

**The Criminal Justice Section  
of the  
American Bar Association**

**2015 Annual Meeting  
Chicago, Illinois**

**ANNUAL REVIEW  
of the  
SUPREME COURT'S TERM,  
CRIMINAL CASES  
(2014-2015)**

Summaries of all Opinions (including Concurrences and Dissents)  
as well as an Overview of the Term,  
regarding the  
Criminal Law (and related) Opinions of the  
United States Supreme Court  
October Term 2014 (Oct. 2014-July 2015)

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**CRIMINAL LAW (and related) DECISIONS**  
**of the U.S. Supreme Court**  
**October 2014 Term (Oct. 2014-August 2015)**

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**The ABA Annual Meeting Presents:**  
**Annual Review of the  
Criminal Law (and Related) Opinions of the  
United States Supreme Court  
Issued During the October 2014 Term**

**2015 Annual Meeting Panelists  
(Chicago IL – July 31, 2015)**

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**Brief Overview of the 2014-15 Term, Criminal Cases**

Here are two “big” stories from the October 2014 Term of the United States Supreme Court: six of the nine Constitutional Law-based decisions came out in favor of the defendant; and two of the nine Justices (Breyer and Ginsburg) announced in *Glossip* that they are now (almost) certain that the death penalty is unconstitutional in all cases.

When you add to *Glossip* (5-4) the decisions in the capital habeas cases of *Brumfield*, *Jennings*, and *Davis v. Ayala*, capital punishment and the **Eighth Amendment** is receiving a lot of attention and has the Justices deeply divided. Two capital habeas petitioners won: in *Brumfield*, a 5-4 majority strongly rejected Louisiana’s effort to avoid finding a capital defendant mentally disabled (which would prohibit his execution); and in *Jennings* the Court had to correct the Fifth Circuit’s refusal to allow Jennings to fully defend relief that he had been granted in the trial court. And *Ayala* received 4 votes (while losing) in a relatively unremarkable application of deferential habeas rules – while Justice Kennedy went out of his way to write a deeply sensitive critique of the use and effects of solitary confinement even while conceding that it has “no direct bearing” on the case. And now five cases set for argument this coming fall involve the Eighth Amendment (four death penalty plus one juvenile LWOP; see the list of coming cases at the end of this booklet. So we might expect the coming Term to be a significant one in terms of contention among the Justices, on the topic of capital punishment, no matter how the individual cases come out.

As is often case, the **Fourth Amendment** produced the most constitutional cases in the past Term. The decision in *Rodriguez*, holding that a traffic stop cannot be extended even minimally for a dog sniff once the purpose of the stop has ended, is sure to affect day-to-day policing. Indeed, the current focus of much of America on policing and traffic stops makes *Rodriguez* and *Heine* (holding that a stop is valid even if based on a reasonable mistake of law) specially important decisions.

Meanwhile, the constitutional **Due Process** prohibition of “vague” criminal statutes received attention in *Johnson*, when the Court held invalid the “residual” definition of “violent felony” in the Armed Career Criminal Act, largely because the Court itself could not agree on what the statute required even after five prior cases. The provision is used relatively rarely; but implications of the decision for other state and federal statutes, as well as vagueness doctrine itself, will linger for years.

*Ohio v. Clark*, holding that the **Sixth Amendment** does not prohibit hearsay testimony from preschool teachers about what a three-year-old told them about abuse, produced some significant disagreement between Justices Alito (majority) and Scalia (conurrence). As a former prosecution trial lawyer, Justice Alito is more a fan of prior caselaw regarding hearsay than he is of *Crawford*'s new regime. But Justice Scalia, the author of *Crawford*, directly accuses Justice Alito of seeking to undermine *Crawford*. Which may well be true, since *Crawford* is far from a literal “textualist” reading of the Sixth Amendment. Substantively, *Clark* provides one more context-specific hint about where the lines between constitutional “testimony” and admissible hearsay may lie, and shows continuing division among the Justices as to application.

Unsurprisingly for a national federal court, the Supremes decided seven cases construing **federal criminal statutes** (plus three more if you include **Immigration** cases). Three of the decisions strike a bit of a “theme” this year: *Elonis*, *Yates*, and *Mellouli*. In each of these cases, the Court read criminal statutes more narrowly than the government wanted, and invoked “common sense” as well as specific legal principles. A “threat” requires some individualized *mens rea* (*Elonis*); a fish is not a “tangible object” subject to prosecution for destruction under a financial records anti-shredding statute (*Yates*); and using one’s sock to hide pills may be a state law conviction but it is not use of “drug paraphernalia” for the federal purpose of immigration removal of an otherwise law-abiding person (*Mellouli*). Each decision drew a strong dissenting opinion. But the Court appeared to draw a strong general line against government “overreaching” in criminal prosecutions even where a broad “literal” reading of a statute might support it. In light of these decisions, prosecutors will do well to exercise wise discretion in choosing the cases they want to push.

Meanwhile, the Court decided two very interesting *mens rea* (**criminal intent**) cases. *Elonis* shows the Court moving ever-more closely to flatly adopting the Model Penal Code structure for *mens rea* even if it does not say so, finding that “negligence” is insufficient to convict for a federal Hobbs Act threat. Meanwhile, *McFadden* takes us down the rabbit hole of how “specific” a criminal *mens rea* must be: while a defendant need not know the precise chemical structure of an “analogue” controlled substance, he must “know its identity.” Future cases will have to address just what exactly that means.

The Court was also more active than usual in issuing seven “**Summary Reversals**” (cases where *certiorari* is granted and the decision below is immediately reversed without further briefing or oral argument). As usual, the Ninth Circuit was the early-Term “whipping boy,” receiving some harsh criticism on the first day of the Term in *Lopez v. Smith*. But by the end of the Term it was the Sixth Circuit that received unfriendly attention (*Woods v. Donald*). Meanwhile, the summary reversals were distributed among six different courts (the Ninth Circuit received two, but then, the Ninth Circuit decides a much larger percentage of overall caseload in the United States.)

Finally, at least eight decisions in **civil cases** this past Term involved issues “related to” Criminal Law. (Note that I list *Sheehan* as a Fourth Amendment case, even though it is “civil,” because it addressed what the Fourth Amendment standard may be for police seeking to take violent, mentally ill, persons into custody, while dismissing as improvidently granted the civil statutory

question it had originally granted to decide.) A student of the Court should also look at the list of Opinions that the Justices issued **related to Orders**, as they sometimes point the way to issues that the Court may well fully address on the merits in the future (e.g., Justice Scalia in *Whitman*, expressing openness to future securities law case in light of “government pretensions”).

In terms of personalities, some Justices (among the “new generation, Justices Alito and Sotomayor; as well as of course “old-timers” Scalia and Thomas) take a more active interest in criminal cases than do others. ( For example, Justices Roberts and Kennedy plainly put their major energies elsewhere this Term; and other than his lengthy treated against the death penalty in *Glossip*, Justice Breyer is not active in criminal decisions unless they involve his Sentencing Guidelines). Meanwhile, Justice Thomas’s many concurrences and dissents shows that he plainly follows his own path in criminal cases (as in others).

Finally, the Court continues to devote between a quarter to a third of its docket to criminal law cases (more if you count the various “civil-but-related” decisions). Some of this attention is because the Constitution and its Bill of Rights creates more constitutional rights and standards for criminal cases than it does for civil. And some of it is because there are more (some would say) criminal cases than civil in the country, if you count all levels. And some of it is because the Court has said in the past (in *Winship*, 1970) that liberty is more significant, in terms of needing protection, than is money. Finally, some of it may be just because the facts of criminal cases are often “juicier” than most civil cases. I recognize that there is room for disagreement about much of the foregoing – I hope at least to provoke your thinking!

\* \* \* \* \*

There is of course always much more that could be said. I hope our fantastic “Annual Review” panelists in Chicago will say some of it! Please ask questions about cases we discuss as we go – and about cases we omit. Your active engagement is what makes doing this work for the Criminal Justice Section both fun and interesting!

Finally, you can receive timely summaries by email of the Supreme Court’s criminal-law opinions by joining the ABA’s Criminal Justice Section and receiving its email updates. I urge you to take advantage of this unique membership benefit. Meanwhile, I look forward to sharing more fascinating and significant rulings with you next summer. In the meantime, remember to “Do Justice” in whatever you do!

Best wishes until next year,

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### **Explanatory Notes for these Materials**

In the pages that follow, detailed summaries of all of the U.S. Supreme Court’s criminal law decisions (and civil cases that the author deems “related”) issued during the past official Term of the

Court are provided, grouped by subject matter. (For a quick assimilation of the Term's work, the "List of Decisions" above provides a one-sentence description of each decision and the later page where it's more detailed summary can be found.) Some decisions address more than one subject -- the author has placed them in the category that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which can sometimes help demonstrate how doctrine and the Justices' thinking developed as the Term progressed.

The goal of these summaries is to be broadly inclusive for the criminal law practitioner. Thus, the Court's civil cases that relate to criminal law topics or fact-areas are also included. We also include immigration law and securities law decisions, because they often relate to criminal law issues, if not immediately than in the future. (This became particularly so after *Padilla v. Kentucky* in 2010 ruled that a criminal defense attorney can violate the Sixth Amendment's effective assistance of counsel requirement if s/he does not provide reasonable advice regarding immigration consequences.)

Each summary begins with the case name, the Justices' votes and who wrote what, and citation to the lower court's opinion. Then a "**Headline**" description of the holding is immediately provided. Then follow somewhat detailed summaries of the case's facts, majority opinion(s), and any separate opinions (concurrences as well as dissents). My view is that all the opinions in any one case are necessary to have a sophisticated understanding of what the case does, and does not, hold -- as well as to see what issues are reserved, likely to be addressed (and so should now be raised) in future cases.

The name of the majority writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. Providing an accurate and somewhat comprehensive representation of each opinion's content is the goal, rather than "sound-bite" brevity. All separate opinions are summarized -- but to aid "skim" reading, we sometimes **bold certain important phrases** in the decisions. And in order to provide the most representative flavor of opinions, quotations are used whenever possible. Finally, comments that appear in [brackets] are the Editor's own thoughts, not the Court's. I attempt to signal these with a bolded "[**Ed. note...**]," unless it interferes too much with the "flow" of the summary.

Following the Summaries of Opinions in argued cases, I also describe decisions issued in unargued (summary reversal) cases. We also provide summaries of interesting dissents or concurrences regarding Orders issued this Term, including dissents from denials of *certiorari*. Finally, we provide a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, so that you can get a preview of what may be coming.

Finally, a chart showing what Justices wrote which opinions this Term (including separate concurring and dissenting opinions), in criminal and related cases, is included. This can sometimes help develop a "snapshot" of which Justices are writing what, and how much, in the field of criminal law.

These materials are the product of Professor Little, and Professor Little, not the ABA or the panelists, bears full responsibility for any errors and opinions expressed. Please be aware that minor changes from the Court's original slip opinions may have been made for ease of reading or understanding. For example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation, or other non-substantive changes, may have been made. Remember that these are merely summaries; interested readers should always review the actual opinions in full and arrive at their own interpretations, rather than rely on the editor's.

**DETAILED SUMMARIES of the COURT'S  
CRIMINAL LAW (and related) OT 2013 OPINIONS**

**I. CONSTITUTIONAL DECISIONS**

**A. FOURTH AMENDMENT**

**Heien v. North Carolina**, 135 S.Ct. at 530 (Dec. 15, 2014), 8 (6-2) to 1 (**Roberts**; *Kagan* concurring with Ginsburg; *Sotomayor* dissenting), affirming 749 S.E.2d 278 (N.C. 2013)).

**Headline:** A reasonable mistake of law can justify a traffic stop (just as a reasonable mistake of fact can).

**Facts:** A sheriff's officer stopped Heine's car because only one of its brake lights was working. The stop led to a consent search (not relevant here) that yielded cocaine. Surprisingly, however, the North Carolina Court of Appeals ruled that state law requires only one functional brake light ("a stop lamp"), and that the officer in fact had no probable cause to stop the car because there was no violation as a matter of law. But on further appeal, the North Carolina Supreme Court held that the officer's mistake of law had been "reasonable" (for example, because another part of the NC traffic code requires that "all ... rear lamps" be working), and that a stop based on a reasonable mistake of law does not violate the Fourth Amendment.

**Roberts (for 8):** "The ultimate touchstone of the Fourth Amendment is reasonableness," and "to be reasonable is not to be perfect." We have previously ruled that reasonable mistakes of fact can support a Fourth Amendment seizure, and we so no basis for distinguishing reasonable mistakes of law. The Fourth Amendment envisions law enforcement mistakes; "the limit is that the mistakes must be those of reasonable men." Older precedents support this conclusion (citing *Riddle*, 1809, and other "19<sup>th</sup> century decisions"), as do some modern Fourth Amendment decisions (*DeFillipo*, 1979). Heien's argument that our modern good-faith cases are limited to remedy, rather than the violation itself, may be right, but does not answer the question presented here. Meanwhile, the complexity and numerosity of criminal laws means that reasonable mistakes of law are likely. This does not discourage officers from learning the law, because the inquiry is "objective reasonableness," and "the inquiry is not as forgiving as the one" used to determine an individual officer's qualified immunity.

Finally, the maxim "ignorance of the law is no excuse" applies to criminal liability (for both defendants and the government), not to determination of Fourth Amendment reasonableness. The officer's mistake here was an objectively reasonable one, so "reasonable suspicion" supported the traffic stop that led to the discovery of illegal drugs and Heine's conviction.

**Kagan concurring (with Ginsburg):** While "I concur in full" in the Court's opinion, I want to emphasize some "important limitations." First, a mistake about "the requirements of the Fourth Amendment" are violations even if viewed as "reasonable." Second, because an officer's "subjective understanding is irrelevant," an officer that is "unaware of or untrained in the law" cannot excuse a violation. Third, the test is much more demanding than the test for qualified immunity, and requires that a mistake be "so doubtful in construction that a reasonable judge could agree with the officer's view." Only "rare" cases involving truly "hard questions of statutory interpretation" will meet the test for "reasonable mistakes of law."

**Sotomayor, dissenting:** The "actual state of the law" should control whether a Fourth Amendment violation has occurred. An officer's reasonable misunderstanding of the actual law might influence the remedy, but not the finding of a violation. "The notion that the law is definite and

knowable sits at the foundation of our legal system,” and today’s ruling is a “further eroding” of the Fourth Amendment’s “protection of civil liberties.” Fourth Amendment encounters can be “invasive, frightening, and humiliating” and affect “communities and their relationships with the police.” Today’s decision allows courts to avoid interpreting the law; they need only find that one interpretation among perhaps many is “reasonable.” Most Circuits have adopted the opposite approach, and there is no evidence that law enforcement has been “unduly hampered.” And “good faith” permits no suppression of evidence, but that is a “remedial concern” (and the fact that North Carolina has, as a matter of state law, not adopted the good faith exception, should be irrelevant). Why should “innocent citizen[s] ... be made to shoulder the burden” of legal interpretation questions? The limits of the Court’s opinion are unclear, and “the more administrable approach” would be to rule oppositely.

**Rodriguez v. United States**, 135 S.Ct. 1609 (April 21, 2015), 6-3 (**Ginsburg**; Kennedy dissenting; Thomas dissenting; Alito dissenting), vacating 741 F.3d 905 (CA8 2013).

**Headline:** A traffic stop that is prolonged beyond the time needed to complete lawful traffic-based inquiries is unreasonable, so a traffic stop cannot be extended to conduct dog-sniff once the purpose of the stop has ended.

