed (8-1) in an opinion by Justice Sotomayor. "This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not." The Court held that where a vehicle is parked on the curtilage of a home, the automobile exception cannot justify the intrusion into protected areas necessary to conduct the vehicle search—in other words, the automobile exception yields. Reasoning that "the scope of the automobile exception extends no further than the automobile itself," the Court determined that the search of a vehicle on the curtilage of a home was no more permissible than the absurd suggestion that an officer could use the automobile exception to enter a living room and search a motorcycle he saw through the window. The Court emphasized that its own precedent has long guarded against allowing exceptions to the warrant requirement to "justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." Allowing the automobile exception to justify such an intrusion onto the curtilage threatened to "transform what was meant to be an exception into a tool with far broader application" and "unmoor[ed] the exception from its justifications." In reaching its

conclusion, the Court rejected Virginia's arguments supporting the search. First, the Court rejected Virginia's assertion that the automobile exception was "categorical," permitting warrantless searches "anytime, anywhere." Second, the Court declined Virginia's invitation to draw the line somewhere other than curtilage—specifically, a bright line at "the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage." The Court rejected this argument in part because it "rests on a mistaken premise about the constitutional significance of visibility," and further because it would "automatically . . . grant constitutional rights to those persons with financial means" to have such structures. Justice Thomas concurred, writing separately to question the Court's authority to require that state courts apply the federal exclusionary rule. Justice Alito dissented in no uncertain terms.

F. Warrantless Search of Rental Car. *Byrd v. United States,* 138 S. Ct. ___ (May 14, 2018). Pennsylvania State Troopers pulled over a car driven by Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin. The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin with the intent to distribute, and possession of body armor by a prohibited person. Byrd moved to suppress the evidence as the fruit of an unlawful search. The district court denied the motion, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, both the district court and court of appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car. The Supreme Court granted cert to address the question whether a driver has a reasonable expectation of privacy in a rental car when that person is not listed as an authorized driver on the rental agreement. In a decision authored by Justice Kennedy (9-0), the Court reversed and remanded, holding that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver. The Court concluded a remand is necessary, however, to address in the first instance the government's argument that this general rule is inapplicable because, in the circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, the justices agreed, "our cases make clear he would lack a legitimate

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

G. Release or Detention Pending Immigration Proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830 (Feb. 27, 2018). **U**nder 8 U.S.C. § 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. § 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. § 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. § 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. § 1003.19(e). The questions presented were: (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. (3) Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be

weighed in favor of release; and whether new bond hearings must be afforded automatically every six months. In a fragmented decision authored by Justice Alito (3-2-1-3), the Supreme Court reversed the Ninth Circuit's construction of the statutes: "In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. All parties appear to agree that the text of these provisions, when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue. Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must *interpret* the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings." Chief Justice Roberts and Justice Kennedy concurred in Alito's opinion in full. Thomas and Gorsuch joined all but part II (holding the Court has jurisdiction, despite jurisdiction-ousting immigration statutes). Justice Sotomayor joined as to part III-C (holding § 1226(a) does not authorize every-6-month bond hearings to determine by clear and convincing if continued detention is necessary). Thomas concurred in part and concurred in the judgment, to which Gorsuch joined except as to footnote 6 (in which Thomas approves of Justice O'Connor's concurrence in *Demore v. Kim* (2003) which explained that § 1226(e) deprives federal courts of authority to set aside a detention decision by the Attorney General). Three justices dissented: Breyer wrote, joined by Ginsburg and Sotomayor. Kagan was recused. This may explain why the case was argued twice over the past two Terms before finally being resolved as it was.

II. FIFTH AMENDMENT

A. Shackling of Defendants. *United States v. Sanchez-Gomez*, 138 S. Ct. ___ (May 14, 2018). Four criminal defendants objected to being bound by full restraints during pretrial proceedings in their cases, but the district court denied relief. On appeal the Ninth Circuit held that the use of such restraints was unconstitutional, even though each of the four criminal cases had ended prior to its decision: Three defendants had pleaded guilty and been sentenced, while the case against the fourth defendant was dismissed as part of a deferred

prosecution agreement. The government petitioned for certiorari question and the Supreme Court agreed to decide only whether the case was moot before it was decided by the Ninth Circuit, or to put it somewhat differently: Whether the appeals were saved from mootness either because the defendants sought "class-like relief" in a "functional class action," or because the challenged practice was "capable of repetition, yet evading review." In a unanimous decision authored by Chief Justice Roberts, the Court rejected the applicability of those mootness-saving analogies, holding instead that the defendant's appeals challenging the use of full restraints during nonjury pretrial proceedings became moot when their underlying criminal cases came to an end before the Ninth Circuit could render its decision.

