

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

**2017 Annual Meeting
New York City, New York**

**ANNUAL REVIEW
of the
SUPREME COURT'S TERM,
CRIMINAL CASES
(2016-2017)**

Summaries of all Opinions (including Concurrences and Dissents),
In argued and non-argument cases and Orders.
Certiorari grants for the upcoming Term,
and a Brief Overview of the Term,
regarding all
Criminal Law and related cases before the U.S. Supreme Court
October Term 2016 (Oct. 2016-July 2017)
(This year with clickable links!)

**Prepared by: Professor Rory K. Little
UC Hastings College of the Law and
Of Counsel, McDermott Will & Emery
Alyxandra N. Vernon (UC Hastings '19)
200 McAllister Street
San Francisco CA 94102
415-225-5190
little@uchastings.edu**

**© Rory K. Little
August 2017**

NOTICE: [Clickable links!](#) For the first time, the electronic version of this Annual Review contains “hyperlinks” to publically available sources for the decided cases, relevant precedents, and related materials. Feel free to email Professor Little or the ABA/CJS staff and request an electronic copy.

**CRIMINAL LAW (and related) DECISIONS
of the U.S. Supreme Court
October 2016 Term (Oct. 2016-August 2017)**

Table of Contents

	<u>Page</u>
Table of Contents	i
Summary List of Cases with Brief Descriptions.....	i
2016 ABA Annual Meeting Panelists.....	1
Brief Overview of the 2016-17 Term, Criminal Side	1
(Explanatory Notes for these materials)	3
Detailed Summaries of Decisions	5
Opinions without argument (Summary Reversals).....	34
Opinions relating to Orders	35
Criminal Law cert grants for the 2017-18 Term	38
Chart: Who Wrote What in the 2016-17 Term	40

Summary List of Cases with Brief Descriptions

(Ordered chronologically within categories. Detailed summaries of all opinions follow this list.)

I. CONSTITUTIONAL DECISIONS

A. First Amendment

[Packingham v. North Carolina](#), 137 S.Ct. 1730 (June 19, 2017): Statute criminalizing the accessing of social media sites by convicted sex offenders violates the First Amendment 5

B. Fourth Amendment

[Manuel v. City of Joliet](#), 137 S.Ct. 911 (March 21, 2017): Fourth Amendment

permits a claim for unlawful pretrial detention based on alleged law enforcement lies, even after judicial determination of probable cause.....	6
<u>County of Los Angeles v. Mendez</u> , 137 S.Ct. 1539 (May 30, 2017): Ninth Circuit’s “provocation rule” rejected because a prior constitutional violation cannot render a separate “reasonable” seizure unconstitutional; but case is remanded for whether officers’ actions were the “proximate cause” of plaintiffs’ injuries	7
<u>Hernandez v. Mesa</u> , 137 S.Ct. 2003 (June 26, 2017): Possible <i>Bivens</i> action for cross-border shooting of Mexican national by U.S. Border patrol is remanded in light of <i>Ziglar v. Abbasi</i> (June 19, 2017); and qualified immunity must be evaluated on “facts knowable” to officers at the time – facts learned “after the incident ... are not relevant.”	9
C. Fifth Amendment	
<u>Bravo-Fernandez v. United States</u> , 137 S.Ct. 352 (Nov. 29, 2016): Double jeopardy does not bar a retrial of a guilty-verdict count that is reversed on appeal, even when jury has returned logically inconsistent acquittal verdicts in the same case.	10
D. Sixth Amendment	
<u>Buck v. Davis</u> , 137 S.Ct. 759 (Feb. 22, 2017) [summarized under “Habeas Corpus,” below]: “Expert” testimony that expressly made race a factor in the jury’s death penalty decision entitles defendant to new sentencing proceeding; defendant’s counsel was ineffective for introducing it. Race bias is so important that various habeas and procedural bars are overcome.....	26
<u>Pena-Rodriguez v. Colorado</u> , 137 S.Ct. 855 (Mar. 6, 2017): Long-standing “no-impeachment” rule regarding internal jury deliberations may be loosened, and evidence of juror statements may be considered and investigated, when evidence suggests that a juror voiced racial stereotypes and the constitutional impartial-jury guarantee was compromised.....	11
<u>McWilliams v. Dunn</u> , 137 S.Ct. 1790 (June 19, 2017): <u>Ake v. Oklahoma</u> (1985), requires the State to provide, to an indigent defendant whose mental condition is at issue, a competent psychiatrist to examine the defendant and then assist in evaluation, preparation, and presentation of the defense.....	12
<u>Lee v. United States</u> , 137 S.Ct. 1958 (June 23, 2017): It can be ineffective assistance to erroneously advise client that his guilty plea will not result in mandatory removal, when defendant shows he would not have accepted the plea but for that erroneous advice.....	14
E. Eighth Amendment	
<u>Buck v. Davis</u> , 137 S.Ct. 759 (Feb. 22, 2017) [summarized under “Habeas Corpus,” below]: “Expert” testimony that expressly made race a factor in the jury’s	