**Facts:** Nebraska Officer Struble stopped Rodriguez’s car after observing a driving violations. Struble was a canine officer, driving alone with his dog in his car. Rodriguez and his passenger gave responses to questions that raise Struble’s suspicions, and Rodriguez declined to come sit in Struble’s police car while a ticket was written. Struble apparently decided to conduct a dog sniff around Rodriguez’s car, and radioed for another officer to come for safety reasons, but he did not tell Rodriguez this. After “I got all the reasons for the stop out of the way,” Struble asked Rodriguez to allow Struble to walk his dog around the car. Rodriguez declined -- at which point Struble ordered him out of the car, waited for the second officer, and did the dog sniff anyway. Surprise!, methamphetamine.

The district court found that there was no probable cause to search the vehicle and that the traffic stop had ended, but ruled that extending the traffic stop for “seven to eight minutes” in order to conduct a safe dog sniff was a “*de minimis* intrusion” that did not violate the Fourth Amendment. The Eighth Circuit affirmed, declining to rule whether there had been additional “reasonable suspicion” to detain Rodriguez’s car (that issue will apparently now be open on remand).

**Ginsburg (for six):** “Authority for a [traffic stop] seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” It is true that “unrelated investigations that did not lengthen the roadside detention” have been approved (*Caballes*, 2005 (dog sniff); *Johnson*, 2009 (questioning)), and that “ordinary inquiries incident to the traffic stop” are permitted (such as checking driver’s license, car registration, and insurance; and checking for outstanding warrants). But a dog sniff is purely a criminal investigatory measure, “not fairly characterized as part of the officer’s traffic mission.” Neither is a dog sniff a “*de minimis*” safety measure, like ordering the driver or passengers out of the car might be. “On-scene investigation into other crimes detours from the [traffic] mission” and can’t be “justified on that basis” or on safety. And we reject the argument that performing traffic stop tasks with “reasonable diligence” can “earn bonus time” to perform unrelated criminal investigation. “A traffic stop prolonged beyond” the time needed to “reasonably complete the stop’s mission” is unlawful.

**Thomas, dissenting (joined by Alito and by Kennedy, except Kennedy would leave the “reasonable suspicion” point for remand):** We should allow this dog sniff based on *Caballes*. Besides, the officer here clearly had additional “reasonable suspicion” to continue to detain Rodriguez

and his car. Allowing unrelated warrant checks, but not dog sniffs, is an “artificial line,” and the majority does not explain why “dogs are different.” Also, officers should have “more leeway” when they have probable cause, as opposed to just reasonable suspicion.

**Alito, dissenting:** “This is an unnecessary, impractical, [“perverse”] and arbitrary decision.” Struble clearly had reasonable suspicion here; and he acted reasonably in waiting for a second officer to “protect his own safety.” Officers will learn how to conduct traffic stops in order to accommodate dog sniffs if they want to.

**City and County of San Francisco v. Sheehan**, 135 S.Ct. 1765 (May 18, 2015), 8 (6-2) to 0, Breyer not participating [his brother was the DJ], (**Alito**; Scalia concurring and dissenting in part with Kagan;), dismissing in part and reversing in part, 743 F.3d 1211 (CA9 2014).

**Headline:** There is no “clearly established right” under the Fourth Amendment for police to specially accommodate mentally disabled suspects in the face of violence. We dismiss as improvidently granted whether the Americans with Disabilities Act requires special accommodations in that context.

**Facts:** Sheehan, who has a “schizoaffective disorder” and lived in a group home in San Francisco, sued the City and two police officers under §1983 for alleged “excessive force.” Because Sheehan had stopped taking her meds and was unresponsive, a counselor entered a room with a key. Sheehan immediately said “get out of here, you don’t have a warrant, I have a knife and I’ll kill you.” The counsellor left, cleared the building, filled out an application for temporary detention, and called the police. Thus when the police arrived, they knew Sheehan had mental problems. They entered her room with a key, and Sheehan came toward the officers with a knife yelling “I’m going to kill you, I don’t need help, get out.” The officers retreated and closed the door. They then decided to reenter without waiting for backup. Sheehan again approached with the knife, and the officers pepper-sprayed her. When Sheehan did not drop the knife, she was then shot multiple times, surviving but with injuries.

The district court dismissed Sheehan’s lawsuit, ruling that the officers did not violate the Fourth Amendment because they used “deadly force” only after lesser measures had failed. The court also ruled that the Americans with Disabilities Act (“ADA”) did not require the officers to act differently. On appeal the Ninth Circuit reversed, ruling that the ADA claim should have gone to a jury, and that the officers should not receive “qualified immunity” because it was “clearly established” that officers could not “forcibly enter” the “home” of a mentally ill person “when there [is] no objective need for immediate entry.” Thus the case was remanded for trial.

**Alito (for 7):** We granted *cert* to decide whether the ADA applies to “on-the-street” encounters with violent persons known to be mentally ill; the City had urged below that it does not, and there is a Circuit split on the question. But in this Court, “San Francisco chose to rely on a different argument” and suggests that the ADA does apply in some circumstances. The Solicitor General agrees, and “no one argues the contrary view.” In this context, it is “prudent” to dismiss that question as improvidently granted. (We also have never decided whether a public entity can be vicariously liable for damages for the indifferent conduct of its employees, and we don’t decide it today because the parties don’t argue that either.) The City’s petition is DIG’d. [**Ed. note:** apparently this means the ADA claim can proceed against the City to trial? Unclear. See n.\* in Scalia’s dissent.]

As for the individual officers, they are entitled to qualified immunity. (We don’t dismiss this question, as the dissent suggests, even as a sanction against the City, because the officers “have a personal interest in the correctness of the judgment [against them] below.”) “The officers’ failure to

accommodate Sheehan’s illness” did not violate “clearly established law.” (We don’t decide the substantive question whether this in fact would violate the Fourth Amendment given the “dangerous circumstances” and the need for officers on the scene to act quickly.) Defining the right at issue as “the right to be free from unreasonable seizure” is “far too general a proposition to control this case.” Even if Ninth Circuit precedents could further define the right (and we express some dubiousness), those cited have no application here. Simply put, no precedent clearly established that there was “no objective need for entry” here. An officer is entitled to “fair notice” of what actions may violate the law, and without it “an officer is entitled to qualified immunity.” These officers “had sufficient reason to believe that their conduct was justified.”

**Justice Scalia concurring in part and dissenting in part, with Justice Kagan:** We concur in dismissal of the ADA question, but we would dismiss the entire case as improvidently granted, because San Francisco should not be “reward[ed]” for its “bait-and-switch tactics.” The City “snookered” us into granting *cert* on the statutory question, which was certworthy; we granted on the second only to make the case complete, even though by itself it was and is not “certworthy” but completely fact-specific. We should dismiss “to deter further snookering.”

**City of Los Angeles v. Patel**, 135 S.Ct. 2443 (June 22, 2015), 5-4 (**Sotomayor**; Scalia dissenting with Roberts and Thomas; Alito dissenting with Thomas), affirming 738 F.3d 1058 (CA9 2013, *en banc*).

**Headline:** “Administrative search” statute allowing police inspection of motel registry records must include “some opportunity for pre-compliance review.”

**Facts:** Los Angeles enacted a municipal ordinance requiring hotel owners to keep records about guests and make those records available to “any officer” of the LAPD “for inspection on demand,” and without a search warrant, although “at a time and in a manner that minimizes interference.” Refusal to show the records makes the owner criminally liable (misdemeanor). Patel and other motel owners sued, claiming that the ordinance was “facially invalid.” The district court and a Ninth Circuit panel upheld the law, but on rehearing *en banc* the Circuit reversed, 7-4, ruling that the Fourth Amendment requires “an opportunity to obtain judicial review ... prior to suffering penalties.”

**Sotomayor (for 5):** First, “facial challenges” to statutes are “not categorically barred or especially disfavored” under the Fourth Amendment, even though the Amendment is often fact-intensive, unless there is “substantial ambiguity” about what the statute allows. The “must be unconstitutional in all its applications” maxim must be understood to mean all applications in which no recognized Fourth Amendment exception exists.

Second, this ordinance is unconstitutional under the Fourth Amendment because “it fails to provide hotel operators with an opportunity for precompliance review.” The Amendment applies to commercial premises as well as homes, and although a “special needs” doctrine may justify searches performed for purposes “other than criminal investigation” (here, deterrence of crime), “the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.” We do not “prescribe the exact form that” such review must take. But we believe it “can be provided without imposing onerous burdens,” for example by using an administrative subpoena process. Many such processes already exist: some 335 by one Department of Justice report. Moreover, in the “rare event that an officer reasonably suspects that a hotel operator may tamper with the registry,” the officer “can guard the registry until the required hearing can occur.” Out holding is “narrow” and of course the normal Fourth Amendment exceptions (such as exigent circumstances or consent) apply. And “nothing in our decision today precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant.”

We reject Justice Scalia’s argument that hotels are “closely regulated” businesses to which the normal rules do not apply. Otherwise this “narrow exception” would “swallow the rule” – “it would be hard to imagine a type of business [today] that would not qualify.” Hotels are not “intrinsically dangerous,” even if they “can be put to use for nefarious ends.” Finally, even if they were “closely regulated,” this ordinance does not satisfy the additional criteria for the exception.

**Scalia dissenting, with Roberts and Thomas:** The government has a substantial interest in deterring “criminal activity ranging from drug dealing and prostitution to human trafficking.” “A limited inspection of a guest register” is not intrusive and “eminently reasonable.” (However, I agree or assume that a facial challenge may be brought, “unless we [a]re to delegate to litigants our duty to say what the law is.”) The Warrant Clause is merely a “presumption,” a “guidepost for assessing the reasonableness” of a search. “Closely regulated businesses” are an exception that we have recognized, and it should apply here; the doctrine has nothing to do with “risk of harm” but rather “the expectations” of the business owners. “At the time of the founding, . . . warrantless searches of . . . places of public accommodations were commonplace.” Today there are “more than 100 similar registration-inspection laws . . . across the country.” Warrantless surprise inspections provide “a necessary incentive for motels to maintain their registers thoroughly and accurately.” [Ed. note: how does the ordinance further “accuracy,” if a motel owner wants to deceive inspectors?] And “guarding” records while a review is underway is “more intrusive” than a quick search. This ordinance is no worse “than the laws we have already upheld.” [Ed. note: On this point Justice Scalia may well be correct; the problem is with the prior “closely regulated businesses” line of cases.]

**Justice Alito dissenting, with Justice Thomas:** We should not hold this law “facially” unconstitutional, because I can imagine “many,” and will now detail “five” examples where application of the law would be constitutional. There are “serious arguments” that facial challenges should never be allowed under the Fourth Amendment; but in any case, this one should fail.

## C. CONSTITUTIONAL DUE PROCESS

See **Kerry v. Din** (June 15, 2015), under “Immigration Law” below at p. 23 (due process in the immigration context).

### 1. Due Process under the Fifth Amendment.

**Johnson v. United States**, 135 S.Ct. 2551 (June 26, 2015), 8 (6-2) to 1 (**Scalia**; *Kennedy* concurring in judgment; *Thomas* concurring in judgment; Alito dissenting), reversing 526 Fed. Appx. 708 (CA8 2013).

**Headline:** (Unusual context: argued early in the Term, then ordered for reargument by the Court *sua sponte* on the constitutional question.) The definition of “violent felony” found in the residual clause at the end of 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act, is unconstitutionally vague.

**Facts:** Johnson, a white supremacist with “a long criminal record,” pled guilty to felon-in-possession of a firearm under 18 U.S.C. § 922(g). At sentencing, the government alleged that he had three prior convictions for “violent felonies” required an enhanced mandatory-minimum 15-year sentence under 18 U.S.C. § 924(e)(1). The last clause of the definitional statute says a “violent felony” includes any felony that “is burglary, arson, or extortion, involves the use of explosives, *or otherwise*

*involves conduct that presents a serious potential risk of physical injury to another.*” The italicized portion is known as the “residual clause” of 18 U.S.C. § 924(e)(2)(B). Johnson argued that his prior conviction for possession of a short-barreled (“sawed off”) shotgun ought not qualify as a “violent felony” because possession does not generally show a “serious potential risk of physical injury.” The district court rejected that argument and imposed 15 years, and the Eighth Circuit affirmed. The Court granted certiorari because there was a split of authority on the application of the residual clause to prior possession convictions.

In two prior cases (*James*, and *Sykes*), Justice Scalia had suggested, in dissent, that because the Court and lower courts could not agree how to interpret, or consistently apply, the residual clause, it should be declared unconstitutionally vague. Prior to the oral argument, your Editor asked on SCOTUSblog whether there were “finally five votes to declare the residual clause unconstitutionally vague?”, <http://tinyurl.com/pnbpfka>. But at oral argument, this point was not advanced by anyone. Two months after argument, however, the Court ordered reargument and directed the parties to brief the constitutional vagueness question.

**Scalia (for 6):** “Our cases establish that” a criminal law violates the Fifth Amendment’s due process clause when a statute that threatens to take away liberty is “so vague that it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement.” The residual clause as we have applied it fails this test. We have previously ruled that a “categorical” approach” must be used: courts must look to the “ordinary case” of a prior conviction crime, and “not ... how an individual offender [has] committed it on a particular occasion.” Here, “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice ... and invites arbitrary enforcement.” It “leaves grave uncertainty about how to estimate the risk,” and “about how much risk it takes.” This becomes a “speculative” inquiry, because there is no reliable way to choose” what an “ordinary case” is, let alone what risk, and how much risk, it involves. Further, “the failure of persistent efforts” by this Court in prior cases “to establish a standard” provides “evidence of vagueness” (*L. Cohen Grocery Co.*, 1921). We have created no “principled objective standard” for applying the residual clause; our cases “devolve into guesswork and intuition,” and the “numerous splits among the lower federal courts” is a “telling feature.” “The life of the law is experience,” and “nine years’ experience” with the residual clause “convinces us that we have embarked upon a failed enterprise.” “Condemning someone to prison for 15 years to life” on “so shapeless a provision ... does not comport with ... due process.” It need not be “vague in all applications” if it is vague in many. And we don’t think our reasoning here will endanger most statutes with similar language but different application standards. Finally, we will not abandon the “categorical approach” as Justice Alito suggests. There were “good reasons” for adopting it, and “the Government has not asked us to abandon it.” *Stare decisis* does not require us to stick to our four prior residual clause decisions: that doctrine “does not matter for its own sake,” and sustaining the statute in light of our confused precedents “would undermine rather than promote the goals [of evenhanded, predictable and consistent application] that *stare decisis* is meant to serve.”

**Kennedy concurring in the judgment:** Justice Alito’s dissent is right that the statute is not unconstitutionally vague. But “assuming that the categorical approach ought to still control,” possession of a short-barreled shotgun “does not qualify as a violent felony.”

**Justice Thomas concurring in the judgment:** I don’t think this possession offense qualifies as a violent felony. It “does not, in the ordinary case, pose a serious risk of injury to others.” A mere “connection” of sawed-off shotguns to violent crimes is “too attenuated.”

But more importantly, I am “increasingly concerned about [the] origins and application” of the constitutional vagueness doctrine, which “shares an uncomfortably similar history with substantive due

process, [which is] a judicially created doctrine lacking any basis in the Constitution.” [Lengthy exegesis of the vagueness doctrine is omitted here.] Because the residual clause has “an unmistakable core of forbidden conduct,” it does not violate the Due Process Clause.

**Alito dissenting:** The Court ought not “brush aside *stare decisis*” just because it “is tired of” the residual clause. [**Editor’s speculation:** could this have been a draft majority opinion circulated after the first oral argument?] *Stare decisis* “is not an inexorable command, ... but neither is it an empty Latin phrase.” The Court has rejected Justice Scalia’s vagueness arguments in two prior cases, and “nothing has changed” since then. We have “trouble settling on an interpretation ... on many recurring legal questions.” It is “not responsible” to “throw in the towel” after only eight years and five cases.