B. **Pretrial Use of Compelled Statements.** *Hays, Kansas v. Vogt*, 137 S. Ct. 55 **(cert. dismissed as improvidently granted, May 29, 2018**). Petitioner is a city in Kansas; respondent is one of its former police officers. In 2013, while still employed by the city, Vogt applied for a job with the police department in a different city. During an interview for that position, he revealed that he had kept a knife for his personal use after coming into possession of it while working as a Hays police officer. The interviewing department extended respondent a job offer conditioned on respondent telling petitioner about the knife and returning it. Vogt told the Hays chief of police about the knife. The chief directed Vogt to provide additional information and opened an internal investigation. Vogt gave the chief a vague one-sentence report related to his possession of the knife and submitted his two weeks' notice of resignation. After the lieutenant in charge of internal investigations asked him to provide additional information, Vogt made a further statement, which included the type of police call he was handling when he came into possession of the knife. Using this information, the lieutenant was able to locate an audio recording which captured the circumstances of how Vogt came into possession of the knife. At that point, the chief terminated the internal investigation, and gave Vogt's statements and the resulting information to the Kansas Bureau of Investigation. Because Vogt had become the subject of a criminal investigation, the other city's police department withdrew its job offer. The State of Kansas charged Vogt with two felony counts related to the knife. Under state law, Vogt was entitled to a probable cause hearing. At this hearing, his statements about the knife and the resulting information were allegedly "used against him." A state district court judge dismissed both charges based on lack of probable cause. Following dismissal of all criminal charges against him, Vogt sued Hays City, the other city with which he sought employment, and four police officers. Vogt alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights.

Specifically, he alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) those statements were used against him in a criminal case when they were used at the probable cause hearing. Question presented: "The Self-Incrimination Clause provides that '[n]o person * * * shall be compelled in any criminal case to be a witness against himself.' A "circuit split has developed over whether certain pretrial uses of compelled statements force a person 'to be a witness against himself' within the meaning of that provision. The question presented was: Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial." Justice Gorsuch has recused himself from this case since he sat on the underlying circuit court panel**. (Following full briefing and oral argument, the Court dismissed the petition for writ of certiorari as improvidently granted, without any further explanation).**

C. Double Jeopardy

1. **Double Jeopardy in Separate Sovereigns.** *Gamble v. United States*, 138 S. Ct. ___ (cert. granted June 28, 2018); decision below at 694 F. App's 750 (11th Cir. 2017). The Fifth Amendment states that "No person shall . . . be twice put in jeopardy" "for the same offence." Yet, Terance Martez Gamble has been subjected to two convictions and two sentences – one in state court and one in federal court – for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of his life behind bars. Gamble argues that the Double Jeopardy Clause prohibits that result and that existing Supreme Court precedent should be overruled. The fact that Gamble's sentences were imposed by separate sovereigns—Alabama and the United States—should make no difference. He argues that the court-manufactured "separate sovereigns" exception—pursuant to which his otherwise plainly unconstitutional duplicative conviction was upheld—is inconsistent with the plain text and original meaning of the Constitution, and outdated in light of incorporation and a vastly expanded system of federal criminal law. For precisely these reasons, Justices Ginsburg and Thomas have called for "fresh examination" of the exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring); *see also id.* ("The [validity of the exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the

whole USA."). Question presented: Whether the Supreme Court should overrule the "separate sovereigns" exception to the double jeopardy clause.

2. **Double Jeopardy Following Acquittal at Severed Trial.** *Currier v. Virginia*, 138 S. Ct. ___ (June 22, 2018). The Double Jeopardy Clause protects the integrity of acquittals through the doctrine of issue preclusion, also known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016) (preferring the term "issue preclusion" to "collateral estoppel"). Issue preclusion dictates that where a jury's acquittal has necessarily decided an issue of ultimate fact in the defendant's favor, the Double Jeopardy Clause bars the prosecution "from trying to convince a different jury of that very same fact in a second trial." *Bravo-Fernandez*, 137 S. Ct. at 359. Here, Currier faced three charges relating to the burglary of a home and theft of a safe containing cash and firearms: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after being convicted of a felony. The firearm charge was based on the theory that he had briefly handled the guns inside the safe. In Virginia), evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial and generally inadmissible. Therefore, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction. The parties acceded to that procedure here. Trying all three charges simultaneously would have unduly prejudiced petitioner by bringing his prior convictions to the attention of the jury to which the breaking-and-entering and grand larceny charges would be tried. Accordingly, the trial court severed the felon-in-possession charge from the other two charges. The Commonwealth elected to first try Currier for breaking and entering and grand larceny. Notably, due to a discovery violation, the trial court excluded from evidence a DNA report connecting Currier to a cigarette butt found in the pickup truck used in the theft. In the end, both the prosecution and defense agreed that the sole issue before the jury was whether Currier was involved in stealing the safe. The prosecutor argued to the jury: "What is in dispute? Really only one issue and one issue alone. Was the defendant, Michael Currier, one of those people that was involved in the offense?" He was acquitted of breaking and entering and larceny charges. He then argued that he couldn't be tried on the question of whether he had a gun