death penalty decision entitles defendant to new sentencing proceeding; defendant’s counsel was ineffective for introducing it. Race bias is so important that various habeas and procedural bars are overcome. 26

[Moore v. Texas](#), 137 S.Ct. 1039 (Mar. 28, 2017): In determining intellectual disability (which would bar execution) States cannot entirely disregard contemporary medical standards (as Texas caselaw did here) 15

F. Due Process (Fourteenth and Fifth Amendments)

[Beckles v. United States](#), 137 S.Ct. 886 (Mar. 6, 2017) [Summarized under “Federal Criminal Statutes,” below]: The advisory federal Sentencing Guidelines are categorically not subject to void-for-vagueness challenges under the Due Process Clause, even if a Guideline uses the same “crime of violence” definition that was struck down as unconstitutionally vague in *Johnson* (2015) 16

[Nelson v. Colorado](#), 137 S.Ct. 1249 (Apr. 19, 2017) [summarized under “Civil Cases Related to Criminal Law Topics,” below]: Colorado statutory procedure that retains monetary assessments of convicted defendants even after their conviction is invalidated, unless the defendant files a separate civil lawsuit and proves innocence by clear and convincing evidence, violates due process..... 31

[Turner v. United States](#), 137 S.Ct. 1885 (June 22, 2017): This is a fact-specific decision that undisclosed evidence was not “material” under *Brady* (1963) 18

[Weaver v. Massachusetts](#), 137 S.Ct. 1899 (June 22, 2017): When the “structural error” of closing the courtroom during jury selection was neither preserved nor raised on appeal, a later ineffective-assistance-of-counsel claim must prove prejudice. 19

II. FEDERAL CRIMINAL STATUTES (in chronological order)

A. Securities

[Salman v. United States](#), 137 S.Ct. 420 (Dec. 6, 2016): The “personal benefit” required for an “insider trading” conviction is not limited to benefits with pecuniary value; giving a tip to a relative can qualify. 20

B. Bank Fraud (18 U.S.C. § 1344(1))

[Shaw v. United States](#), 137 S.Ct. 462 (Dec. 12, 2016): Subsection (1) of the bank fraud statute does not require proof that the defendant intended to take the bank’s property, as opposed to the customer’s property deposited in the bank. 21

C. Federal Sentencing Guidelines

[Beckles v. United States](#), 137 S.Ct. 886 (Mar. 6, 2017) [summarized under “Due Process,” above]: The advisory federal Sentencing Guidelines are categorically

not subject to void-for-vagueness challenges under the Due Process Clause, even if the Guideline uses the same “crime of violence” definition that was struck down as unconstitutionally vague in <i>Johnson</i> (2015)	16
<u>Dean v. United States</u> , 137 S.Ct. 1170 (Apr. 3, 2017): When choosing the reasonable sentence for one count, the judge may take into account a lengthy mandatory minimum term imposed on another count.	22
D. Appellate Review of Restitution Orders (18 U.S.C. § 3742; Fed.R.Cr.P. 4)	
<u>Manrique v. United States</u> , 137 S.Ct. 1266 (Apr. 19, 2017): To appeal the amount of restitution, the defendant must file a notice of appeal from the actual restitution order, not just from the initial imposition of sentence	23
E. Fair Debt Collection Practices	
<u>Midland Funding, LLC v. Johnson</u> , 137 S.Ct. 1407 (May 15, 2017): Debt collectors who file claims they know are outside the statute of limitations do not violate the “false, deceptive, misleading, unconscionable or unfair” prohibitions in the Fair Debt Collection Practices Act	24
F. Criminal Forfeiture (21 U.S.C. § 853(a)(1))	
<u>Honeycutt v. United States</u> , 137 S.Ct. 1626 (June 5, 2017): Federal criminal forfeiture is limited to property “acquired” by the defendant, so there is no “joint and several liability” for forfeiture among co-conspirators unless the individual actually acquired or “personally benefited” from the forfeitable property	25