Moreover, the residual clause is no more vague than many other statutes that have been upheld. It is “not incomprehensible” and provides “an ascertainable standard.” If anything, it is the categorical approach that is the problem, a requirement not found in the statute but rather “the handiwork of this Court in *Taylor*” (1990). We should instead rule that the residual clause is to be applied to the “real world conduct” of particular defendants. The principle of “constitutional avoidance” counsels that, rather than declare a statute unconstitutional, we should adopt a construction that saves it. (Justice Alito then details why he thinks *Taylor* is wrong.). [**Ed. note:** This is a somewhat stunning suggestion, that *Taylor* and the categorical approach should be abandoned; it would affect many more contexts than just this relatively rarely applied residual clause.] Note that *Apprendi* does not apply to prior convictions; and even if it did, the question whether a prior conviction constitutes a “violent felony” could be tried to a jury. Finally, the Court “transforms vagueness doctrine” by abandoning the settled “unconstitutional in all applications” rule of application.

By the way, possession of a sawed-off shotgun is a violent felony under the residual clause’s definition, whether a “categorical” or “real offense” approach is applied. “The majority of States agree.”

## 2. Due Process under the Fourteenth Amendment.

**Kingsley v. Henderson**, 135 S.Ct. 2466 (June 22, 2015), 5-4 (**Breyer**; Scalia dissenting; Alito dissenting), vacating 744 F.3d 443 (CA7 2014).

**Headline:** Pretrial detainee need show only that force used against him was “objectively unreasonable;” subjective intent to use excessive force is not required.

**Facts:** Kingsley was a pretrial detainee in a Wisconsin jail on a drug charge. He declined to remove a piece of paper covering a light in his cell, or to leave his cell while deputies removed it, so they forcibly removed him in handcuffs. The parties disagree about an alleged physical altercation then between Kingsley and deputies, but they agree that Officer Hendrickson directed another officer to “tase” Kingsley, which he did. Kingsley sued for “excessive force,” and at trial the district judge instructed the jury (among other things) that “force used recklessly” was required and one factor would be “whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances” to use the force that was used. The jury found for the officers. On appeal, Kingsley argued that “objective reasonableness” was required and that the instruction did not meet this standard. But the Seventh Circuit ruled (2-1) that subjective intent was required: “there must be an actual intent to violate the plaintiff’s rights or reckless disregard for his rights.” This furthered a Circuit split.

**Breyer for 5:** “The Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment” (quoting *Graham*, 1989). The standards may be (and we don’t

decide today) different for convicted offenders who are lawfully subject to punishment. One requisite for an excessive force claim made by a pretrial detainee is that the force used was “*objectively* unreasonable,” not “that the officers were *subjectively* aware that their use of force was unreasonable” (emphases in original). All agree that a “purposeful, knowing, or possibly reckless state of mind” is required for the use of force – “negligently inflicted harm is categorically beneath the threshold of constitutional due process.” But here, the use of force was undeniably deliberate; the question is, what state of mind applies to the amount of force used. A requirement of “objective reasonableness” is consistent with our precedent and is “workable.” Of course it must be applied “not mechanically” or with “20/20 hindsight,” but based on the “facts and circumstances of each particular case” as known to the officers “at the time.” A bad-faith intention to cause harm may be “sufficient,” but it is not “necessary.” An objective standard “adequately protects an officer who acts in good faith,” and there has not been “a rash of unfounded claims” in the Circuits that already use an objective standard.

So “a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.” We think the instructions here erroneously “suggested the jury should weigh [the officers’] subjective reasons for using force and subjective views about the excessiveness of the force.” We remand for consideration of whether this was harmless error.

**Scalia dissenting with Roberts and Thomas:** “The intentional infliction of punishment” should be required to prove an excessive force claim under the Fourteenth Amendment; “objectively unreasonable force, without more,” is not sufficient. “Intent to punish” is the “focus” of the due process analysis under *Bell v. Wolfish* (1979). “It is illogical automatically to infer punitive intent from the fact that a prison guard used more force against a pretrial detainee than was necessary.” That “might be *evidence* that he acted with intent to punish,” but it cannot be dispositive. I reject Kingsley’s claim that there is a substantive due process right of pretrial detainees to be “free[] from objectively unreasonable force.” Such a right does meet the *Glucksberg* standard of “deeply rooted in this Nation’s history and tradition.” [Note that this foreshadows the discussion to come a few days later in *Obergefell*, the same-sex marriage case, apparently on the minds of these dissenters.] Finally, “in its tender-hearted desire to tortify [Ed. note: Best Word of the Term award!] the Fourteenth Amendment,” the majority “overlooks” the existence of many state law vehicles for possible recovery for abuse by state officials.

### C. SIXTH AMENDMENT (Confrontation Clause)

**Ohio v. Clark**, 135 S.Ct. 2173 (June 18, 2015), 9 (6-3) to 0 (**Alito**; *Scalia* concurring in the judgment; *Thomas* concurring in the judgment), reversing 999 N.E.2d 592 (Ohio 2013).

**Headline:** Introduction of preschool teachers’ accounts of what 3-year-old told them about abuse did not violate *Crawford*.

**Facts:** Clark (whose unsavory background as a pimp Justice Alito begins with) was charged with physically abusing two young children in his care. At Clark’s trial, preschool teachers testified as to what one 3 year-old child had said when they asked him about bruises and marks they had noticed. (The child was ruled incompetent to testify based on his young age.). Clark was convicted and sentenced to 28 years imprisonment. But on appeal, the Ohio appellate and Supreme Courts reversed, ruling that the teachers’ questions had been directed at “gathering evidence” pursuant to a state mandatory reporting law that made them state “agents,” and were therefore “testimonial,” so that their introduction violated the Confrontation Clause under *Crawford* (2004).

**Alito (for 6):** The Sixth Amendment’s Confrontation Clause guarantees “the accused ... the right ... to be confronted with the witnesses against him.” We once interpreted the Clause to allow admission of “out-of-court statements by an unavailable witness” if it had “particularized guarantees of trustworthiness.” *Ohio v. Roberts* (1980). But in *Crawford* (2004) “we adopted a different approach,” under which “testimonial” statements are often barred: “a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial” -- “the primary purpose test is ... necessary, but not always sufficient.” Statements that “would have been admissible ... at the time of the founding” are not prohibited. “But we have “not offer[ed] an exhaustive definition of ‘testimonial’ statements.” Our subsequent cases “have labored to flesh out what it means.” [A brief recounting of those cases followed.]

Today we rule that statements to non-law enforcement personnel may fall within the Confrontation Clause’s exclusion. But under “all the relevant circumstances here,” the preschool teachers’ testimony, recounting an interview with a young apparent child abuse victim that was “clearly not made with the primary purpose of creating evidence for Clark’s prosecution,” was not constitutionally prohibited. The interview was “in the context of an ongoing emergency involving suspected child abuse.” “The immediate concern was to protect a vulnerable child” and not release him back to his abuser – “similar to the 911 call in *Davis* (2006).” It was an “informal and spontaneous” conversation. And “statements by very young children will rarely, if ever, implicate the Confrontation Clause.” [Ed. Note: Of course, the statements here were by adult preschool teachers, recounting statements allegedly made by a young child.] Historically, there is “strong evidence” that such statements were admissible at common law. Finally, the “questioner’s identity” as not being someone whose primary job is to obtain criminal evidence, is “highly relevant.” “We do not ignore the reality” that teachers are generally not like police. The “natural tendency” of such statements to be used in criminal prosecution is “irrelevant,” as is the potential “jury’s perception” of the statements.

**Scalia, concurring in the judgment, with Justice Ginsburg:** “I agree” that “the statements here would not be testimonial under the usual [*Crawford*] test” [which Justice Scalia invented as the author and architect of *Crawford*]. The young child’s “primary purpose” was “certainly not” to generate prosecution evidence. [Ed. note: whose “purpose” counts? The out-of-court speaker, or the in-court questioner?]

But “I write separately to protest the Court’s shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently recused from the grave in *Crawford*.” [Ed. note: *Crawford* is one of Justice Scalia’s criminal justice “babies,” two others being *Apprendi* and the revitalized Fourth Amendment doctrine of “search” in, for example, *Jardines*.] “The author [i.e., Justice Alito] displays his hostility to *Crawford*” with “snide distractions” and “mislead[ing] dicta.” [Ed. note: Here Justice Scalia displays what I would say is his greatest weakness: insulting Justices who more often might be his allies, based on disagreement in a particular case.] For example, the idea that the “primary purpose test is merely one of several heretofore unmentioned conditions ... is absolutely false.” “A suspicious mind (or even one that is merely not naïve) might” think Justice Alito is attempting “to smuggle long-standing hearsay exceptions back into the Confrontation Clause.” “The good news is,” this is “nothing but dicta.”

**Justice Thomas concurring in the judgment:** “I agree ... that statements made to private persons or by very young persons will rarely implicate the Confrontation Clause.” But the majority opinion “does not offer clear guidance.” The primary purpose test is just “an exercise in fiction” (as I have written before). I would use my previously suggested “sufficient indicia of solemnity” test instead. The statements here do not meet that test and so were admissible.

## D. EIGHTH AMENDMENT

**Glossip v. Gross**, 135 S.Ct.2726 (June 29, 2015), 5 to 4 (2+2), (**Alito**; *Scalia* concurring; *Thomas* concurring; *Breyer* dissenting; *Sotomayor* dissenting), affirming 776 F.3d 721 (10<sup>th</sup> Cir. 2015).

**Headline:** Capital defendant did not demonstrate that use of particular chemical for lethal injection would violate Eighth Amendment. **Extra headline:** In a lengthy dissent, Justice Breyer, joined by Justice Ginsburg, says that he now thinks it is “likely” that the death penalty violates the Eighth Amendment in all cases. Much fireworks among the Justices on this point; the Court’s five opinions total 123 pages.

**Facts:** Four prisoners on Oklahoma’s death row sued under §1983, arguing that the first chemical used in Oklahoma’s three-drug execution protocol, midazolam, could not reliably render an inmate fully anesthetized and unconscious, so that the pain of death undisputedly caused by the next two drugs would be felt by the inmate. In dissent, Justice Sotomayor described this claim as allowing capital inmates to feel “the chemical equivalent of being burned at the stake.” [Ed. Note: Oklahoma has turned to midazolam because other drugs have become unavailable. In addition, one execution in Oklahoma using midazolam was botched and the inmate appeared to suffer grievously before finally dying. At oral argument, Justice Alito described the drug’s unavailability as a result of “guerilla warfare against the death penalty,” and his majority opinion describes the history of this at some length (but its relevance to the claim is unclear). It is clear that this case, nominally about one chemical, became a vehicle for considering much larger concerns about capital punishment, both pro and con.]

After a three-day evidentiary hearing in December 2014 featuring conflicting expert doctors’ testimony, the district court denied a preliminary injunction (to enjoin executions with midazolam), finding that the prisoners had failed to show a likelihood of success on the merits. *Baze* (2008, plurality op.) requires that a challenge to an execution method must show a “risk that is sure or very likely to cause ... needless suffering amounting to an objectively intolerable risk of harm.” Accepting the testimony of the state’s expert, the district court found that it is a “virtual certainty” that the large dose of midazolam Oklahoma now uses will render the inmate “sufficiently unconscious” so that he does not feel pain. The district court also ruled that an injunction should be denied because the plaintiffs had failed to “identify a known and available [alternative] method of execution that would present a substantially less severe risk of pain (also citing *Baze*). The Tenth Circuit affirmed. On January 15, 2015, one of the four plaintiffs was executed using midazolam (without apparent incident); and a week later the Court granted *certiorari* (too late for the executed plaintiff) and stayed the other executions.

**Alito for 5:** [Apparently now adopting the *Baze* plurality opinion as the majority rule (see p. 14 & n.2.) The plaintiffs have failed (1) to demonstrate that midazolam presents a substantial risk of severe pain, and reliance on the state’s expert testimony was not clearly erroneous, even if there were some errors; or (2) to identify “an alternative that is feasible, readily implemented, and [that] in fact significantly reduces a substantial risk of severe pain.” With regard to alternatives, “lobbying by anti-death penalty advocates” has made other drugs unavailable; and the Court has previously approved other more painful methods (gas chamber, electrocution, hanging) as constitutional. “Because ... capital punishment is constitutional, ... there must be a constitutional method of carrying it out.” As for midazolam, it was “not clear error” to conclude that this drug “is highly likely to render a person unable to feel pain during an execution.” [A detailed examination of the evidence is omitted here.] The dissent’s “outlandish rhetoric,” accusing us of approving a method like being “drawn and quartered” or “burned at the stake,” is “simply wrong” and “reveals the weakness of its legal arguments.”

**Thomas concurring with Justice Scalia:** “I write separately to respond to Justice Breyer’s dissent.” We have previously addressed his constitutional concerns. And a survey of actual cases shows that “each of these crimes was egregious enough to merit the severest condemnation that society has to offer.” We ought not rely on “empirical studies performed by death penalty abolitionists,” and we should trust results “left to the jurors and judges who [actually] sit through the trial,” rather than “legal elites (or law students).” Their “quantification of moral depravity” is “arbitrary, not to mention dehumanizing.” [Ed. note: Justice Thomas presents rather graphic details of various murders for which capital punishment has been imposed, reminiscent to some extent of his dissent in *Brumfield v. Cain* two weeks earlier (see summary under “Habeas” decisions, p. 22 below.)]

**Scalia concurring with Justice Thomas:** “I write to respond to Justice Breyer’s plea for judicial abolition of the death penalty,” which represents only “a vocal minority of the Court.” Breyer “contorts the constitutional text” and produces “a white paper devoid of any meaningful legal argument,” “full of contradictions and (it must be said) gobledy-gook.” The questions of capital punishment “are contextual and admit of no easy answer,” which is “why we rely on juries.” And “delay” is a problem of the Court’s own making,” and is a “nonsense” argument in any case. As for deterrence, there are studies that say it works. “We federal judges live in a world apart from the vast majority of Americans” and “the People” rightly decide “how much incremental deterrence is appropriate.” Finally, if Justice Breyer’s suggestion to grant merits review of the death penalty is taken up, for us to “once again consider the constitutionality of the death penalty,” I would ask counsel to also brief whether *Trop v. Dulles* (1958) should be overruled. The concept of “evolving standards of decency” causes “mischief to our jurisprudence, to our federal system, and to our society.” “The Framers ... disagreed bitterly” about capital punishment, and so left it to “the People.” Justice Breyer ought not “arrogate to himself the power to overturn that decision.”

**Justice Breyer dissenting, with Justice Ginsburg:** “Rather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on ... whether the death penalty violates the Constitution.” [Ed. Note: reminiscent of Justice Blackmun’s “I will no longer tinker with the machinery of death” statement some 20 years ago (*Callins*, 1994).] After considering much information that has accrued in the 40 years since we last approved the death penalty in *Gregg v. Georgia* (1976), I “believe that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment’” under the Eighth Amendment. The new considerations are “(1) serious unreliability, (2) arbitrariness in application, (3) unconscionably long delays,” and (4) that “most places within the united States have abandoned its use.” [The details of Justice Breyer’s 46 page opinion are left for the reader to discover.]

**Justice Sotomayor dissenting, with Ginsburg, Breyer, and Kagan:** First, it was “clear error” to “credit the scientifically unsupported and implausible testimony of [the State’s] single expert witness.” Instead, plaintiffs “have presented ample evidence showing that the State’s planned use of [midazolam] poses substantial, constitutionally intolerable risks.” The Court “misconstrues and ignores the record evidence.” [Much detail on this point omitted here.]

Meanwhile, the requirement that challengers to an execution method must prove some palatable “alternative means for their own executions” is “wholly novel” and “legally indefensible.” We have ruled that the Eighth Amendment prohibits all “barbaric” or “cruel and unusual” punishments “categorically,” regardless of whether acceptable alternatives exist. The Court “reengineer[s] *Baze* to support its newfound rule.” “If all available means of conducting an execution are cruel and unusual, then conducting the execution will constitute cruel and unusual punishment. Nothing compels a State to perform and execution.” “I dissent” [Ed. note: no “respectfully.”]