during a burglary because, as the jury had found, he hadn't taken part in the burglary. The trial court rejected his challenge. Given the second opportunity to convince a jury of Currier's involvement in the break-in and theft, the Commonwealth modified its presentation in two ways: (1) Its key witnesses refined their testimony and redelivered it with greater poise; and (2) the Commonwealth corrected its procedural error from the first trial by successfully introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that Currier had at some point been in the truck used to steal the safe. This time, the jury found Currier guilty and sentenced him to five years in prison. Currier moved to set aside the verdict on double jeopardy grounds. Virginia courts rejected his challenge. The Supreme Court affirmed, rejecting his double jeopardy challenge (5-4) in an opinion written by Justice Gorsuch (joined by C.J. Roberts, Thomas, Alito, and Kennedy (in part)). The majority held that because Currier consented to have the charges tried separately, his trial and conviction on the felon-in-possession charge did not violate the Double Jeopardy Clause (Parts I and II of Gorsuch's opinion). The majority determined that consenting to multiple trials waives not only the protection against multiple trials but also the protection against re-litigation of an issue following an acquittal (an *Ashe v. Swenson* issue). Justice Kennedy, who provided the deciding fifth vote, would have ended the inquiry there. A plurality of the Court went further, setting forth broader grounds for the ruling. In Part III of his opinion, Gorsuch (with Roberts, Thomas and Alito) questioned whether re-litigating an issue after acquittal violates double jeopardy at all—directly challenging *Ashe*'s constitutional issue-preclusion. For them, issue preclusion is a doctrine related to civil litigation that should not be imported into criminal cases. Justice Ginsburg dissented (with Breyer, Sotomayor, and Kagan), providing a detailed background of the principles and protections involved, and the confusion caused by the majority/plurality decision.

III. CRIMES

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

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

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

the government will use it responsibly," for "doing so risks allowing policemen, prosecutors, and juries to pursue their personal predilections" leading to intolerable non-uniformity. Justice Thomas dissented (joined by Alito) on textual grounds, concluding that the majority's limitation on the provision's scope was not grounded in the text, and was instead the Court substituting its own judgment for that of Congress. The majority and dissenting opinions disagreed about the *mens rea* differences between the terms "willfully" and "corruptly," in case Congress cares to take this into account in amending the statute.

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

C. Burglary of Nonpermanent or Habitable Mobile Structure as "Violent Felony" Under ACCA. *United States v. Stitt*, 138 S. Ct. ___ and *United States v. Sims,* 138 S. Ct. ___ (cert. granted Apr. 23, 2019, consolidated), decision below at 860 F.3d 854 (6th Cir. 2017) (en banc) and 854 F.3d 1057 (8th Cir. 2017). The Supreme Court granted cert to review two decisions with a common question: Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii). Under Tennessee law the premises of a burglary includes any "habitation;" thus, in *Stitt*, the en banc Sixth Circuit held that Tennessee's burglary statute does not categorically qualify as an ACCA predicate because it is broader than generic burglary. In *Sims*, an Eighth Circuit panel held that "Arkansas residential burglary categorically sweeps more broadly than generic burglary" because it covers vehicles used or adapted for overnight accommodation. In that court's view, no burglary statute covering vehicles—even if limited to vehicles used as homes— can qualify as "burglary" under the ACCA.

D. Oklahoma Tribal Jurisdiction. *Royal, Warden v. Murphy*, 138. S. Ct. ___ (cert. granted May 21, 2018; Justice Gorsuch recused); decision below at 875 F.3d 896 (10th Cir. 2017). The Tenth Circuit held that Oklahoma lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held

that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore "Indian country" subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. In its cert petition, the state argues that this holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions. To put this holding into perspective, the former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Moreover, other litigants have invoked the decision below to reincarnate the historical boundaries of all "Five Civilized Tribes"—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. According to the state, the decision thus threatens to effectively redraw the map of Oklahoma. The state also contends that prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*; and that civil litigants are using the decision to expand tribal jurisdiction over non-members. Question presented: Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