HABEAS CORPUS

<u>Buck v. Davis</u> , 137 S.Ct. 759 (Feb. 22, 2017): Appellate court must grant a Certificate of Appelability (“COA”) if the issue presented is “debatable,” and should not determine the merits at that stage. “Expert” testimony that expressly made race a factor in the jury’s death penalty decision entitles defendant to new sentencing proceeding; defendant’s counsel was ineffective for introducing it. Race bias is so important that various habeas and procedural bars are overcome	26
<u>Davila v. Davis</u> , 137 S.Ct. 2058 (June 26, 2017): Ineffective assistance of habeas counsel does not excuse procedural default allegedly caused by ineffective assistance of appellate counsel; <u>Martinez v. Ryan</u> (2012) distinguished	28

III. IMMIGRATION LAW

<u>Jennings v. Rodriguez</u> , argued on Nov. 30, 2016, not decided, set for re-argument in October 2017: Whether aliens subject to mandatory detention are entitled to bond hearings, and possibly release, at some point in time?	29
---	----

<u>Sessions v. Dimaya</u> , argued on Jan. 17, 2017, not decided, set for re-argument in October 2017: Another <i>Johnson</i> (2015) follow-on (see <i>Beckles</i> , above): whether “crime of violence” as incorporated into alien removal statutes is unconstitutionally vague	29
<u>Esquivel-Quintana v. Session</u> , 137 S.Ct. 1562 (May 30, 2017): The generic federal definition of “sexual abuse of a minor,” for purposes of federal removal action, requires a victim age of under 16, regardless of state law’s minimum age	29
<u>Maslenjak v. United States</u> , 137 S.Ct. 1918 (June 22, 2017). To revoke a naturalized citizen’s citizenship based on claim that alien “procured” citizenship by a false statement, the government must show that the statement “played some role.”	30
<u>Lee v. United States</u> , 137 S.Ct. 1958 (June 23, 2017) [summarized under “Sixth Amendment,” above]: It can be ineffective assistance to erroneously advise client that his guilty plea will not result in mandatory removal, when defendant shows he would not have accepted the plea but for that erroneous advice.....	14
 IV. CIVIL CASES RELATED TO CRIMINAL TOPICS	
<u>Nelson v. Colorado</u> , 137 S.Ct. 1249 (Apr. 19, 2017): Colorado statutory procedure that retains monetary assessments of convicted defendant, even after the conviction is invalidated, unless the defendant files a separate civil lawsuit and proves innocence by clear and convincing evidence, violates due process.....	32
<u>Ziglar v. Abbasi</u> , 137 S.Ct. 1843 (June 19, 2017): A major revision of <i>Bivens</i> analysis; cannot imply a constitutional cause of action without considering “special factors.” Also, officials here entitled to qualified immunity.....	33
 V. SUMMARY REVERSAL OPINIONS (Cases decided summarily, on <i>cert</i> petition, without full briefing or argument)	
<u>Bosse v. Oklahoma</u> , 137 S.Ct. 1 (Oct. 11, 2016): <u>Habeas; death penalty</u>	35
<u>White v. Pauly</u> , 137 S.Ct. 548 (Jan. 9, 2017): <u>Qualified Immunity, 4th Amendment</u>	35
<u>Rippo v. Baker</u> , 137 S.Ct. 905 (Mar. 6, 2017): <u>Due Process; Potential Judicial Bias</u>	35
 VI. OPINIONS RELATING TO ORDERS (such as denial of <i>certiorari</i>)	35
VII. CRIMINAL LAW CERTIORARI GRANTS FOR NEXT TERM (OT ’17)	39
VIII. CHART: Who wrote what in OT ’16)	41

The ABA Annual Meeting Presents:

**Annual Review of the
Criminal Law (and Related) Opinions of the
United States Supreme Court
Issued During the October 2016 Term**

**2017 Annual Meeting Panelists
(New York City, NY – August 11, 2017)**

The Honorable Gerard E. Lynch
Judge, U.S. Court of Appeals for
the Second Circuit
New York City, NY

Joshua L. Dratel
Law Offices of Joshua L. Dratel, P.C.
New York City, NY

Margaret M. Garnett
Chief, Criminal Appellate
U.S. Attorney's Office for the
Southern District of New York
New York City, NY

Professor Rory K. Little (Panel Moderator)
UC Hastings College of the Law
Senior Counsel, McDermott Will & Emery
San Francisco, California

Brief Overview of the 2016-17 Term, Criminal Cases

It is wrong to say that there were no “blockbuster” decisions from the Supreme Court this past Term. Many decisions issued in the areas of criminal law and procedure will have lasting and important impact, even if few captured widespread attention of the media and general public.

The Court did continue its historic decline in the number of total cases decided, only 62 after argument (24 criminal or related), plus three summary reversals (all criminal). However, all the decisions were largely overshadowed by the lingering absence of a ninth Justice (almost the entire Term), and then the nomination, confirmation hearings, and ascension of Tenth Circuit Judge Neil Gorsuch to the Court. Justice Gorsuch did not take the Supreme Court bench until April 2017. In his absence, a number of cases were affected, internally as well as in the public view, by evenly-divided 4-4 votes. Thus two cases argued before Justice Gorsuch was confirmed were, on the last day of the Term, set for re-argument in October, indicating an internal 4-4 vote. A third case that had received a great deal of attention -- the cross-border shooting case of [Hernandez v. Mesa](#) -- was ultimately remanded on the last day of the Term in a narrow and brief 5-3 *per curiam* opinion, which undoubtedly masked a 4-4 vote on the merits of the difficult questions presented. And a number of other cases this Term were decided on narrow grounds that the eight Justices could agree on, and then remanded for consideration of the more divisive issues. For example, *Manuel*; *City of LA v. Mendez*.

On the merits, of the 24 total “merits” decisions in the criminal law area (plus 3 summary reversals, see the Chart at the end of this booklet), 14 were constitutional law-based; another seven were federal statutory decisions. As for which was the most “important” criminal law decision of the Term, everyone will have their “favorites.” Still, from this author’s perspective, the most important criminal-law case of the Term may in fact have been a civil case: [Ziglar](#). The decision announced a major “rethinking” of [Bivens](#) (1971) analysis; that is, when does the Constitution itself provide an inherent cause of action for damages based on alleged violation of constitutional rights? The

plaintiffs here made serious allegations against high-ranking federal officials for alleged constitutional abuses committed against non-citizen detainees in response to the terrorist tragedy of September 11, 2001. The Court determined that almost no [Bivens](#) actions existed here, and announced that [Bivens](#) actions, even if based generally on constitutional Amendments that have previously been found to support them (Fourth, Eighth, and Due Process), should be rare and denied absent “special factors.” Here, “special factors” were found to weigh against the [Bivens](#) claims. The Court also endorsed a rule that question is one of federal legislative, as opposed to constitutional, intent. ([Ziglar](#) also announced important points regarding qualified immunity).

In two cases, issues of race and ethnicity received important attention ([Buck](#) and [Pena-Rodriguez](#)). In both cases, serious allegations of race bias were held to provide relief for the defendants. It is clear that “race bias” has become an evil that Justices can agree on regardless of politics (although Justice Thomas did manage to dissent in both). [Buck](#) also includes an important ineffective assistance of counsel ruling. The Chief Justice’s decision in [Buck](#) (and his decision to keep it) is extremely powerful, and his majority opinion does multiple somersaults to avoid habeas and other procedural barriers in the face of the racial issue there, barriers that likely would have been impenetrable in any other context.