## II. FEDERAL CRIMINAL STATUTES

### A. Bank robbery, 18 U.S.C. § 2113(e)

**Whitfield v. United States**, 135 S.Ct. 785 (Jan. 13, 2015), 9-0 (**Scalia**), affirming 548 Fed. Appx. 70 (CA4 2013)

**Headline:** Moving victim a short distance in her house, from one room to another, counts as “forcing a person to accompany” the robber.

**Facts:** Whitfield “botched” a bank robbery and in flight entered the home of a 79-year old woman. He moved her from the hallway into a room about 4 to 9 feet away, where the terrified woman suffered a fatal heart attack. Whitfield was charged under 18 U.S.C. §2113(e), which permits conviction of anyone who, while “attempting to avoid apprehension for” a bank robbery, “forces any person to accompany him” without consent. The Fourth Circuit affirmed his conviction, ruling that only “a forced accompaniment” is required for conviction, not a “substantial movement.”

**Scalia:** “We hold that a bank robber ‘forces a person to accompany him’ for purposes of §2113(e) when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance.” Although “accompany” does not “embrace minimal movement” and implies movement “from one place to another,” the movement here, “several feet” and “from one room to another ... surely sufficed.” “The danger [in] a forced accompaniment” does not “vary with the distance traversed,” and we have “no authority to add a limitation the statute plainly does not contain.”

### B. Obstruction of Justice (Sarbanes-Oxley “anti-shredding” statute), 18 U.S.C. § 1519.

**Yates v. United States**, 135S.Ct. 1074 (Feb. 25, 2015), 5 (4-1) to 4 (**Ginsburg**; *Alito* concurring in the judgment; *Kagan* dissenting), reversing 733 F.3d 1059 (CA11 2013).

**Headline:** “Fish case.” Congress did not intend a fish to be a “tangible object” within the meaning of the federal financial fraud obstruction of justice statute.

**Facts:** A state fish and wildlife officer who was deputized to enforce federal conservation laws found 72 grouper fish less than 20 inches long on Yates’ three-member commercial fishing boat. All the fish were within an inch and a quarter of the 20-inch limit. Yates was cited and the officers directed him to keep the undersized fish on his boat until they returned to port. However, (there is no dispute), Yates instead directed his crew to discard the undersized fish and replace them with other fish from their catch. Over two and a half years later, Yates was federally charged under 18 U.S.C. § 1519 with “destroy[ing] ... a tangible object with the intent to ... obstruct ... the [federal] investigation.” (By this time, relevant laws had changed so that none of Yates fish would have been undersized under current regulations.) Yates argued that the statute was limited to “documents or records” but the district court followed precedent and affirmed a jury conviction, as did the Eleventh Circuit under the statute’s “plain language.” [**Ed. note:** A sign that things will not go well for the government is Ginsburg’s statement in the “facts” that “For life, [Yates] will bear the stigma of having a federal felony conviction.”]

**Ginsburg, for four (plurality):** “A fish is no doubt an object that is tangible,” but we hold that “fish are not trapped within the term” in this statute. The statute was part of the Sarbanes-Oxley

Act of 2002, “designed to ... restore trust in financial markets following” Enron. Section 1519 expressly lists as its other objects “any record, document, or tangible object,” and “it would cut §1519 loose from its financial mooring to hold that it encompasses any and all objects.” We hold that a “tangible object” to be within § 1519 “must be one used to record or preserve information.” “The same word[, placed] in different contexts, sometimes means different things,.” Thus “tangible object” in FRCrP 16 can mean “any physical evidence” -- but not so here. “If Congress meant” §1519 to encompass all “spoliation of evidence, ... one would have expected a clearer indication of that intent.” Instead, §1519 seems to be a “specialized provision expressly aimed at corporate fraud and financial audits;” and a broader meaning would appear to duplicate the reach of other federal criminal statutes. “We rely on the principle of *noscitur a sociis* – a word is known by the company it keeps.” The statute makes it a crime to, among other things, “make a false entry in ... any ... tangible object,” which might include logbooks or hard drives, but not fish. So we give it a “moderate interpretation.” Finally, the “rule of lenity” directs us to the narrower interpretation for a crime that could lead to a 20-year prison sentence.

**Alito concurring in the judgment:** Although this is a “close” case, “Yates has the better of the argument.” “A fish does not spring to mind” when reading §1519 (“neither does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick”). And reading “‘tangible object’ too broadly could render ‘record’ and ‘document’ superfluous.” The nouns and the verbs of the statute, as well as its title (referring only to destruction of “records”) support a narrow view. “The Government’s argument, though colorable, becomes too implausible to accept.”

**Kagan dissenting with Scalia, Kennedy and Thomas:** Plain language shows that “a ‘tangible object’ is an object that’s tangible. I would apply the statute that Congress enacted.” [Further details of the 19 page dissent are omitted here.]

### C. Prison Litigation Reform Act of 1996, 28 U.S.C. § 1915(g).

**Coleman v. Tollefson**, 135 S.Ct. 1759 (May 18, 2015), 9-0 (**Breyer**), affirming 733 F.3d 175 (2013).

**Headline:** “Three strikes” statute barring repeated frivolous IFP prisoner filings applies even if the third strike dismissal is still on appeal.

**Facts:** Section 1915(g) of the federal *in forma pauperis* (“IFP”) statute prohibits any federal IFP filing (without payment of fees) by a prisoner who has “on 3 or more prior occasions, while incarcerated ..., brought a [federal] action or appeal ... that was dismissed on grounds that it was frivolous, malicious, [etc.]” By 2010, three federal lawsuits filed by prisoner Coleman had been dismissed as frivolous (or for other listed grounds). He then sought to file four new federal lawsuits IFP, arguing that because one of his three prior dismissals was still on appeal, §1915(g) did not apply. The district court disallowed the new filings, and the Sixth Circuit affirmed (2-1), even though “the vast majority” of other Circuits had ruled that a prior dismissal does not count under §1915(g) if an appeal of one of the three prior dismissals is pending.

**Breyer for a unanimous Court:** “The Sixth Circuit majority correctly applied §1915(g). A prior dismissal ... counts as a strike even if the dismissal is the subject of an appeal. ... That ... is what the statute literally says.” And this is consistent with the purpose of the statute, the statute’s other operations, and “the way in which the law ordinarily treats trial court judgments.” We doubt that this will deny prisoners the ability to pursue their lawsuits when a prior dismissal has been erroneous, and

we don't answer the hypothetical question of whether our reading of the statute should operate to deny a prisoner the right to appeal from the third dismissal itself.

#### **D. Prohibition on Felons Possessing Firearms, 18 U.S.C. § 922(g).**

**Henderson v. United States**, 135 S.Ct. at 1780 (May 18, 2015), 9-0 (**Kagan**), vacating 555 Fed. Appx 851 (CA11 2014).

**Headline:** A federal court has equitable power to approve the request of a convicted felon to transfer his firearms to a third party so long as the felon will not later “control” the guns.

**Facts:** Henderson (incidentally a U.S. Border Control agent) was charged with distributing marijuana, and he surrendered his firearms to the FBI as a condition of bail. Once he was convicted (he pled guilty), Henderson was not permitted to possess his guns. So he asked the FBI to transfer his guns to a friend who had agreed to purchase them. But the FBI declined to transfer the guns, saying that allowing Henderson to direct their transfer would place him in unlawful “constructive possession” of the guns. Henderson asked the district court that had handled his criminal case to direct the transfer, but the court declined on the same ground. The Eleventh Circuit affirmed.

**Kagan:** A federal court has equitable authority to dispose of property in connection with a criminal case. But federal law prohibits returning guns to a convicted felon; and a court cannot approve a “sham transfer” to a third party who “leaves [the defendant] in effective control” of his guns. However, we rule that even a convicted felon retains a property right to “sell or otherwise dispose of” his guns. This is not “possession” but rather a different aspect of property ownership. So long as Henderson does not “control” the guns after transfer, he will not “possess” them; and a federal court may authorize such a transfer. The felon can “do no more than nominate” the transferee. Only if the felon later has “the ability to use or direct the use of his firearms” would he have unlawful “constructive possession.” Before approving such a transfer, a federal court may require “assurances” from the third party, and may reject assurances that the court finds “not credible.” But the court has “equitable power” to “accommodate” the felon’s requested transfer when the court “is satisfied that a felon will not retain control of his guns.” The case is remanded to evaluate Henderson’s proposed transfer “in accord with these principles.”

#### **E. Federal extortion-by-threats statute, 18 U.S.C. § 875(c).**

**Elonis v. United States**, 135 S.Ct. 2001 (June 1, 2015), 7 to 1 to 1 (**Roberts**; *Alito* concurring and dissenting in part; *Thomas* dissenting), reversing 730 F.3d 321 (CA3 2013).

**Headline:** “Facebook threats” case. The federal statute requires some *mens rea* “more than negligence” -- either purpose, knowledge, or (left undecided) recklessness -- “that the communication will be viewed as a threat.”

**Facts:** Elonis posted things on Facebook that a reasonable person could perceive to be threats, such as: a photograph of a coworker with a knife to her neck and the caption “I wish” and referencing “sinister plans” for them; a series of posts about his estranged wife such as “did you know it’s illegal for me to say I want to kill my wife?;” a statement that there were “enough elementary schools [nearby] to initiate the most heinous school shooting ever imagined;” and (about an FBI agent who interviewed him about these threats) “took all the strength I had not to ... pull my knife, flick my wrist, and slit her throat.” He was indicted for these statements under 18 U.S.C. § 875(c), which makes it a

crime to transmit in interstate commerce “any communication containing any threat ... to injure the person of another.” His defense and testimony at trial was that he did not intended to threaten anyone, and was merely imitating the rap lyrics and style of Eminem. The government argued, and the trial court instructed, that no intent on Elonis’s part was required, and that a “true threat” (one not protected by the First Amendment) required only that “a reasonable person would foresee that the statement would be interpreted” by others as a threat of physical injury. The Third Circuit affirmed Elonis’s conviction (and 44 month imprisonment sentence).

**Roberts (for 7):** Although § 875(c) does not specify a *mens rea* for a defendant to be convicted, “the general rule” is that some mental state (or scienter, or *mens rea*) is required on the part of a criminal defendant “before he may be found guilty.” *Morrisette* (1952). However, “we read into [a federal] statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.” *Carter* (2000). Here, we reject the government’s argument that a “negligence standard” -- what a “reasonable person” would believe -- is sufficient under § 875(c). Elonis himself must have some culpable mental state regarding “the threatening nature” of his statements. This could be shown by proving that it was his purpose to threaten, or that he had “knowledge that the communications will be viewed as a threat.” Even “recklessness” might suffice – but we don’t address that because the parties did not argue that issue in their briefs, and mentioned it “only briefly” at oral argument. We clarify that “negligence is not sufficient” to convict under § 875, but there is yet no Circuit law on whether “recklessness” should suffice. “Prudence” counsels that we not resolve the issue here. Although we may be “capable” of deciding the issue, our normal practice of waiting for lower court decisions and full briefing will “help ensure that we decide it correctly.”

**Alito concurring in part and dissenting in part:** *Marbury* (1803) says we should “say what the law is,” but the Court today says “only what the law is not.” This “is certain to cause confusion and serious problems.” The parties here have argued the issue, and deciding it now will avoid needless errors and disagreements in the lower courts, which do not have “the luxury of choosing” their own docket as we do. While I agree with the Court that § 875(c) “requires more than negligence,” I would also rule that recklessness is enough. And there is no First Amendment bar to applying that conclusion in a case like this one where Elonis’s threats were “pointedly directed at [specific] victims.” Finally, rather than vacate Elonis’s conviction I would remand it for the Third Circuit to consider whether the proof met a “recklessness” standard such that Elonis should stay convicted on a “harmless error” theory. [**Ed. note:** This seems like a rather remarkable theory of harmless error, where the Government argued to the jury that “it doesn’t matter what he thinks” and the instructions permitted conviction on that theory.]

**Thomas dissenting:** We should rule, as 11 Circuits have, that the common law concept of “general intent” is sufficient to convict here. Rejection of that approach, and the failure to opine as to recklessness, “throws everyone into a state of uncertainty.” [An interesting and lengthy further discussion is omitted here.] I would affirm the Third Circuit on that common law theory applied to these facts.

#### **F. Controlled Substance Analogue Enforcement Act, 21 U.S.C. §802(32)(A).**

**McFadden v. United States**, 135 S.Ct. 2298 (June 18, 2015), 9 (8-1) to 0 (**Thomas**; *Roberts* concurring in part and in the judgment), *vacating* 753 F.3d 432 (CA4 2014).

**Headline:** For conviction under the federal “Analogues” drug statute, defendant must “know” that he is dealing with an analogue controlled substance, meaning that he “knew the identity of the substance he was distributing.”

**Facts:** To combat the distribution of analogue drugs that mimic the effects of prohibited drugs but differ in chemical structure, Congress enacted the Controlled Substance Analogue Enforcement Act of 1986, which defines “controlled substance analogue” substances (21 U.S.C. §802(32)(A)), and then directs that if an analogue is “intended for human consumption,” it should be “treated ... as a controlled substance in schedule I” of the federal narcotics statute, 21 U.S.C. §841. Thus a defendant who “knowingly” possesses an analogue with the intent to distribute is guilty (§841(a)). The lengthy definition of “analogue” requires (1) a chemical structure “substantially similar” to a controlled substance; (2) an “effect on the central nervous system that is substantially similar to” a controlled substance, “or” (3) an intention or representation that it will have such a “substantially similar” effect. Needless to say (I hope), this lengthy definition is not a model of clarity.

McFadden produced and sold substances that he referred to as “bath salts” but also compared to cocaine and meth. A store in Charlottesville, Virginia [home of what University?] came under investigation, and the owner made “controlled buys” from McFadden and recorded calls with him. At trial, McFadden requested that the jury be instructed that, to convict, they must find “that he ‘knew that the substances he was distributing possessed the characteristics of ... analogues,’ including their chemical structure.” But the district court gave only a “compromise” instruction, and McFadden was convicted. The Fourth Circuit affirmed, and ruled that the only “knowledge” the government was required to prove was “that the defendant meant for the substance to be consumed for humans.”

**Thomas (for 8):** An analogue defendant must know that he is “dealing with a controlled substance,” which we think can be proven regarding analogues “in two ways.” First, that the defendant actually knew the substance is “actually listed on the federal drug schedules or treated as such by ... the Analogue Act – regardless of whether he knew the particular identity of the substance.” Or second, that he “knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.” That is, he “must know the identity of the substance he possessed.” Which (later) also means “knowledge of the physical characteristics that give rise to ... treatment” as a controlled analogue. [Ed. note: *Mens rea* is a particularly slippery subject – but even so, I don’t find the Court’s general language in this opinion particularly helpful.] (Importantly, the Court notes twice (nn.1 & 3) that knowledge may be proven by “circumstantial,” that is inferential, evidence.)

The Fourth Circuit’s instruction failed to include this “knowledge” aspect. Also, the federal statutes reach only federally controlled substances, not “all substances regulated by any law.” And the “canon of constitutional avoidance” [which sounds vaguely like the “rule of lenity” here] “has no application” for “an unambiguous statute such as this one.” [“unambiguous,” really?] As for harmless error, we decline to consider it in the first instance, and so we remand.

**Roberts, concurring in part and in the judgment:** “I join the Court’s opinion, except for the part that says the government can prove the requisite knowledge “by showing that the defendant knew the identity of the substance he possessed.” This statement by the Court is dictum, and “should therefore not be regarded as controlling if the issue arises in future cases [Ed.note: as it surely will.] Instead, as the statute says, the defendant “needs to know that the substance is controlled” (emphasis in original). “Identity” is not sufficient; and here is “a pop quiz for any reader who doubts the point: Two drugs—dextromethorphan and hydrocodone — are both used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?” (In a footnote: “the answer is hydrocodone.”) Just as in *Liparota* (1985) we ruled that a defendant must know something is

“stolen” to be convicted of receipt of stolen property.