E. Claims of Securities Fraud. *Lorenzo v. Securities and Exchange Commission*, 138 S. Ct. ___ (cert. granted June 18, 2018); decision below at 872 F.3d 578 (D.C. Cir. 2017). The antifraud provisions of the federal securities laws prohibit two well-defined categories of misconduct. One category is the use of *fraudulent statements* in connection with the offer and sale of securities. The other category is employing *fraudulent schemes* in connection with the offer and sale of securities. In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), the Supreme Court considered the elements of a fraudulent statement claim and held that only the "maker" of a fraudulent statement may be held liable for that misstatement under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5(b). The question presented is whether a misstatement claim that does not meet the elements set forth in *Janus* can be repackaged and pursued as a fraudulent scheme claim. The Circuits have split 3-2 on this question. The Second, Eighth and Ninth Circuits have held that a misstatement alone cannot be the basis of a fraudulent scheme claim, while the DC Circuit and the Eleventh Circuit have held that a misstatement standing alone can be the basis of a fraudulent scheme. [Note- This is a civil case with potential implications for criminal prosecutions].

IV. TRIAL AND PLEA

A. Challenging Juror's Alleged Racial Bias. *Tharpe v. Sellers*, 138 S. Ct. 545 (Jan. 8, 2018) (per curiam). Tharpe moved to reopen his federal habeas corpus proceedings under Fed, R. Civ. P. 60(b) regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. The district court denied the motion on the ground that, among other things, Tharpe's claim was procedurally defaulted in state court. The district court also noted that Tharpe could not overcome that procedural default because he had failed to produce any clear and convincing evidence contradicting the state court's determination that Gattie's presence on the jury did not prejudice him. Tharpe sought a certificate of appealability (COA), which the Eleventh Circuit denied after deciding that jurists of reason could not dispute that the district court's procedural ruling was correct. The Eleventh Circuit's decision, as the Supreme Court read it, was based solely on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Supreme Court reversed (6-3). It noted that Tharpe had produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." The Court held that Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. Thus, the Court held, the Eleventh Circuit erred when it concluded otherwise. The Court also noted the ground on which the Eleventh Circuit chose to dispose of Tharpe's application—prejudice—is not the only question relevant to the broader inquiry whether Tharpe should receive a COA. The district court denied Tharpe's Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit. As to those additional issues, the majority expressed no view. It also noted that under the applicable standard for relief from judgment under Rule 60(b)(6), which is available only in " 'extraordinary circumstances,' " *Gonzalez v. Crosby*,

545 U.S. 524, 536 (2005), Tharpe faces a high bar in showing that jurists of reason could disagree whether the district court abused its discretion in denying his motion. It may be that, at the end of the day, Tharpe should not receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the Court of Appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe. Justice Thomas dissented, joined by Alito and Gorsuch. In their view Tharpe will not be able to meet the procedural requirements for relief and the remand is therefore is an unnecessary do-over.

B. Appellate Consequences of Guilty Plea. *Class v. United States*, 138 S. Ct. 798 (Feb. 21, 2018). The defendant had firearms in his car, which was parked and locked in a parking garage on the grounds of the U.S. Capitol. He was charged with violation of 40 U.S.C. § 5104(e), which prohibits carrying on, or having readily accessible, a firearm on the grounds of the U.S. Capitol building. In defense, he raised Second Amendment and due process challenges, but he ultimately pled guilty, conceding his factual guilt. The plea agreement did not contain an express waiver of his right to appeal his conviction. On appeal, he re-raised his constitutional challenges to the statute. The D.C. Circuit held that by pleading guilty, he waived all "claims of error on appeal, even constitutional claims." The Supreme Court reversed (6-3) in an opinion by Justice Breyer, holding that a guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. "The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. We hold that it does not. Class did not relinquish his right to appeal the District Court's constitutional determinations simply by pleading guilty. [T]his holding flows directly from this Court's prior decisions . . . in *Haynes* v. *United States*, 390 U.S. 85, 87, n. 2 (1968) . . ., *Blackledge* v. *Perry,* 417 U.S. 21 (1974) . . . , and *Menna* v. *New York,* 423 U.S. 61 (1975) (*per curiam*)**."** Notably the majority was not persuaded by the government's argument that Fed. R. Crim. P. 11(a)(2) (conditional pleas) is the exclusive way in which a defendant can both plead guilty and then appeal the underlying statute of conviction. The majority made clear, however, that a defendant may waive the right to such an appeal by an express waiver taken in conjunction with the guilty plea, but no such waiver occurred in Class's case. Justice Alito dissented (joined by Kennedy and Thomas).