The Fourth Amendment generated two important decisions ([Manuel](#) and [County of Los Angeles v. Mendez](#)), although both were narrow in light of thornier issues on which the Justices were likely evenly divided. Meanwhile, the First Amendment decision in [Packingham](#), recognizing the importance of web-based social media sites, was powerful and reminiscent of the Chief Justice’s similar opinion in the “cellphone search case” three Terms ago ([Riley](#)). In addition, the ineffective assistance decision in [Jae Lee v. United States](#), holding that erroneous advice about mandatory removal may vacate a guilty plea if the defendant would otherwise have gone to trial, is quite important in (once again, see [Padilla](#), 2010) recognizing the realities of plea bargaining in cases with immigration consequences.

On the statutory side, the decision in [Salman](#) was viewed as a “blockbuster” in the securities fraud area. It likely will extend the reach of the “insider trading” doctrine which many view as essential to policing an “honest” market in publically-traded companies.

Finally, on substance, I urge you to look at the “Opinions in Connection with Orders” section of this booklet (page 35). You will see that death penalty cases are driving deep disputes among the Justices when in Conference. Additionally, I think you will find the list of cases that have been granted for review next Term, found at the end of this booklet (p. 39), very interesting. The final page of the booklet (p. 41) gives you a visual representation of how the criminal law work of the Court was divided among the Justices.

For the first time in the 20-year history of this panel, this booklet has “clickable” links to the cases and other materials, in its electronic version. If you want an electronic copy, please email Professor Little or the staff at the Criminal Justice Section and it will be sent to you.

Undoubtedly our panelists will have more to say about these cases, as well as others I have not mentioned here. A tape of the session is available from the ABA’s Criminal Justice Section. I hope those of you attending will ask hard questions about cases we discuss – and about cases we omit – as the panel unfolds. Your active engagement is what makes doing this work for the Criminal Justice Section both fun and interesting!

And if you would like to receive timely email notices of the Supreme Court's criminal-law opinions during each Term, you should join the ABA's Criminal Justice Section and subscribe to its email updates. I urge you to take advantage of this unique membership benefit.

I look forward to sharing more fascinating and significant rulings with you next summer. Please remember to "Do Justice" in whatever you do!

Best wishes until next year,

– Professor Rory K. Little
U.C. Hastings College of the Law
San Francisco
little@uchastings.edu

August 2017

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 review of the Term's work, the "List of Decisions" above provides one-sentence descriptions for each decision and the later page number 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 civil cases that relate to criminal law topics or fact-areas are included. For example, we include civil "excessive force" or *Bivens* cases, and immigration decisions, because they often relate to criminal law issues (if not immediately, then in the future). This became particularly so for immigration after *Padilla v. Kentucky* (2010), and this Term's *Jae Lee* decision, holding 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, its date and publication cite, 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 follows 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 case are necessary to have a sophisticated understanding of what the case does or does not, hold – as well as to see what issues are reserved or are likely to be addressed 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. While all separate opinions are summarized, we sometimes **bold certain important phrases** in the decisions to aid the time-pressed "skimming" reader. I also use quotes from the decisions (not paraphrases) wherever 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, we describe decisions issued in non-argued cases (summary reversals). We also provide summaries of interesting dissents or concurrences regarding Orders issued this Term. Most often these are 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. And the last page of this booklet is a chart showing what Justices wrote which opinions this Term (including separate concurring and dissenting opinions) in criminal and related cases. This can provide a useful “snapshot” of which Justices are writing what, and how much, in the field of criminal law.

These materials are the product of Professor Little alone (with drafting assistance from his research assistant). 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 and verb tenses or singular-plurals, as well as other non-substantive changes, may have been made. Finally, remember that these are merely summaries. 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 2016 OPINIONS**

I. CONSTITUTIONAL DECISIONS

A. FIRST AMENDMENT

[Packingham v. North Carolina](#), 137 S.Ct. 1730 (June 19, 2017) 8-0 (**Kennedy**; *Alito* concurring with Roberts and Thomas), reversing 777 S.E.2d 738 (N.C. 2013).

Headline: Statute making it a felony for sex offenders to access social media sites like Facebook is unconstitutional under the First Amendment.