**G. The Armed Career Criminal Act, 18 U.S.C. § 924(e).**

See **Johnson v. United States**, above at p. 9 under “Fifth Amendment, Due Process” (residual clause defining “violent felony” is unconstitutionally vague).

### III. HABEAS CORPUS

**Jennings v. Stephens**, 135 S.Ct. 793 (Jan. 14, 2015), 6-3 (**Scalia**; Thomas dissenting), reversing 537 Fed. Appx. 326 (CA5 2013).

**Headline:** A habeas petitioner who has won relief in the trial court may argue alternative ground for relief on appeal, without having to file a cross-appeal or obtain Certificate of Appealability.

**Facts:** Jennings, who already had a long criminal record, was convicted for shooting and killing a Houston police officer during a robbery. At his capital sentencing trial, his attorney presented only the prison chaplain as a witness, and then argued to the jury that “I feel like I ought to just sit down” because if the jury chose a death sentence, “I can’t quarrel with that.” The jury did so choose, and the Texas courts affirmed. On federal habeas, Jennings (with new counsel) argued two “*Wiggins* errors” (failure to present mitigating evidence of childhood abuse and of mental illness) and a “*Spisak* error” (ineffective closing argument). The district court granted relief (unusual in Texas) on the *Wiggins* errors, but denied relief on the *Spisak* error. On appeal, the Fifth Circuit reversed and affirmed Jennings’ death sentence on the *Wiggins* grounds; but the court said it lacked jurisdiction to rule on Jennings’ continued claim of *Spisak* error because he had not filed a cross-appeal or obtained a Certificate of Appealability (“COA”) under 28 U.S.C. 2253(c).

**Scalia for 6:** We have ruled that an appellee who does not file a cross-appeal “may urge [affirmance] any matter appearing [in] the record,” although he may not seek to “enlarge his own rights or lessen the rights of his adversary.” *American Railway Express* (1924). (And any more restrictive view “distorts” *American Railway*.) Because the district court ordered Jennings a new sentencing hearing, Jennings “*Spisak*” argument did not seek to “enlarge” his rights under that decree. Jennings sought the same indivisible relief” on appeal. So “the intuitive, straightforward answer” to Jennings’s question is “yes,” he may argue *Spisak* as a ground for affirmance even though he did not file a cross appeal listing that as an issue. It was one of three arguments in the record before the district court.

The state’s argument that each claimed ground of ineffective assistance is different, and that each one “enlarges” the petitioner’s rights, is a “peculiar” one and “would transform conditional habeas corpus relief ... to a general grant of supervisory authority over state trial courts.” [Ed. note: To me there seems a simpler way to describe this. The habeas relief order is that the state must provide a constitutionally acceptable new sentencing hearing; not that it merely provide one that avoids the specific error(s) identified in the habeas proceeding. Thus, here, the state on remand must avoid *Wiggins* errors, *Spisak* errors, and all other constitutional errors.] We ought not (as we think the dissent does) “confuse” appellate rights with “preclusive” effects that a judgment may have later. Even if this incentivizes “frivolous” habeas appellate arguments – and we think that concern is “exaggerated” – “that is a problem that can only be solved by Congress,” not us.

Finally, the COA requirement of 2253(c) does not apply here, because it applies only when “an appeal ... is taken” by habeas petitioner. “It does not embrace the defense of a judgment by a petitioner on alternative grounds.” Again, rewriting the statute is “beyond the power of the courts.”

**Thomas dissenting, with Kennedy and Alito:** Habeas orders should not be equated to “ordinary civil judgments.” Habeas orders direct the state “to cure the specific defect identified by the district court.” [Ed. note: I think this is simply not correct, see “Ed. note” two paragraphs above. Habeas orders in capital cases direct the state to provide a new sentencing proceeding that is constitutionally sufficient in all aspects.] “The majority’s position is fundamentally at odds with the law of judgments.” Moreover, it is inconsistent with AEDPA [the 1996 amendments to the federal habeas laws], which sought to block “frivolous habeas appeals” and “reduce delays.” This will increase the work of federal courts of appeals in habeas cases.

**Brumfield v. Cain**, 135 S.Ct. 2269 (June 18, 2015), 5-4 (**Sotomayor**; Thomas dissenting; Alito dissenting), vacating 744 F.3d 918 (CA5 2014).

**Headline:** State court’s determination that capital defendant was not mentally disabled (which would bar execution) was unreasonable.

**Facts:** Brumfield shot and killed an off-duty Louisiana police officer during a robbery. He was sentenced to death before the Supreme Court ruled in *Atkins* (2002) that the Eighth Amendment prohibits the execution of mentally disabled (previously, mentally retarded) persons. The Louisiana Supreme Court implemented *Atkins* by ruling that a capital defendant who raised a “reasonable doubt” or “reasonable ground” about his mental disability would receive an evidentiary hearing (*Williams*, 2002). Brumfield filed a post-conviction petition requesting such a hearing, together with some evidence (including a 75 IQ score); and a request for funding to further test and investigate his claimed mental disability. The state trial court denied a hearing and dismissed Brumfield’s petition, and the Louisiana Supreme Court summarily denied review. On federal habeas, the district court granted relief, holding both that Brumfield should have been provided a hearing and resources to support it, and that in any case Brumfield is mentally disabled. But the Fifth Circuit reversed, ruling that Brumfield had not shown the state court’s factual findings or legal ruling to be “clearly unreasonable” under 28 U.S.C. §2254(d).

**Sotomayor for 5:** We rule that the state court’s denial of a hearing was based on “an unreasonable determination of the facts” under §2254(d)(2). So we do not reach other legal questions presented. First, the IQ score evidence was “entirely consistent with intellectual disability;” a score of 75 does not automatically preclude such a finding. Second, it was unreasonable to conclude that Brumfield’s evidence did not raise a reasonable question regarding “impairment in adaptive skills.” This is particularly true since, prior to *Atkins*, Brumfield had little incentive to pursue his argument; and after *Atkins* he was denied funds to pay for investigating it. While some evidence “may have cut against Brumfield’s claim,” that is not the standard under Louisiana law [Ed. note: and under the Eighth Amendment?] In response to the dissent, “we do not deny that Brumfield’s crime were terrible, causing untold pain for the victims and their families. But we are called upon today to resolve a different issue. There has already been one death that society rightly condemns. [But] the question here is whether ... to permit the State ... to take his life as well.”

**Thomas dissenting with Roberts, Scalia and Alito (who join all but Part I-C**, detailing the accomplishments of the murdered officer’s son, a NFL football star, “a study in contrasts” compared to “Brumfield’s argument that his actions were the product of his disadvantaged background”): The majority “oversteps th[e] limits” of §2254(d) and “fails to respect the Louisiana state courts and our precedents.” [Further detail of the 28-page dissent is omitted here.]

**Alito dissenting with Roberts:** “The story recounted in” Justice Thomas’s Part I-C “is inspiring, ... but I do not want to suggest that it is essential to the legal analysis.”

**Davis v. Ayala** 135 S.Ct. 2187 (June 18, 2015), 5-4 (**Alito**; *Kennedy* concurring; *Thomas* concurring; *Sotomayor* dissenting), reversing 756 F.3d 656CA9 2014).

**Headline:** State court’s finding of harmless error must be unreasonable to grant habeas; the finding here -- that the exclusion of defense counsel from hearing the prosecutor’s reasons for striking minority jurors was harmless -- was not unreasonable.

**Facts:** Ayala was convicted of a triple (gang) murder and sentenced to death. At Ayala’s trial, the prosecutor struck all seven black and Hispanic potential jurors; the defense challenged this under *Batson* (1986). Over defense counsel’s objection, the trial judge permitted the prosecutor to give his reasons “outside the presence of the defense so as not to disclose trial strategy.” The judge then denied the *Batson* challenges. The California Supreme Court affirmed the conviction and sentence, ruling that although exclusion of the defense from the *Batson* hearing was error, it was “harmless beyond reasonable doubt” because review of the record showed that the strikes had been for “proper, race-neutral reasons.” On federal habeas, the district court denied relief, ruling that the state court’s harmless error ruling was not “clearly unreasonable” under §2254(d). But a 2-1 Ninth Circuit panel reversed, reviewing *de novo* a claim that jury selection transcripts had been lost, and applying the federal harmless error standard of *Brecht* (1993) “without regard for the state court’s harmlessness determination.” [**Ed. note:** Justice Alito’s opinion also stresses the facts that show lengthy delays in resolving this case, where the defendant was convicted in 1989 -- but he does not explain why those facts are relevant. This presumably is a small quiet response to Justice Kennedy’s concurrence.]

**Alito for 5:** “Assuming without deciding that a federal constitutional error occurred, [it] was harmless.” “The test [for harmlessness] is different in a collateral proceeding,” *Brecht* requires “actual prejudice,” not harmlessness beyond reasonable doubt as *Chapman* would require on direct appeal. The habeas court cannot grant relief unless it has “grave doubt” that the federal error “had substantial and injurious effect” on the jury’s verdict. Moreover, the *Brecht* standard also includes (“subsumes”) the deferential standards of §2254. Here the state’s harmless error was an “adjudication on the merits,” and the “clearly unreasonable” standard of §2254(d) must be satisfied (that is, “error ... beyond any possibility for fair-minded disagreement,” citing *Harrington v. Richter*, 2011).

“With this background,” the Court explains (in a detailed review of the jury selection, omitted here) why the error was harmless. Its critique of the Ninth Circuit’s opinion is harsh: “The Ninth Circuit ... distort[ed] the record and the applicable law.” “The record provides no basis for the Ninth Circuit’s flight of fancy,” and “speculation” about possible “extrarecord information” is “not enough.” “The panel majority misunderstood the role of a federal court in a habeas case,” which is not to “second-guess” state courts but rather “to guard against extreme malfunctions in state criminal justice systems” (quoting *Harrington* which was quoting Justice Stevens’s concurrence in *Jackson v. Virginia*, 1979)). [**Ed. note:** The Court’s harsh criticism has been a frequent refrain in reversals of the Ninth Circuit in habeas cases. Still, it should be noted that Justice Stevens in 2011 would likely not have agreed with *Harrington*’s use of his 1979 statement, had he still been on the Court.]

**Kennedy concurring:** “My join is unqualified” and the Court’s opinion is “complete and correct in all respects.” I write separately to address a fact “mentioned at oral argument ... with no direct bearing on” the legal issues here:” the fact that Ayala has been held in solitary confinement for “all or most of the past 20 years or more:” “a windowless cell no larger than a typical parking spot for

23 hours a day,” and for that one hour, little or no opportunity for interaction with anyone.”  
“Consideration of the many issues solitary confinement presents is needed.”

**Thomas concurring:** “In response to” Justice Kennedy’s concurrence, I would “point out . . . that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims now rest” and that if Alyala is housed there for a few more years, he will “have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.”

**Sotomayor dissenting with Ginsburg, Breyer and Kagan:** I don’t disagree with the Court’s “discussion of the applicable standard of review.” [Ed. note: But Justice Sotomayor then restates the standard in terms that sound more generous to the petitioner than the majority’s.] However, upon a detailed review of the record, “little doubt exists that counsel’s exclusion from Ayala’s *Batson* hearings substantially influenced the outcome.” [The details of her review are omitted here.] The Court “overlooks that Ayala raise[s] a procedural *Batson* claim...; the proper inquiry is not whether” the record supports the California court’s conclusion, but “whether it may have been different had counsel been present.”

#### IV. IMMIGRATION LAW

**Mellouli v. Holder**, 135 S.Ct. 1980 (June 1, 2015), 7-2 (**Ginsburg**; Thomas dissenting), reversing (CA8 2013).

**Headline:** State conviction for “drug paraphernalia,” based on state jailers finding pills in Mellouli’s sock when he was arrested, is not sufficient for federal removal.

**Facts:** Mellouli is a lawful permanent resident from Tunisia who during his years in the U.S. received a master’s degree, taught mathematics at a Missouri university, and became engaged to a U.S. citizen. [Ed. note: The Court does not explain why these facts are relevant, but see Justice Thomas’s dissent]. He was then arrested for DUI and driving on a suspended license. In jail, state deputies found four orange pills, later admitted to be Adderall, “hidden in Mellouli’s sock.” To resolve the charges, Mellouli pled guilty to Kansas’s “possession of drug paraphernalia, to wit: a sock,” used to conceal a controlled substance. He received a suspended sentence and 12 months’ probation. Some months later ICE officers arrested him as removable for this offense -- and he was in fact deported (while engaged to marry a U.S. citizen) in 2012. [Ed. note: Justice Ginsburg does a nice job of subtly conveying the sad harshness of this immigration decision.] The Eighth Circuit denied a petition for review. [Also stated as facts in the opinion:] under federal law, Mellouli’s conduct would not have qualified as a drug paraphernalia offense, and a sock would not meet the federal definition of drug paraphernalia. And in 19 States his conduct would not be a criminal offense.

**Ginsburg for 7:** To evaluate this case, we use the “categorical approach” which “has a long pedigree in our Nation’s immigration law.” It gives “predictability” for non-citizens addressing criminal charges in state courts. [Ed. note: the Court’s opinions here anticipate to some extent its later debate regarding the “categorical approach” for evaluating state law crimes in *Johnson*, decided three weeks later and summarized above at p. 9.] Here, because Kansas lists at least nine substances as “controlled” which are not controlled under federal law, and Mellouli did not admit to what the “orange pills” were in his plea, “Mellouli would not be deportable” for the offense he pled guilty to. But the BIA has been inconsistent in its treatment of different “drug trade” crimes, and here the BIA ruled that “the requirement of correspondence between the Federal and State” offenses did not apply. We think the BIA’s approach was error and “is owed no deference.” “It makes scant sense” in this

context, and it “leads to consequences Congress could not have intended.” The federal statute does not make persons deportable “for *any* drug crime” (emphasis in original). Even if its words might possibly be construed that way, we do not “extend [them] to the furthest stretch of their indeterminacy” (quoting *Yates*, decided earlier in the Term and summarized above). [Ed. note: Intricate details of the federal immigration statutes and case histories are omitted here.] The government’s “sweeping interpretation departs so sharply from ... text and history that it cannot be considered a permissible reading.”

**Thomas dissenting with Alito:** The Court should not reject BIA’s permissible interpretation of federal immigration law. Because the statute says a person is deportable for any offense “relating to” a federally-controlled substance, the decision below was correct. There need not be correspondence between the state offense and federal drug offenses, and “the majority’s 12 references to the sock that Mellouli used to conceal his pills are thus entirely beside the point.” The federal statute is “keyed to” the state law at issue, not to the facts of the underlying offense. The majority’s narrowing definition of “relating to” can’t fit, in context of the surrounding immigration statutes. If the Court is silently moving to a “modified categorical approach” in the immigration field, it will “run into [other] problems.” My result is not too harsh or “outlandish” -- “I see nothing absurd about removing individuals who are unwilling to respect the drug laws of the jurisdiction in which they find themselves.” We ought not misinterpret a federal statute based on “a gut instinct that an educated professional engaged to an American citizen should not be removed for concealing unspecified orange tablets in his sock.”

**Kerry v. Din**, 135 S.Ct. 2128 (June 15, 2015), 5 (3-2 – two different opinions make up the majority) to 4 (**Scalia** with Roberts and Thomas; **Kennedy** with Alito; Breyer dissenting), vacating 718 F.3d 856 (CA9 2013):

**Headline:** Wife of foreign national received sufficient “due process” in the denial of a petition on her husband’s behalf, when the U.S. informed her that the petition was denied under a statute invoking “terrorist activities.”