V. SENTENCING

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

1. Eligibility Following Rule 11(c)(1)(C) Sentence. *Hughes v. United States*, 138 S. Ct. ___ (June 4, 2018). Is a defendant who enters into an agreed sentence under Fed. R. Crim. P. 11(c)(1)(C) eligible for a later sentence reduction based on a retroactively applicable change in the Sentencing Guidelines, under 3583(c)(2)? In a 6-3 decision authored by Justice Kennedy, the Court held that such a defendant is eligible for 3582(c) relief, clarifying confusion about its prior plurality opinion in *Freeman v. United States*. "The proper construction of federal sentencing statutes and the Federal Rules of Criminal Procedure can present close questions of statutory and textual interpretation when implementing the Federal Sentencing Guidelines. Seven Terms ago the Court considered one of these issues in a case involving a prisoner's motion to reduce his sentence, where the prisoner had been sentenced under a plea agreement authorized by a specific Rule of criminal procedure. *Freeman v. United States*, 564 U.S. 522 (2011). The prisoner maintained that his sentence should be reduced under 18 U.S.C. §3582(c)(2) when his Guidelines sentencing range was lowered retroactively. 564 U.S., at 527–528 (plurality opinion). No single interpretation or rationale in *Freeman* commanded a majority of the Court. The courts of appeals then confronted the question of what principle or principles considered in *Freeman* controlled when an opinion by four Justices and a concurring opinion by a single Justice had allowed a majority of this Court to agree on the judgment in *Freeman* but not on one interpretation or rule The application and construction of seemingly competing Supreme Court precedent is highlighted by the detailed question presented by petitioner: 'This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" that courts could follow in later cases when similar questions arose under the same statute and Rule. For guidance courts turned to this Court's opinion in *Marks v. United States*, 430 U.S. 188 (1977). Some courts interpreted *Marks* as directing them to follow the 'narrowest' opinion in *Freeman* that was necessary for the

judgment in that case; and, accordingly, they adopted the reasoning of the opinion concurring in the judgment by JUSTICE SOTOMAYOR." The *Marks* rule, though, has been subject to great criticism because it seemingly allows the Court's holding to be determined by a single justice with whom eight other justices disagree. The Court found no need to alter the *Marks* rule for construing plurality opinions in this case. Instead, the majority here found that the district court accepted Hughes' Type-C agreement after concluding that a 180-month sentence was consistent with the Sentencing Guidelines. The court then calculated Hughes' sentencing range and imposed a sentence that the court deemed "compatible" with the Guidelines. Thus, the sentencing range was a basis for the sentence that the District Court imposed. That range has "subsequently been lowered by the Sentencing Commission," so Hughes is eligible for relief under §3582(c)(2). In so ruling, the majority rejected the government's "recycled" *Freeman* arguments to the contrary. Justice Sotomayor concurred, adhering to her *Freeman* concurrence, but acknowledging that her concurrence in that case led to unsettled law, so she now joins the majority decision in full in order to settle the legal precedent. Chief Justice Roberts dissented, joined by Thomas and Alito, and in the end recommended that the government can obviate this holding by obtaining waivers of future 3582(c) relief as a condition of a Type-C plea agreement.

2. Eligibility Following Substantial Assistance Sentence. *Koons v. United States*, 138 S. Ct. ___ (June 4, 2018). In a unanimous decision, written by Justice Alito, the Court held that a defendant is not eligible for 3582(c) relief in a drug case with a mandatory minimum sentence even if he was sentenced lower based upon substantial assistance. "Under 18 U.S.C. §3582(c)(2), a defendant is eligible for a sentence reduction if he was initially sentenced 'based on a sentencing range' that was later lowered by the United States Sentencing Commission. The five petitioners in today's case claim to be eligible under this provision. They were convicted of drug offenses that carried statutory mandatory minimum sentences, but they received sentences below these mandatory minimums, as another statute allows, because they substantially assisted the Government in prosecuting other drug offenders. We hold that petitioners' sentences were 'based on' their mandatory minimums and on their substantial assistance to the Government, not on sentencing ranges that the Commission later lowered. Petitioners are therefore ineligible for §3582(c)(2)

sentence reductions. The government had asked the Court to go further in its ruling, applying it to any sentence with a mandatory minimum, but the Court declined, in footnote 1: "The Government argues that defendants subject to mandatory minimum sentences can never be sentenced 'based on a sentencing range' that the Commission has lowered, 18 U.S.C. §3582(c)(2), because such defendants' 'sentencing range[s]' are the mandatory minimums, which the Commission has no power to lower. . . . We need not resolve the meaning of 'sentencing range' today."