Facts: In 2002, 21-year-old Packingham had sex with a 13-year-old and pled guilty to taking indecent liberties. This made him a registered sex offender, “a status that can endure for 30 years or more.” In 2008, North Carolina enacted a statute making it a felony for registered sex offenders to access “commercial social networking websites.” It applied to social media sites like Facebook, Twitter, and LinkedIn. In 2010, Packingham posted a Facebook status update saying “God is Good” after a traffic ticket was dismissed. He was indicted under the N.C. statute. There was no allegation that he had ever contacted a minor via social media. The trial court denied his motion to dismiss the indictment on First Amendment grounds and imposed a suspended sentence. The NC court of appeals reversed on First Amendment grounds, but the North Carolina Supreme Court reversed (two justices dissenting), ruling that the statute was “carefully tailored” to reach only websites that provide “an opportunity to gather information about minors.” The majority said that offenders could still use websites such as the Paula Dean Network to learn about news and express opinions.

Kennedy (for 8): [First sentence, without citation:] “A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” For example, “a street or a park is a quintessential forum” protected by the First Amendment. While “in the past there may have been difficulties” in identifying “in a spatial sense” the “most important places” for operation of this principle, “today the answer is clear. It is cyberspace.” [There follows a brief, Kennedy-esque discussion of social media sites like Facebook, Twitter and LinkedIn – Facebook’s 1.79 billion users “is about three times the population of North America.” Reference the “vast democratic forums of the Internet,” quoting [Reno v. ACLU](#), 1997. “The Cyber Age is a revolution of historic proportions” and “we cannot appreciate yet its full dimensions.” Thus “the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection.”

Even if this statute is assumed to be content-neutral and subject only to “intermediate scrutiny,” it “cannot stand.” While new technology can and always has been used to commit crimes, that cannot “insulate[]” it “from all constitutional protections.” This statute enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. (Perhaps a “more specific law” could pass muster; we are also troubled, but do not decide, that this law applies to persons “who already have served their sentence and are no longer subject to the supervision of the criminal justice system. Even convicted criminals – and in some instances especially convicted criminals – might receive legitimate benefits from” social media.) Social media sites provide much more than possibly communicating with minors; they are tools for checking employment ads, and speaking and listening in the “modern public square.” In sum, “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” The state “has not met its burden to show that this sweeping law is necessary ... to serve th[e] purpose” of keeping sex offenders away

from vulnerable victims. The best analogy is when [we struck down](#) an ordinance “prohibiting any First Amendment activities” at LAX. If that law was not constitutional, “it follows with even greater force” that this “complete bar” is unconstitutional. These “websites [are] integral to the fabric of our modern society and culture.”

Alito concurring, joined by Roberts and Thomas: I agree with the Court’s conclusion in light of this statute’s “staggering reach” and “extraordinary breadth.” But I cannot join the majority’s “undisciplined dicta” and “deeply troubling” “musings.” The Court’s opinion will be misinterpreted to equate the “entirety of the internet with public streets and parks.” States should not be powerless to restrict dangerous sexual predators from accessing teenage dating sites or other teen-targeted sites. **[Ed. note:** But the majority opinion pretty clearly says it does not extend that far.]

The North Carolina law easily satisfies the “legitimate government interest” test, because prevention of sexual exploitation and abuse of children is a hugely important government interest. But the statute sweeps too far, reaching websites unlikely to facilitate sex crimes against a child.

However, the Court fails to explain the implications of its new free speech musings about cyberspace. Unlike physical locations where parents can more easily monitor who their children speak with, the internet permits un-witnessed meetings in which children are not protected by the watchful eye of teachers, parents, or spectators. **[Ed. note:** this critique by Justice Alito, like the majority’s dicta, seems overbroad and open to contest. For example, there are “spectators” to postings on many websites.] The internet offers anonymity and is a breeding ground for false identities. The majority should follow its own advice and “should be cautious in applying our free speech precedents to the internet,” “taking one step at a time.”

B. FOURTH AMENDMENT

[Manuel v. City of Joliet](#), 137 S.Ct. 911 (Mar. 21, 2017), 6-2 (**Kagan**; Thomas dissenting; Alito dissenting with Thomas), reversing and remanding 590 Fed.Appx. 641 (7th Cir. 2015).