**Facts:** Din, a naturalized U.S. citizen, filed this lawsuit after the U.S. denied a visa to her husband (Berashk, an Afghan citizen). A consular official informed Berashk that he was inadmissible under 8 U.S.C. 1182(a)(3)(B), without further explanation. That statute finds inadmissible (among other listed reasons) persons involved in “terrorist activities,” and there is apparently no dispute that Berashk was once a “civil servant in the Taliban regime.” Din claimed the lack of any hearing or further explanation denied her “due process,” regarding her “right to live in the United States with her spouse.” The Ninth Circuit agreed that she had “a protected liberty interest in marriage” and remanded the district court’s dismissal.

**Scalia, joined by Roberts and Thomas (plurality):** “There is no such constitutional right” (that is, a “liberty” interest in being able to live in the US with one’s spouse) as Din claims – so “no process is due.” [A critique of “the artificial world of ever-expanding constitutional rights” follows.] “Providing material support to a terrorist organization” falls within the statutory denial ground, and Din’s husband did that by serving in the Taliban government. It is “absurd” to contend that denying a visa to an alien “deprives” Din of a “liberty” or property “right,” even under the “expand[ed] view of such rights adopted in recent decades. (And even if a “narrowly tailored to serve a compelling state interest” test were applied, the statute here, denying a visa to one involved in terrorism, “obvious[ly] meets that criteria.) The “actual holdings” of cases that Din (and Justice Breyer in dissent) rely on “hardly establish the capacious right she now asserts.” Moreover, no alien has a “fundamental right to

live in the United States,” and we have ruled that an alien cannot pursue a lawsuit to the contrary (*Kleindienst*, 1972). “Nothing ... establishes a free-floating and categorical liberty interest in marriage.” [Ed. note: the irony of this statement, coming two weeks before the same-sex marriage decision which was presumably circulating in draft at this time, seems apparent. No wonder Justice Kennedy, author of *Obergefell*, did not join this opinion.] Finally, Justice Breyer’s suggestion that there is some lesser “not-so-fundamental” set of rights, that can be taken away with minimal process, is “troubling.” “The dissent fails to cite a single case supporting its novel theory,” and we [the three Justices in this plurality] reject it. “Footnoted dictum” is “shallow” support for this “dangerous doctrine;” we have ruled that new “fundamental rights” must be “deeply rooted in this Nation’s history and tradition” (*Glucksberg*, 1997, holding no “right” to assisted suicide). The government has not denied Din’s marriage, and she is “free to live with her husband anywhere in the world” if “permitted.” This may deprive Din of something “important” as Justice Breyer says, but if that creates substantive constitutional rights then “we are in for quite a ride.”

**Kennedy, joined by Alito, concurring in the judgment:** [Ed. note: This opinion appears to be the “controlling” opinion, since it is a narrower ground than the plurality and necessary for the five-vote majority.] “Assuming that ... Din has a protected liberty interest, ... the notice she received regarding her husband’s visa denial satisfied due process.” Under *Kleindienst* (1972), all that is required for denial of a visa is a “facially legitimate and bona fide reason.” The reasoning of *Kleindienst* “has particular force in the area of national security.” Here’s Din’s admission that her husband once “worked for the Taliban government ... provides at least a facial connection to terrorist activity.” “Absent an affirmative showing of bad faith,” we ought “not ‘look behind’ the government’s exclusion of Berashk.” Thus the citation of the statute as the reason for denial was “all the process to which [Din] was entitled.”

**Breyer dissenting with Ginsburg, Kagan and Sotomayor:** Din’s interest in living together with her spouse is a “liberty interest” to which the Due Process Clause grants “procedural protection.” The fundamental right of marriage “encompasses the right of spouses to live together,” and much law “creates a strong expectation” that the government will not deny this right without giving “strong reasons.” Justice Scalia is wrong that I am inventing “new ground” here. As for “the process which is due,” mere citation of a statute is not an adequate “statement of reasons.” It failed to set forth any “factual basis” for the exclusion. [Ed. note: While one can imagine arguments to counter the majority’s reliance on Din’s admission that her husband once worked for the Taliban, Justice Breyer’s opinion is strangely silent regarding that fact.]

**Mata v. Lynch**, 135 S.Ct. 2150 (June 15, 2015), 8-1 (**Kagan**; Thomas dissenting), reversing 558 Fed. Appx. 366 (CA5 2014).

[Ed. note: Facts and procedural history omitted here.]

**Kagan for 8:** “When the BIA denies an alien’s statutory motion to reopen a removal case, courts have jurisdiction to review [that] decision.” “Nothing changes when the Board denies a motion to reopen because it is untimely -- ... the reason for the denial makes no difference.” Even if the court believe the Board’s denial was correct or even unreviewable, the proper course is to take jurisdiction and then reject on the merits, not to dismiss for lack of jurisdiction.

**Justice Thomas** would vacate and remand for reconsideration under the correct standard, rather than reverse

## VI. CIVIL CASES RELATED TO CRIMINAL TOPICS

### A. Federal Rule of Evidence 606(b)

**Warger v. Shauers**, 135 S.Ct.525 (Dec. 9, 2014), 9-0 (Sotomayor for 9), affirming 721 F.3d 606 (CA8 2013).

**Headline:** There is no exception to the rule that bars evidence of statements made during jury deliberations, for statements that might show that a juror lied on *voir dire*.

**Facts:** Warger sued Shauers for a traffic accident in which Wargers lost a leg. The jury ruled against Warger. A juror later came forward and said that another juror (who had become the foreperson) had said during deliberations that her daughter had once caused a serious car accident and that if she “had been sued it would have ruined her life.” Wargers filed for a new trial, with an affidavit from the first juror, alleging that this showed that the foreperson had lied during *voir dire* when she said she could be “fair and impartial.” The Eighth Circuit ruled that the evidence was barred by F.R.Evid. 606(b), creating a 3-2 Circuit split.

**Sotomayor for a unanimous Court:** The “plain meaning” of Rule 606(b) bars this evidence, and there is no implicit exception for evidence that might show that a juror lied during *voir dire*. The Rule applies “during an inquiry into the validity of a verdict” and makes inadmissible any evidence “about any statement made or incident that occurred during the jury’s deliberations.” This understanding of the Rule is consistent with the majority common law rule, which we endorsed in *McDonald* (1915) and *Clark* (1933). Congress adopted this view, and the history of the Rule (“for those who consider legislative history relevant”) also shows it. We reject the argument that a post-jury-verdict attack on juror honesty during *voir dire* is not an “inquiry into the validity of a verdict.” As for “constitutional avoidance,” the Rule is not ambiguous nor is there any serious question of its constitutionality in these circumstances, even if the Constitution does require an “impartial” jury.

We also hold that the exception in Rule 606(b) for “extraneous prejudicial information ... improperly brought to the jury’s attention” applies only to information derived from a source “external” to the jury, and not to “the general body of experiences that jurors are understood to bring with them to the jury room.” Again, we think *Tanner* (1987), holding that the Rule precludes evidence that jurors had been drunk during deliberations, forecloses Warger’s arguments.

### B. Religious Land Use and Institutionalized Persons Act

**Holt v. Hobbs**, 135 S.Ct. 853 (Jan. 20, 2015), 9 (7-2) to 0 (**Alito**; *Ginsburg* concurring; *Sotomayor* concurring), reversing 509 Fed. Appx. 561 (CA8 2013).

**Headline:** Prison must allow Muslim prisoner to maintain closely trimmed beard in prison (constitutional freedom of religion undertones).

**Facts:** Holt (“a.k.a Abdul Maalik Muhammad”), a prisoner in Arkansas, is a “devout Muslim.” He believes his religion requires him not to shave, but offered a “comprise” to prison officials that he be permitted to grow a ½ inch trimmed beard. Arkansas prison policy prohibits beards, although it allows a “neatly trimmed moustache” and a ¼ inch beard for prisoners with “a diagnosed dermatological problem.” Arkansas asserted a security interest in its policy, arguing that inmates might “hide contraband” in a beard, and that a prisoner might shave his beard and thereby escape or elude “restricted area” prison restrictions. Holt sued under the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). A magistrate judge granted a preliminary

injunction, and (when the by-then-bearded prisoner appeared before him) remarked that it seemed “preposterous” to think that he could hide contraband in his ½ inch beard. Nevertheless, he recommended dismissal of Holt’s lawsuit based on “deference” to prison officials and because Holt could observe his religion “in other ways.” The district court agreed and the Eight Circuit affirmed.

**Alito for 9:** We reverse. RLUIPA provides “expansive protection for religious liberty,” “greater ... than is available under the First Amendment.” The state “does not dispute the sincerity of [Holt’s] belief,” and “does not argue” that its policy does not “substantially burden” Holt’s exercise of religion. Thus the statute shifts the burden to the state, and the district court’s “alternative “means” argument for Holt to exercise his religion was error. And while “we readily agree that the [state] has a compelling interest in staunching the flow of contraband into and within its facilities,” it is “hard to take seriously” its argument that its ½ inch beard policy really furthers that interest. “An item of contraband would have to be very small indeed” to be concealed by a ½ inch beard, and the prison policy allows hair on the head to exceed that length. RLUIPA “does not permit ... unquestioning deference” to prison authorities. We have a “responsibility” to follow Congress’s statutory command.

The statute sets an “exceptionally demanding” “least restrictive means” standard, and the state does not meet it here. **[Ed. note:** One must recall (as Justices Ginsburg and Sotomayor do in their concurrences) that Justice Alito wrote the majority opinion in last Term’s *Hobby Lobby* decision, which involved application of the same statutory structure and was quite controversial.] There are many ways to protect against contraband, and no reason is offered to distinguish a ½ inch beard from the ¼ inch beards that are allowed. Many other prisons allow ½ inch beards, apparently without problems. And although “prisons [also] have a compelling interest in the quick and reliable identification of prisoners,” other prisons take a photo of inmates without a beard, as well as with, to prevent disguises, which is a less restrictive means that would allow Holt’s religious exercise. The state’s arguments boil down to **“the classic rejoinder of bureaucrats throughout history: If I make an exception for you I’ll have to make an exception for everybody.”** We have rejected such arguments before “and we reject it again today.” RLUIPA still allows prisons to “question whether a prisoner’s religiosity ... is authentic” if they suspect he is using it “to cloak illicit conduct.”

**Ginsburg concurring with Sotomayor:** The accommodation here “would not detrimentally affect others who do not share petitioner’s belief” so -- unlike in *Hobby Lobby* -- I concur.

**Sotomayor concurring:** I agree with the Court, but want to make clear that “nothing in the ... opinion calls into question” our statements in *Cutter* (2005) that the “dangerous prison environment” matters and that some “deference is due to institutional officer’s expertise.” Also, “least restrictive means” does not mean that prison officials “must refute every conceivable option.” Here they “inadequately responded” to less restrictive policies “that [Holt] brought to the [state’s] attention during ... the litigation” itself.

**C. “Whistleblower” Protection Act, 5 U.S.C. § 2302, and TSA non-disclosure statute and regulations, 49 U.S.C. §114(r).**

**Department of Homeland Security v. MacLean**, 135 S.Ct. 913 (Jan. 21, 2015), 7-2 (**Roberts; Sotomayor** dissenting), affirming 714 F.3d 1301 (CAFC 2013).

**Headline:** Statutory whistleblower protection exists for a federal Air Marshall who reported arguable air safety concerns to media, because his disclosures were not “specifically prohibited by law.”

**Facts:** MacLean, a TSA Air Marshal, disclosed to a news media outlet that TSA was cutting back on overnight trips for Marshals who were placed on planes to address potential airplane hijackings after September 11, 2001. MacLean viewed this as a safety concern and arguably in violation of law. (He first attempted to have his concerns addressed internally, but was rebuffed.) When members of Congress immediately expressed concern, TSA cancelled its cutback plans. Then they fired MacLean for violating TSA non-disclosure regulations. On MacLean’s challenge, the MSPB ruled that he was not protected by the federal “whistleblower” statutes (5 U.S.C. 2302), because his disclosure was “specifically prohibited by law,” which is a statutory exception to federal whistleblower protection (49 U.S.C. §114(r)). On appeal, the Federal Circuit reversed, ruling that the TSA’s non-disclosure regulations are not “law” and that the statute that directed TSA to promulgate such regulations did not, by itself, “specifically prohibit” disclosures.

**Roberts for 7:** When Congress wrote “specifically prohibited by law” as an exception to whistleblower protections, “it meant to exclude rules and regulations,” because in the same statute it used the phrase “law, rule or regulation” when it meant that. *Russello* (1983); *IRS v. FLRA* (1990). In addition, “Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.”

The TSA non-disclosure regulations here are not themselves “law.” The government conceded this below, and we reject its contrary arguments here.

Finally, the statute that directs TSA to promulgate nondisclosure regulations “does not prohibit anything,” even if it does “impose a legislative mandate” to publish such regulations. The statute grants “substantial discretion to the TSA” regarding what may or may not be disclosed, so the statute itself cannot be considered a “specific” nondisclosure directive. If this allows TSA workers to “gravely endanger public safety” – a concern we find at least “legitimate” – Congress or the President (by Executive Order) may address it. But “it is not our role to do so for them.”

**Sotomayor dissenting with Kennedy:** [Ed. note: This is an interesting combination of Justices; perhaps this is one of the few genuinely “non-ideological” cases the Court sees from time to time.] “I agree with much of the Court’s opinion...., [but] I part ways” regarding the statute that directs the TSA to mandatorily promulgate nondisclosure regulations (“shall prescribe regulations prohibiting the disclosure ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation,” 49 U.S.C. §114(r)(1)). Some agency discretion is “necessary in the administration of many antidisclosure statutes ... but that does not change the fact that Congress itself is the source of the prohibition of disclosure.” Congress’s intent is “clear” here and “I would respect that intent.” Nevertheless, I also “appreciate the narrowness of the Court’s holding,” because it would appear to sustain a statute written slightly differently, such as “The disclosure of information detrimental to the security of transportation is prohibited and the TSA shall promulgate regulations to that effect.” Still, “I myself decline to surrender so fully to sheer formalism.”

#### **D. Federal Securities Law**

**Omnicare v. Laborers District Council Construction Industry Pension Fund**, 135 S.Ct. 1318 (March 24, 2015), 9 (7-2) to 0 (**Kagan**; *Scalia* concurring in part and in the judgment; *Thomas* concurring in the judgement), vacating 719 F.3d 498 (CA6 2013).

**Headline:** Statement of opinion cannot be an “untrue statement of a material fact” or an omission thereof. But the omission of implied facts regarding the speaker’s basis for opinion could violate the statute, so we remand for that theory.

**Facts:** Omnicare, a large pharmaceutical services provider, said in its public stock offering registration statement that “we believe our contract arrangements ... are in compliance with applicable federal and state laws” and “are legally and economically valid arrangements.” “Accompanying these legal opinions were some caveats” [the details of which are omitted here.] Federal securities laws make untrue statements” and “omi[ssions]” about “materials facts” actionable. Pension fund investors sued, alleging that the two opinion statements were “materially false,” and “omitted material facts necessary” to make them not misleading. The district court dismissed, ruling that statements about a company’s “belief as to its legal compliance” are not actionable unless the company “knew at the time” that they were untrue. The Sixth Circuit reversed, ruling that a securities complaint is sufficient if it alleges that statements are “objectively false,” without any allegation of subjective “disbelief.”

**Kagan (for 7):** “We see the[e] allegations [regarding untrue statements versus omissions] as presenting different issues.” First, the statements were of opinion, not fact, and they do not become statements of fact simply because they ultimately prove incorrect. “The difference between [fact versus opinion] is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly.” The “reasonable person ... recognizes the import of words like ‘I thing’ or ‘I believe’ and grasps that they convey some lack of certainty.” “Reasonable investors do not understand such statements as guarantees.” Of course, if the speaker does not actually hold the belief, the statements could be false; and “embedded statements of fact” within an opinion can also be false. But the statements here were “pure statements of opinion” and were concededly “honestly held,” even if ultimately wrong.