3. **Explanation for Denial of Relief.** *Chavez-Meza v. United States*, 138 S. Ct. ___ (June 18, 2018). This case concerns a criminal drug offender originally sentenced in accordance with the Federal Sentencing Guidelines. Subsequently, the Sentencing Commission lowered the applicable Guidelines sentencing range; the offender asked for a sentence reduction in light of the lowered range; and the district judge reduced his original sentence from 135 months' imprisonment to 114 months. Believing he should have obtained a yet greater reduction, Chavez-Meza argued that the district judge did not adequately explain why he imposed a sentence of 114 months rather than a lower sentence. The Tenth Circuit held that the judge's explanation was adequate. In a 5-3 decisions authored by Justice Breyer (Gorsuch recused), the Supreme Court agreed with the court of appeals. The Court noted that at the defendant's initial sentence he sought a variance from the Guidelines range (135 to 168 months) on the ground that his history and family circumstances warranted a lower sentence. The judge denied his request. In doing so, the judge noted that he had "consulted the sentencing factors of 18 U.S.C. 3553(a)(1)." He explained that the "reason the guideline sentence is high in this case, even the low end of 135 months, is because of the [drug] quantity." He pointed out that the defendant had "distributed 1.7 kilograms of actual methamphetamine," a "significant quantity." And he said that "one of the other reasons that the penalty is severe in this case is because of methamphetamine." He elaborated this latter point by stating that he had "been doing this a long time, and from what [he] gather[ed] and what [he had] seen, methamphetamine, it destroys individual lives, it destroys families, it can destroy communities." This record was before the judge when he considered petitioner's request for a sentence modification. He was the same judge who had sentenced petitioner originally. Petitioner asked the judge to reduce his

sentence to 108 months, the bottom of the new range, stressing various educational courses he had taken in prison. The Government pointed to his having also broken a moderately serious rule while in prison. The judge certified (on a form) that he had "considered" petitioner's "motion" and had "tak[en] into account" the relevant Guidelines policy statements and the §3553(a) factors. He then reduced the sentence to 114 months. The Court's majority held that the record as a whole strongly suggests that the judge originally believed that, given petitioner's conduct, 135 months was an appropriately high sentence. "So it is unsurprising that the judge considered a sentence somewhat higher than the bottom of the reduced range to be appropriate. As in Rita, there was not much else for the judge to say." Justice Kennedy dissented (joined by Sotomayor and Kagan) because merely checking a box on the current form AO-247 does not allow for meaningful appellate review of the decision, and he recommended changes to expand on that form..."My disagreement with the majority is based on a serious problem—the difficulty for prisoners and appellate courts in ascertaining a district court's reasons for imposing a sentence when the court fails to state those reasons on the record; yet, in the end, my disagreement turns on a small difference, for a remedy is simple and easily attained. Just a slight expansion of the AO–247 form would answer the concerns expressed in this dissent in most cases, and likely in the instant one."

B. Extent of Mandatory Restitution. *Lagos v. United States,* 138 S. Ct. ___ (May 29, 2018). Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." 18 U.S.C. § 3663A(b)(4). The Fifth Circuit held that this provision covers the costs of internal investigations and private expenses that were "neither required nor requested" by the government; these private costs were incurred outside the government's official investigation, and, indeed, were incurred before the government's investigation even began. The Supreme Court reversed, in a unanimous opinion authored by Justice Breyer: "We must decide whether the words 'investigation' and 'proceedings' are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings."

C. Excessive Fines in State Court. *Timbs v. Indiana,* 138 S. Ct. ___ (cert. granted June 18, 2018); decision below at 85 N.E. 3d 1179 (Ind. 2018). Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

VI. DEATH PENALTY

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

B. Method of Execution. *Bucklew v. Precythe*, 138 S. Ct. ___ (cert. granted Apr. 30, 2018); decision below at — F.3d —, No. 17-3052, 2018 WL 1163360 (8th Cir. Mar. 6, 2018). Russell Bucklew was scheduled for execution on March 20 by a method that he alleges is very likely to

cause him needless suffering. Neither the district court nor the court of appeals denies that. Bucklew's very likely suffering stems from an exceedingly rare disease called cavernous hemangioma. The disease is progressive, and has caused unstable, blood-filled tumors to grow in his head, neck, and throat. Those highly sensitive tumors easily rupture and bleed. The tumor in his throat often blocks his airway, requiring frequent, conscious attention from Bucklew to avoid suffocation. His peripheral veins are also compromised. That means that the lethal drug cannot be administered in the ordinary way, through intravenous access in his arms. An expert who examined Bucklew concluded that while undergoing Missouri's lethal injection protocol, Bucklew is "highly likely to experience . . . the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway." As he struggles to breathe through the execution procedure, Bucklew's throat tumor will likely rupture. "The resultant hemorrhaging will further impede Mr. Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood during the lethal injection process." Bucklew's execution will very likely be gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection execution. He proposed and alternative lethal gas method of execution, which wa srejecetd by the district court. In a 2-1 decision, a panel of the Eighth Circuit concluded that this execution is not cruel and unusual solely because, in its view, Bucklew failed to prove that his alternative method would substantially reduce his risk of needless suffering. **Questions presented:** (1) Should a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition assume that medical personnel are competent to manage his condition and that the procedure will go as intended? (2) Must evidence comparing a state's proposed method of execution with an alternative proposed by an in-mate be offered via a single witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate? (3) Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition? In addition the Supreme Court added a fourth question when it granted cert: (4) Whether petitioner met his burden under *Glossip v. Gross*, 576 U. S. ___ (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.