Second, the statute treats omissions somewhat differently, because it requires “material facts ... necessary to make statements” (without qualifying it with “of fact”) not misleading. And this “depends on the perspective of a reasonable investor,” who may “depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion” (that is, their “basis for holding that view” such as “some meaningful legal inquiry”) before asserting a legal opinion. This could “mislead” the reasonable investor “audience.” Thus “knowledge that the Federal Government was taking the opposite view” could make a legal opinion misleading if that fact were omitted. However, “an opinion is not necessarily misleading” just because “an issuer knows, but fails to disclose, some fact cutting the other way.” It “always depends on context.”

We think our view is consistent with common law principles (and [n. 11:] “we disagree with Justice Scalia’s common-law-based opinion”), as well as “the purpose” of the securities law in question. “Literal accuracy is not enough;” otherwise the “magic words” of “I believe” would “punch a hole in the [protection of] the statute.” This is not a “loose” or “amorphous” standard of liability (and Congress can change it if it likes): “The investor must identify particular ... material facts going to the basis for the issuer’s opinion ... whose omission makes the statement ... misleading to a reasonable person reading the statement fairly and in context.” Mere general allegations or “recitation of the statutory language” is “not sufficient.” There will still be “strong economic incentives” for seller to make disclosures helpful to the consumer.

We therefore remand for the lower courts to reconsider “with the right standards in mind.”

**Scalia concurring in part and in the judgment:** “The Court’s view would count far more expressions of opinion to convey collateral facts than I – or the common law – would.” So “I concur only in part.” [Common-law discussion omitted here.] “Most listeners hear ‘I believe’ ... as *disclaiming* the assertion of a fact.” I don’t think a “reasonable investor” is “right to expect a reasonable basis for *all* opinions in registration statements.” The common law recognized exceptions only for the opinions of doctors and other “experts.” We ought not have a “presumption of expertise

on all topics” in a registration statement.” And the majority’s “objective test” will “invite roundabout attacks upon expressions of opinion.”

**Thomas concurring in the judgment:** I agree that there is no “untrue statement of a material fact” here. But it is not “advisable to opine” [pun intended?] regarding omissions in opinions, because that theory of liability “was never passed on below” by the lower courts and “not properly before us.” The lower courts treated the two questions as one, they were not separated in the Questions Presented here, and Justice Scalia shows that “the scope of this theory of liability is far from certain.”

#### **E. Qualified Immunity and Americans with Disabilities Act**

See *City and County of San Francisco v. Sheehan*, above at p. 7 under “Fourth Amendment” (dismissing as “improvidently granted” the question whether the Americans with Disabilities Act requires special accommodations when police confront potentially violent persons whom they know are mentally ill).

#### **F. *Qui Tam* (31 U.S.C. §§ 3729 et seq.) and Wartime Suspension of Limitations Act (“WSLA,” 18 U.S.C. § 3287).**

**Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter**, 135 S.Ct. 1970 (May 26, 2015), 9-0 (**Alito**), affirming in part and reversing in part 710 F.3d CA4 2013).

**Headline:** The WSLA applies only to criminal claims, not civil *qui tam* actions; and *qui tam* bar based on earlier-filed “pending” actions does not apply where prior action has been dismissed.

**Facts:** Carter filed a *qui tam* lawsuit against Kellogg and other Iraq war defense contractors, alleging fraudulent billing against the U.S. government. In fact, he filed it four times over four years, due to “a remarkable sequence of dismissals and [re-]filings” [too complicated to recount here]. Carter’s lawsuits were dismissed because a related *qui tam* case had been filed earlier, although that first lawsuit was then dismissed for failure to prosecute. Carter’s later re-filed suits were also dismissed because, by that time, they were beyond the *qui tam* statute’s six-year limitations period (§3731(b)), and the district court ruled that the Wartime Suspension of Limitations Act (“WSLA”) [**Ed. note:** who knew there even was such an Act?] did not apply. The Fourth Circuit reversed on both issues, and remanded, but when the district court dismissed Carter’s fourth attempt to re-file, because his cert petition was pending, the Court granted cert.

**Alito for 9:** First, the WSLA applies only to criminal offenses, not to civil lawsuits (even ones alleging fraud). The statute used to say it applied to “indictable” offenses, and the more recent change to “offense involving fraud ... against the United States” was not intended to change the limitation of the statute to criminal offenses. “ ‘Offense’ is most commonly used to refer to crimes.” Even if it is “sometimes used more broadly, ... that is not how it is used in Title 18.” “Text, structure, and history” all point toward limiting the WSLA to criminal cases. (We do not decide whether it is also limited only to those situations in which “Congress has formally declared war.”)

Second, “dismissal with prejudice” of Carter’s lawsuits “was not called for” under the *qui tam* statute’s “pending action” language. The “ordinary meaning” of pending means that “an earlier suit bars a later suit while the earlier suit remains undecided, but ceases to bar that suit once it is dismissed.” The argument that “pending” encompasses dismissed lawsuits “does not comport with any known use of the term ‘pending’;” otherwise “the trial of Socrates” is also still “pending.” This is especially true when an earlier suit is dismissed on non-merits ground (as was true here, for failure to

prosecute). If our statutory ruling leads to “practical problems,” the reality is that “the False Claims Act’s *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together like a finely tuned machine.”

## G. Patent Litigation

**Commil USA v. Cisco Systems**, 135 S.Ct. 1950 (May 26, 2015), 6-2, Breyer recused, (**Kennedy**; **Scalia** dissenting), vacating 720 F.3d 1361 (CAFC 2013).

**Headline:** A good faith belief in the invalidity of a patent is no defense to induced infringement.

**Facts:** Commil sued Cisco, alleging that Cisco had infringed its patent on networking equipment and had also induced others to infringe Commil’s patent, by selling infringing equipment to others to use. Cisco was found guilty for infringement; but offered as a defense to induced infringement at a second trial that it had had a good faith belief that Commil’s patent was invalid. The district court, however, precluded evidence on that point, and Cisco was found liable. The Federal Circuit reversed, 2-1, ruling that because “one cannot infringe an invalid patent,” then a good faith belief in invalidity can “negate the requisite intent for induced infringement.”

**Kennedy for 6:** [Details of patent law are omitted for this criminal law summary.] We have held that a defendant can be liable for infringement if he (1) knows of the patent, and (2) knows that the acts [he does] constitute infringement. *Global Tech* (2011). But “infringement and validity are separate issues.” A patent is “presumed valid” and if a person knows of a patent and believes it is not valid -- the correct course is to challenge its validity, not to commit acts one knows could be infringing. “Invalidity is an affirmative defense” when someone is sued; it “is not a defense to infringement, it is a defense to liability.” Our ruling is “no stranger” to general legal principles: “In the usual case, ‘I thought it was legal’ is no defense”: “the general rule that ignorance of the law or mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system” (quoting *Cheek*, 1991). Federal courts have certain powers to frivolous or vexatious litigants. [**Ed. note:** This is the Court’s response to the complaints that its ruling will encourage “patent trolls” (my words not the Justices’). But this response seems like weak solace to victims of the phenomenon.] The other [briefly mentioned] option is to pursue legislative solutions.

**Scalia dissenting with Roberts:** Because “only valid patents can be infringed,” someone with a good faith belief that a patent is invalid “necessarily believes that the patent cannot be infringed.” So such a good-faith belief should be a defense to induced infringement. The Court’s contrary ruling will “increase the *in terrorem* power of patent trolls.”

## H. Excessive Force Under 42 U.S.C. § 1983.

**See Kingsley v. Henderson**, above at p. 11 under “Due Process under the Fourteenth Amendment” (only “objective unreasonableness” required for excessive force claim by pretrial detainee).

## VII. OPINIONS WITHOUT ARGUMENT (SUMMARY REVERSALS)

**Lopez (Warden) v. Smith**, 135 S.Ct. 1 (Oct. 6, 2014), 9-0 (**per curiam**), reversing 731 F.3d 868 (CA9 2014): Like the first swallow of spring, the first summary reversal of the Term is of a Ninth Circuit habeas decision, reminding us (as “we have emphasized time and time again”) that a Circuit may not rely on its own precedent to identify “clearly established law” under the federal habeas statute, 28 U.S.C. §2254(d).

Smith was charged with murder of his wife. He presented a defense (which came as a bit of a surprise) that he could not have hit his wife with sufficient force due to recent shoulder surgery. After the evidence closed, the government requested an aiding and abetting instruction, and in rebuttal closing, the government argued that even if Smith had not himself killed his wife, he could be convicted on the aiding-and-abetting theory. The jury convicted Smith without specifying its theory of guilt. He was sentenced to 25 years to life. The California state courts affirmed, ruling that under California law Smith was adequately on notice that the prosecution might use different theories of murder. But the federal district court granted habeas relief and the Ninth Circuit affirmed, ruling that Smith had a constitutional due process right to more fair notice. The Circuit “did not purport to identify any [U.S. Supreme Court] case” that clearly set forth a rule against the California state court decisions, but found Smith’s case “indistinguishable” from a prior Ninth Circuit decision.

**Ruling (9-0):** No Supreme Court decision clearly establishes that a prosecutor’s focus on one theory of liability at trial can render earlier notice of another theory of liability inadequate. Although the Circuit cited Supreme Court precedents holding that a defendant has a constitutional right to adequate notice of charges against him, that general proposition is “far too abstract” to clearly establish the specific rule the Ninth Circuit employed, and “fair-minded jurists” might disagree with its application here. “We have before cautioned the lower courts—and the Ninth Circuit in particular—against framing our precedents at such a high level of generality.” Under federal habeas law, lower federal courts may not “refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.” Meanwhile, the Circuit’s ruling that the state courts made “unreasonable determinations of the facts” actually “ranks as a legal determination,” and one for which the Ninth Circuit had “nothing” to support it other than its own precedent.

**Carroll v. Carman**, 135 S.Ct. 348 (Nov. 10, 2014), 9-0 (**per curiam**), reversing 749 F.3d 192 (CA3 2014): Pennsylvania State Police Officers Carroll and Roberts went to the home of Andrew and Karen Carman in search of an armed car thief. They parked in a gravel lot in the “far rear of the property” where they noticed a small shed with a light on. Officer Carroll “poked his head in” the shed and announced his presence. When no one responded, the officers proceeded through the back yard toward a sliding glass door that opened onto a ground-level deck. Andrew Carman then came out and “belligerently and aggressively approached” the officers. When Carman ignored the officers’ questions, turned away, and appeared to reach for his waist, Officer Carroll grabbed his arm. Carman then “twisted away . . . lost his balance, and fell into the yard.” A consent search of the Carmans’ house yielded nothing and they were not charged with a crime. The Carmans sued Officer Carroll under §1983, and Carroll defended by arguing that his conduct was lawful under a “knock and talk” exception to the Fourth Amendment. The Third Circuit reversed a jury verdict for the officer, ruling that any “knock and announce” exception must “begin . . . at the front door,” and that Officer Carroll was not entitled to qualified immunity.

**Ruling (9-0):** No precedent clearly established that a “knock and announce” exception must begin at the front door of a home. Indeed, lower court decisions allow the police to enter at any “place visitors could be expected to go” or that are “readily accessible to the general public.” Thus the

question (which we do not decide) is certainly not “beyond debate,” and Officer Carroll was entitled to qualified immunity.

**Johnson v. City of Shelby**, 135 S.Ct. 346 (Nov. 10, 2014), 9-0 (**per curiam**), reversing 743 F.3d 59 (CA5 2013): Johnson and other police officers in Shelby, Mississippi, were fired by the city, and they sued federally, alleging that they had been fired for exposing criminal activities of a city alderman. Summary judgment was granted against the officers because, the district court said and the Fifth Circuit affirmed, they had not cited 42 U.S.C. §1983 in their complaint. Their motion to amend their complaint was denied.

**Ruling (9-0):** The Federal Rules of Civil Procedure require only “a short and plain statement of the claim,” which is satisfied here, because the officers “stated simply, concisely, and directly [the] events that, they alleged, entitled them to damages from the city.” “They were required to do no more,” and there is “no heightened pleading rule” for §1983 complaints. Also, “for clarification and to ward off further insistence on a punctiliously stated ‘theory of the pleadings,’ petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to §1983.”

**Glebe v. Frost**, 135 S.Ct. 429 (Nov. 17, 2014), 9-0 (**per curiam**), reversing 757 F.3d 910 (CA9 2014): Frost was charged with robbery on an accomplice theory. He testified at trial that he had been involved but that he had acted under duress. Before closing argument, the Washington state trial judge ruled that state law did not permit counsel to both contest the elements of the charge and also claim duress, and that Frost could argue only one of the two theories. Frost therefore argued only duress, and was convicted. On appeal the Washington Supreme Court ruled that precluding the alternative arguments was constitutional error, but that the error was harmless because the jury had heard two taped confessions by Frost as well as his admission of criminal conduct on the stand. But on federal habeas, the Ninth Circuit ultimately ruled *en banc* (6-5) that precluding Frost’s alternative arguments was “structural error” (citing *Herring v. N.Y.* (1975)) that required relief.

**Ruling (9-0):** It is not “clearly established” (as federal habeas law requires) that the error here was “structural” error not subject to harmless error analysis. *Herring* involved a complete denial of closing argument, not a restriction of it, and a reasonable jurist “could reasonably conclude” that the latter “differs” from the former. Habeas law does not permit the Ninth Circuit to “bridge the gap” by relying on its own precedents. Finally, the Ninth Circuit’s alternative argument that Frost was forced to “admit guilt” here is “no more sound than the first,” because this too, is not “clearly established” structural error as 28 U.S.C. § 2254(d) requires. The case is remanded for consideration of the “harmless error” ground. [**Ed. note:** Note that the Court’s opinion in *Davis v. Alaya* issued later in this Term and summarized at p. 22 above, may affect that remand.)

**Christeson v. Roper**, 135 S.Ct. 891 (Jan. 20, 2015), 7-2 (**per curiam**; Alito dissenting), reversing unpublished summary order that affirmed a denial of stay of execution (CA8 2014): Christeson was convicted on three counts of murder and was sentenced to death, all of which was affirmed in the Missouri state courts. Christeson’s appointed lawyers missed the filing for his first federal habeas petition, which was then denied as untimely. He requested new appointed counsel “who would not be laboring under a conflict of interest,” but the district court refused and the Eighth Circuit summarily affirmed.

**Ruling (8-1):** The decision to deny Christeson substitute counsel “contravened our decision in *Martel* (2012),” which held that a motion for substitution of counsel should be granted when it is “in the interests of justice.” It was error for the district court to “fail to acknowledge [prior counsel’s]

conflict of interest.” We noted in *Martel* that “a district court would be compelled to appoint new counsel if the first lawyer developed a conflict.” Christeson’s motion for substitution, “while undoubtedly delayed, was not abusive,” in that it was filed a month after new counsel “became aware of Christeson’s plight and well before the State had set an execution date, and it requested only 90 days to investigate and file a motion” for equitable tolling. Christeson may indeed “face a host of procedural obstacles” but he “is entitled to the assistance of counsel” to pursue his “opportunity.”

**Alito dissenting with Thomas:** “I would not reverse ... without briefing and argument.” “The availability of equitable tolling in cases governed by [AEDPA] is a question of great importance.” “It is not clear that this case involves anything other than an attorney error, albeit a serious one,” which may well “fall short of establishing the kind of [attorney] abandonment that is needed for equitable tolling under out precedent.”

**Grady v. North Carolina**, 135 S.Ct. 1368 (Mar. 30, 2015), 9-0 (**per curiam**), reversing 762 S.E.2d 460 (N.C. 2014). Grady was convicted of sexual offenses in 1997 and 2006, and after he served his imprisonment sentences, he was ordered as a recidivist to wear a satellite tracking device and be monitored for the rest of his life. The North Carolina courts rejected the argument that our decision in *Jones* (2012, holding that a GPS tracking device used to track a car is a “search”) applied to a “civil” recidivist case.

**Ruling (9-0):** The Fourth Amendment applies in all “search” contexts, and the civil nature of this proceeding does not alter that. “The State conducts a search when it attaches a device to a person’s body, without consent, for the purpose of tracking that individual’s movements,” citing *Jones; Jardines* (2013). And “the very name” of North Carolina’s “monitoring” program, as well as the statutory text, shows that it is “plainly designed to collect information.” We remand for the State’s consideration of whether its monitoring program is “reasonable” under the Fourth Amendment.

**Woods (Warden) v. Donald**, 135 S.Ct. 1372 (Mar. 30, 2015), 9-0 (**per curiam**), reversing 580 Fed.Appx. 277 (CA6 2015): Woods was tried with two codefendants for armed robbery and felony murder. When the government elicited testimony to introduce a chart showing phone calls among other defendants (not Donald), Donald’s attorney said he had no objection because “I ha[ve] no dog in this race and no interest in that.” However, after a short recess, the lawyer was not present for ten minutes when the trial resumed, which the judge permitted without the lawyer because he had indicated that he had “no interest” in the telephone chart. Donald was convicted and sentenced to life imprisonment. The Michigan state courts rejected his Sixth Amendment ineffective assistance argument based on his lawyer’s brief absence. But the federal habeas district court granted relief and the Sixth Circuit affirmed.

**Ruling (9-0):** Although we said in *Cronic* (1984) that “courts may presume that a defendant has suffered unconstitutional prejudice if he is denied counsel at a critical stage of his trial,” no decision of this Court clearly establishes that a constitutional violation occurs when defendant’s lawyer is “briefly absent during testimony concerning other defendants.” Precedent that is “similar to” a case is not “contrary to.” This is “all that should have mattered to the Sixth Circuit. “Just last Term we warned the Sixth Circuit...” Federal habeas relief was thus improper under 28 U.S.C. §2254(d); we don’t decide the substantive merits issue.

## IX. OPINIONS RELATING TO ORDERS (such as denial of certiorari)

**Jones v. United States**, No. 13-10026 (Oct. 14, 2014; from CADC), Scalia dissenting with Thomas and Ginsburg from denial of *certiorari*: A jury convicted defendants of distributing small amounts of cocaine but acquitted them of conspiracy. But the sentencing judge found that they *had* committed conspiracy, and imposed a higher Guidelines sentence. Defendants “present a strong case” that “but for the judge’s finding of fact,” their sentences would be held “substantively unreasonable.” Lower courts have taken our silence on this question to mean that such sentences are constitutional. This is wrong and “has gone on long enough.” We should take this case to address these precedents “disregarding the Sixth Amendment” or “acknowledge that all sentences below the statutory maximum are substantively reasonable” [Ed. note: this last is said with tongue firmly in cheek.]

**Volkman v. United States**, No. 13-8827 (Oct. 20, 2014, from CA6), *Alito with Thomas concurring* in a GVR in light of *Burrage* (2014): Volkman, a medical doctor, was convicted for distributing controlled substances leading to the deaths of four of his patients, and sentenced to four consecutive life sentences. While a remand for consideration of “but for causation” is appropriate under our new decision in *Burrage*, “I write to highlight ... petitioner’s burden going forward.” His jury did receive a “but for causation” instruction, so on this remand he must meet the high “no rational juror could decide” burden for sufficiency of the evidence. In addition, our remand does not disturb his other non-death convictions.

**Whitman v. United States**, No. 14-29 (Nov. 10, 2014, from CA2), **Scalia**, with Thomas, “respecting the denial of certiorari”: The Second Circuit has ruled that it will defer to the SEC’s interpretation of federal securities laws, which may be used for both criminal and civil liability. So here they affirmed the conviction. But “a court owes no deference to the prosecution’s interpretation of a criminal law,” *Abramski* (2014), and “I doubt the government’s pretensions to deference” here. Moreover, the rule of lenity should apply, and our prior decision in *Babbitt* (1995) “contradicts the many cases before and since.” This case is a “poor setting ... to reach the question” because of its procedural history and the fact that Whitman does not raise the question of deference. “But when a petition properly presenting the question comes before us, I will be receptive to granting it.”

**Joseph v. United States**, No. 13-10639 (Dec. 1, 2014, from CA11), **Kennedy and Sotomayor** would grant certiorari; **Kagan**, with Ginsburg and Breyer, “respecting the denial of certiorari”: Joseph appealed his drug convictions and career offender sentence. He did not make, in his opening appellate brief, an argument that was clearly foreclosed by Eleventh Circuit precedent. But when we overruled that CA11 precedent, Joseph sought to add the argument to his appellate brief. But CA11 denied his motion, invoking the rule that arguments not presented in the opening brief are forfeited. This is contrary to the rule in every other Circuit. But because CA11 applies its rule inconsistently and “we do not often review the Circuit courts’ procedural rules, ... I favor deferring, for now, ... in the hope that [CA11] will reconsider” its rule.

**Redd v. Chappell (Warden)**, No. 14-6264 (Dec. 1, 2014, from CA9), **Sotomayor**, with Breyer, “respecting the denial of certiorari”: “Seventeen years after petitioner was first sentenced to death and more than four years after his conviction and sentence were affirmed on direct appeal, petitioner has not received counsel to represent him in his state habeas proceedings.” But State law entitles him to appointed counsel on habeas, and until he has counsel, the California Supreme Court “refuses to consider capital inmates’ pro se submissions.” Thus this habeas petitioner “must either waive his right to counsel or continue to wait.” This is “undoubtedly troubling,” but I vote to deny the cert petition because “it is not clear” that he “has been denied all access to the courts” for his claims of

constitutional error – there may be some federal court avenues yet open to him. Moreover, “I hope” that California will appoint him state habeas counsel “soon.”

**Plumley (Warden) v. Austin**, No. 14-271 (Jan. 20, 2015, from CA4), **Thomas, with Scalia, dissenting from denial of certiorari** [a lengthy 7-page opinion]: In *Pearce* (1969), this Court “created a [constitutional] presumption of vindictiveness” for more severe sentences imposed after a new trial. We have said that the presumption applies “only where there is a reasonable likelihood of ... *actual* vindictiveness,” but “despite this instruction, confusion reigns” in the lower courts. We should grant review “to resolve the confusion.”

**Warner v. Gross** (Jan., 15, 2015, from Okla S.Ct.), **Sotomayor**, with Ginsburg, Breyer and Kagan, dissenting from denial of a stay of execution: [**Ed. note:** This is one of the four petitioners in *Glossip* (summarized above at p. 14 under “Eighth Amendment”) whose stay application failed because it needed five votes, rather than just the four required to grant *cert*, which happened a few weeks later.] There is certainly a “reasonable probability” that we will grant *certiorari* [as evidenced by the fact that there are four votes here, and indeed the Court did subsequently grant *certiorari*. (Justice Sotomayor’s lengthy critique of the lower court’s ruling and findings, omitted here, foreshadowed her lengthy dissent in *Glossip* some five month later.)]

**Bower v. Texas**, No. 14-292 (March 23, 2015, from Texas Ct. Crim. App.), **Breyer** with Ginsburg and Sotomayor dissenting from denial of cert: Bowers was sentenced to death in Texas for the murder of four men. He filed multiple appeals and habeas petitions, all denied. However, “a week before Bower’s conviction became final,” we decided in *Penry* (1989) that Texas’s “special issues” format for considering mitigation evidence was unconstitutional. The federal courts in the Eleventh Circuit denied Bower’s claim under *Penry*, but after Bower was back in the state courts, “the Fifth Circuit changed its mind about the meaning of *Penry*.” Then the Texas trial court decided that Bower was right about his *Penry* claim, but the Texas Court of Criminal Appeals reversed. So here we are: apparent *Penry* error that is unreviewed. “We do not often intervene only to correct a case-specific legal error. But the error here is glaring, and the consequence may well be death.” Rather than wait for future federal habeas proceedings, which may be procedurally barred, “we should act now” to grant review and correct the error.

**Hittson v. Warden, GDCP**, No. 14-8589 (June 15, 2015, from CA11), **Sotomayor**, with Kagan, “respecting denial of *cert*”: On federal habeas, when a lower state court has ruled on the merits of a claim, and the state Supreme Court has summarily denied review, *Ylst* (1991) made clear that the federal courts should review the reasons given in the last “reasoned state judgment.” But here, the Eleventh Circuit ruled that *Harrington* (2011) has “superceded *Ylst*,” so that the federal court must “consider hypothetical theories that could have supported” denial of the claim. The Circuit “plainly erred,” because there was no lower court order in *Harrington*, and *Harrington* cited *Ylst* with approval. Still, I concur in the denial of *cert*, because “I am convinced the Eleventh Circuit would have reached the same conclusion” even applying *Ylst*, and it currently has a pending *en banc* petition that will afford the Circuit “an opportunity to correct its error.”

**Carlton v. United States**, No. 14-8740 (June 22, 2015, from CA5), **Sotomayor**, with Breyer, “respecting denial of *cert*”: Carlton will “spend several additional months in jail” because the district court raised his Guidelines by two levels based on the government representing trial testimony that, in fact, never happened. But there was no objection, and the Fifth Circuit ruled that it will not review “fact errors” for “plain error.” I think the Fifth Circuit is wrong; “there is no basis apparent for ... an exception for factual errors.” Every other Circuit has ruled oppositely. “Nevertheless I reluctantly

agree” with the decision to deny *cert*, because the Fifth Circuit should have “the first opportunity” to resolve its own inconsistent use of its rule.

## **Criminal Law Certiorari Grants for the Upcoming Oct. '14 Term**

As of July 29, 2015, the Court has granted *certiorari* (or review, in one “original jurisdiction” case, *Mississippi v. Tennessee*) in 35 cases for the coming Term. That is nine more cases than at the same time last Term – and a number of new criminal cases will likely be added to the docket after the Court’s “opening conference” scheduled for September 28, 2014.

Eleven of the cases in which review has already been granted for the next Term are criminal-law-or-related (under my generous standards). The Eighth Amendment portends to be a particular focus: four cases involve the death penalty, and a fifth involves juvenile life without parole. The other interesting point is that, so far, not a single case granted for review next Term involves the Fourth Amendment. I can’t recall a prior Term where that was true.

Finally, five of the eleven cases in which review has been granted are from State Supreme courts, suggesting that at least some of the Justices realize that waiting for a criminal case to come to them via a later federal habeas petition can obscure the legal question presented, due to the highly deferential standards now embodied in the federal habeas statute, §2254 (the 1996 AEDPA amendments).

Here are brief descriptions of the criminal-law Questions presented in the cases granted so far:

1. **Hurst v. Florida**, No. 14-7505: Whether Florida's death sentencing scheme, which permits a judge to find aggravating factors to impose death (and which does not require a jury to determine mental disability or to be unanimous in their findings or sentence) violates the Sixth Amendment or the Eighth Amendment in light of *Ring v. Arizona*. (Florida Supreme Court)
2. **Foster v. Humphrey**, No. 14-8349: Whether the Georgia courts erred in failing to recognize race discrimination under *Batson v. Kentucky* in a case where state prosecutors struck all four prospective black jurors, offering “race-neutral” reasons, and it was later discovered that the prosecution had (1) marked with green highlighter the name of each black prospective juror; (2) circled the word “BLACK” on the questionnaires of five black prospective jurors; (3) identified three black prospective jurors as “B#1,” “B#2,” and “B#3”; (4) ranked the black prospective jurors against each other if “it comes down to having to pick one of the black jurors.” (Georgia Supreme Court).
3. **Montgomery v. Louisiana**, No. 14-280: Whether *Miller v. Alabama*, which prohibits mandatory LWOP for juveniles convicted of homicide, applies retroactively. (Louisiana Supreme Court).
- 4 & 5. **Kansas v. Carr**, No. 14-450, and **Kansas v. Gleason**, No. 14-452: (1) Whether the Eighth Amendment requires that a capital-sentencing jury be affirmatively instructed that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court ruled?; and (2) whether the trial court's decision not to sever co-defendants for sentencing in a capital case violates an Eighth Amendment right to “individualized sentencing.” (Kansas Supreme Court).

6. **Luis v. United States**, No. 14-419: Whether the pretrial restraint of a criminal defendant's untainted assets (that is, assets allegedly not traceable to the crime charged) violates the Fifth and Sixth Amendments if those assets are needed to retain the defendant's preferred counsel. (Eleventh Circuit).
7. **Ocasio v. United States**, No. 14-361: Whether a federal Hobbs Act conspiracy to commit extortion requires the government to prove that the conspirators agreed to obtain property from someone outside the conspiracy. (Fourth Circuit).
8. **Lockhart v. United States**, No. 14-8358: Whether 18 U.S.C. § 2252(b)(2) -- which requires a mandatory minimum ten-year prison term for a defendant convicted of possessing child pornography if he "has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" -- is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward." (Second Circuit).
9. **Musacchio v. United States**, No. 14-1095: Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions, or just against the statute, where the jury instructions required the government to prove additional or more stringent elements than the statute and indictment require; and whether a statute-of-limitations defense not raised before or at trial is reviewable on appeal. (Fifth Circuit).
10. **Torres v. Lynch**, No. 14-1096: Whether, for immigration removal purposes, a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks. (Second Circuit).
11. **Bruce v. Samuels**, No. 18-844: Whether the 20% of income "cap" in the Prison Litigation Reform Act (28 U.S.C. §1915(b)(2)) -- requiring *in forma pauperis* prisoners to still pay something toward the fee for filing federal cases -- applies on a "per case" or "for all cases" basis. (D.C. Circuit).

-- E N D as of August 10, 2015 --

## WHO WROTE WHAT in the 2014-15 Term

(All written opinions in argued cases are included, not just majorities)

Majority opinions are in **Bold**; *Concurrences are in italics*; Dissents are underlined

### ROBERTS

Heine  
Elonis  
MacLean  
*McFadden*

### SCALIA

Johnson  
Whitfield  
Jennings  
**Kerry v. Din**  
*Ohio v. Clark*  
*Glossip*  
*Sheehan*  
*Omnicare*  
Patel  
Kingsley  
Commil

### KENNEDY

**Kerry v. Din**  
**Commil**  
*Johnson*  
*Davis v. Ayala*  
Rodriguez

### THOMAS

**McFadden**  
*Johnson*  
*Ohio v. Clark*  
*Glossip*  
*Davis v. Ayala*  
*Omnicare*  
Elonis  
Jennings  
Briumfield  
Mellouli

### GINSBURG

Rodriguez  
Yates  
Mellouli  
*Holt*

### BREYER

Kingsley  
Coleman  
Glossip  
Kerry v. Din

### ALITO

Ohio v. Clark  
Glossip  
Davis v. Ayala  
**Holt**  
**Sheehan**  
**Kellogg**  
*Yates*  
*Elonis*  
Rodriguez  
Patel  
Johnson  
Kingsley  
Brumfield

### SOTOMAYOR

Patel  
Brumfield  
Warger  
*Holt*  
Heine  
Glossip  
Davis v. Ayala  
MacLean

### KAGAN

Henderson  
Mala  
Omnicare  
*Heine*  
Yates

Total Authored decisions in argued Criminal Law-and-Related cases: 28 (out of 66 total argued Court decisions); (plus 7 *per curiam* Summary Reversals).

Total Writings in argued Criminal Law-and-Related cases: 65 (plus 7 summary reversals).

Criminal Law Workhorse: **Justice Alito** (second year in a row; former U.S. Attorney):  
-- the most writings, most majorities and most dissents.

Workhorse Runners-up: **Justices Scalia** and **Thomas** (do their many dissents support this year's "A liberal Term" theme?)

**Justice Sotomayor** once again leads the "liberals" in total writings in criminal cases.