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

D. Reasonably Necessary Investigative Costs in Capital Collateral Review. *Ayestas v. Davis, Dir. Tex. DCJ*, 138 S. Ct. 1080 (Mar. 21, 2018). Carlos Ayestas was convicted of murder and sentenced to death in a Texas court. While his federal habeas proceeding was pending, the Harris County District Attorney's Office accidentally disclosed a typewritten document memorializing the basis of its charging decision,

which included "THE DEFENDANT IS NOT A CITIZEN." He sought funding under 18 U.S.C. § 3559(f) for investigative services needed to prove his entitlement to federal habeas relief. That section makes funds available if they are "reasonably necessary," but his motion was denied. The Fifth Circuit affirmed that denial by interpreting "reasonably necessary" to require an inmate to show "substantial need." Through the substantial-need standard, the Fifth Circuit withheld expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself. The Supreme Court reversed and remanded, in a unanimous decision authored by Justice Alito. "We hold that the lower courts applied the wrong legal standard, and we therefore vacate the judgment below and remand for further proceedings." As a threshold matter, the Court determined that the denial of funding is a judicial decision subject to appellate review. On the merits, the Court determined that the correct legal standard is set forth in the statute, not the Fifth Circuit's more demanding rule: "Section 3599 appears to use the term 'necessary' to mean something less than essential. The provision applies to services that are 'reasonably necessary,' but it makes little sense to refer to something as being 'reasonably essential.' What the statutory phrase calls for, we conclude, is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important." The Court set out considerations to guide the decision, but in simple terms it said: "To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks. But the 'reasonably necessary' test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone." Justice Sotomayor concurred (joined by Ginsburg), explaining specifically how Ayestas met that standard.

VII. APPEALS

A. Fourth Prong of Plain Error Review. *Rosales-Mireles v. United States*, 138 S. Ct. ___ (June 18, 2018). Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The PSR calculated a total offense level of 21 and criminal history of 13 points, resulting in a criminal history category of VI = advisory guidelines range of 77 to 96 months' imprisonment. The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was

V, yielding an advisory Guidelines range of 70 to 87 months. Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence would be a within-Guidelines sentence. The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment. On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double-counting the prior conviction in his criminal history. The government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error. The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. It also held that Rosales had satisfied the third prong of plain-error review. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. And the district court did not explicitly and unequivocally indicate that it would have imposed the same sentence irrespective of the Guidelines range. Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009)). Such errors, the court said, are "'ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "*no* discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." The court of appeals thus affirmed. **But, the Supreme Court reversed, 7-2** in an opinion by Justice Sotomayor. "Federal Rule of Criminal Procedure 52(b) provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns the bounds of that discretion, and whether a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights, calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence. The Court holds that such an error will in the ordinary case, as here, seriously affect the fairness,

integrity, or public reputation of judicial proceedings, and thus will warrant relief." Justice Thomas dissented (joined by Alito) because he sees the holding, as applied to an ordinary case, goes far beyond the specific question presented and contravenes what he sees as long-established principles of appellate review. The majority opinion, together with the dissent, clarify the burden of plain error review, making it a far less onerous standard of review.

VIII. IMMIGRATION

A. Unconstitutional Vagueness of 18 U.S.C. § 16(b). *Sessions v. Dimaya*, 138 S. Ct. ___ (Apr. 17, 2018). "Three Terms ago, in *Johnson* v. *United States*, this Court held that part of a federal law's definition of 'violent felony' was impermissibly vague. . . . The question in this case is whether a similarly worded clause [§16(b) of the Immigration and Nationality Act] in a statute's definition of 'crime of violence' suffers from the same constitutional defect." The Ninth Circuit had held that the INA suffers from the same defect as ACCA. The Supreme Court affirmed in an opinion by Justice Kagan, in which Justice Gorsuch provided the fifth vote in a concurrence that withheld support for two points in the majority opinion. Justice Kagan's opinion "[adher[ed] to our analysis in *Johnson*," holding that §16(b) does suffer from the same defect of unconstitutional vagueness as did ACCA's residual clause. In reaching this conclusion, the majority opinion reiterates the application of "ordinary case analysis" and the categorical approach, finding that vagueness ensues in this context due to two factors, as it did in ACCA's residual clause: "[H]ow to estimate the risk posed by a predicate crime" and a lack of clarity about the "threshold level of risk" required for a violent felony. Justice Gorsuch's concurrence did not join as to the propriety of the ordinary case analysis in future contexts, but since the government did not ask for any retreat from that analytical framework, he was unwilling to explore it here. He leaves open the possibility that Justice Thomas' dissenting view may be correct, that the Court should remedy vagueness by retreating from the ordinary case approach. He also contends that the vagueness at issue is procedural, not a substantive demand. Chief Justice Roberts dissented (joined by Kennedy, Thomas and Alito) and Justice Thomas dissented separately (joined in part by Kennedy and Alito). Those hoping this decision would directly impact the similar residual clause in §924(c), will find that clause mentioned only once, in the Chief Justice's dissent: "Of special concern, §16 is replicated in the definition of 'crime of violence' applicable to §924(c), which prohibits using or carrying a firearm 'during and in relation to any crime of violence,' or possessing a firearm 'in furtherance of any such crime.' §§924(c)(1)(A),(c)(3). Though I express no view on whether

§924(c) can be distinguished from the provision we consider here, the Court's holding calls into question convictions under what the Government warns us is an "oft-prosecuted offense."

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

IX. COLLATERAL CONSEQUENCES

A. Sex Offender Registration & Notification Act – Nondelegation. *Gundy v. United States*, 138 S. Ct. ___ (cert. granted Mar. 5, 2018);

decision below at 695 Fed. Appx. 639 (2d Cir. 2017). Congress did not determine SORNA's applicability to individuals convicted of a sex offense prior to its enactment. Instead, 42 U.S.C. § 16913(d) delegated to the Attorney General the "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . ." The authority to legislate is entrusted solely to Congress. U.S. Const. Art. I §§ 1, 8. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). While the nondelegation doctrine does not prevent Congress from "obtaining the assistance of its coordinate Branches," it can do so only if it provides clear guidance. *Id.* at 372-73. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.'" Question presented: Whether Congress violated the nondelegation doctrine by delegating to the Attorney General the authority to determine if SORNA's registration requirements apply to offenders convicted prior to SORNA's enactment.

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

A. COA for Juror's Alleged Racial Bias. *Tharpe v. Sellers*, 138 S. Ct. 545 (Jan. 8, 2018) (per curiam). Tharpe moved to reopen his federal habeas corpus proceedings under Fed. R. Civ. P. 60(b) regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. The district court denied the motion on the ground that, among other things, Tharpe's claim was procedurally defaulted in state court. The district court also noted that Tharpe could not overcome that procedural default because he had failed to produce any clear and convincing evidence contradicting the state court's determination that Gattie's presence on the jury did not prejudice him. Tharpe sought a certificate of appealability, which the Eleventh Circuit denied after deciding that jurists of reason could not dispute that the district court's procedural ruling was correct. The Eleventh Circuit's decision, as the Supreme Court read it, was based solely on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Supreme Court reversed (6-3) in a per curiam decision. It noted that

Tharpe had produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." The Court held that Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. Thus, the Court held, the Eleventh Circuit erred when it concluded otherwise. The Court also noted the ground on which the Eleventh Circuit chose to dispose of Tharpe's application—prejudice—is not the only question relevant to the broader inquiry whether Tharpe should receive a COA. The district court denied Tharpe's Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit. As to those additional issues, the majority expressed no view. It also noted that under the applicable standard for relief from judgment under Rule 60(b)(6), which is available only in "'extraordinary circumstances,'" *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), Tharpe faces a high bar in showing that jurists of reason could disagree whether the district court abused its discretion in denying his motion. It may be that, at the end of the day, Tharpe should not receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the court of appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe. Justice Thomas dissented, joined by Alito and Gorsuch. In their view Tharpe will not be able to meet the procedural requirements for relief and the remand is therefore an unnecessary do-over.

B. IAC: Failure to Appeal Following Plea Waiver. *Garza v. Idaho*, 138 S. Ct ___ (cert. granted June 18, 2018); decision below at 405 P.3d 576 (ID 2018). Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

C. Deference to State Court Determinations in Absence of Clearly Established Supreme Court Precedent--"Looking Through"

Summary State Decisions. *Wilson v. Sellers*, 138 S. Ct. ___ (Apr. 17, 2018). AEDPA requires a prisoner who challenges (in a federal habeas court) a matter "adjudicated on the merits in State court" to show that the relevant state-court "decision" (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d). Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the federal habeas court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. Sometimes, however, the last state court decision says simply "affirmed" or "denied," so the precise grounds for the ruling are unknown. In a 6-3 decision authored by Justice Breyer, the Court reiterated the look-through doctrine in habeas corpus cases, as set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision). In such cases, the federal habeas court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed. Justice Gorsuch dissented, joined by Thomas and Alito.