Headline: Allegedly **unlawful detention even after judge detains finding probable cause is properly analyzed as an unreasonable seizure** under the Fourth Amendment, not the due process clause. The case is otherwise remanded for further analysis of the proper “elements of, and rules associated with” such a claim

Facts: Taking Manuel’s complaint as true, he was arrested by an officer who beat him and called him racial slurs, without probable cause. Manuel alleged that a field test on pill he was carrying, and a later test at the police station, came back negative, but the officers lied and said the results were positive. A county judge ordered Manuel detained on these allegedly false complaints. Manuel was detained for seven weeks until the state dismissed the charges (which, he alleges, was not until four weeks after a state lab test on the pills also came back negative).

Two years after the dismissal, Manuel sued for damages under 42 U.S.C. §1983, alleging both arrest and detention without probable cause under the Fourth Amendment. The district court dismissed for two reasons. First, it ruled that the two-year statute of limitations began to run from the date of the arrest, not the later date of release, and thus had expired. Second, the court followed Circuit precedent to rule that unlawful detention after “legal process” begins – here the judge’s probable cause detention order – must be analyzed under the Due Process Clause, not the Fourth Amendment. Because state law provides adequate remedies for the due process violation ([Parratt v. Taylor](#) (1981)), the federal case was dismissed. The Court in [Albright v. Oliver](#) (1994) had left

open whether there is a constitutional tort called “malicious prosecution” and if so, what rules might govern it. The Circuits have split on various questions in this area, so cert was granted here.

Kagan (for 6): Manuel’s claim “fits the Fourth Amendment ... as hand in glove.” That pretrial detention without probable cause is a Fourth Amendment issue was “decided some four decades ago” in [Gerstein v. Pugh](#) (1975); and the alternative due process theory was advanced and rejected in that case. Five Justices in two separate opinions in *Albright* re-endorsed this idea, and agreed that “the Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.” This is true even if “legal process” has occurred, “when legal process itself goes wrong” as is alleged here.

Our opinion only addresses “the threshold inquiry” that the Fourth Amendment properly governs. Other issues are remanded for further consideration now that the Fourth Amendment basis is clear. [“We are a court of review, not of first view.”](#) While courts must “look first to the common law of torts,” common law rules “guide rather than control” the constitutional analysis. Courts need not adopt common law rules wholesale. For example, many courts have held that there must be a “favorable termination” of the criminal case, before suit may be filed, which would make Manuel’s lawsuit timely. “Other still-live issues relating to the contours” of this Fourth Amendment claim may also be considered.

[**Ed. Note:** Interestingly, footnote 8, which definitely looks like an [eight-Justice compromise](#), says that “once a trial has occurred, the Fourth Amendment drops out,” and a due process analysis might apply to wrongful incarceration that continues after conviction. Why this is so is largely unexplained – and could impact damages claims filed by “actually innocent” defendants who can prove their innocence only years after conviction.]

Thomas dissenting: I join Alito’s dissent in full, but I would not even concede that a Fourth Amendment claim continues through a “first appearance,” since that makes no difference in this case.

Alito dissenting, joined by Thomas: I agree that the Fourth Amendment claim may persist after some “legal process” occurs soon after an arrest. “But if the Court means ... that new Fourth Amendment claims continue to accrue as long as pretrial detention lasts, the Court stretches the concept of a seizure much too far.” The Framers did not intend that “seizure” means “a continuing condition,” and the Court’s ruling does not “follow from settled precedent.” Instead, the common law tort of “malicious prosecution” claim applies, and that claim should be adjudicated under the Due Process Clause. Also, the Court should not avoid the “accrual” issue that I believe we granted cert to decide. [**Ed. Note:** Justice Alito has a plausible argument here -- the Court’s non-decision is likely a result of an internal 4-4 tie on the issue, one of a number of eight-Justice-driven decisions this Term.] Manuel cannot take advantage of the “favorable termination” timing rule unless his claim sounds in the common-law tort of “malicious prosecution.” But if that is true, then it is governed by the due process clause, not the Fourth Amendment – and dismissal under *Parratt* was correct. The majority’s footnote 8 shows the flaw in the Court’s logic. **The “well-known medical maxim – first do no harm – is a good rule of thumb for courts as well”** [a typical understated zinger from Alito.]

[County of Los Angeles v. Mendez](#), 137 S.Ct. 1539 (May 30, 2017), 8-0 (Alito), [vacating and remanding](#) 815 F.3d 1178 (9th Cir. 2016).

Headline: When law enforcement uses force that is judged “reasonable” based on “circumstances relevant to that determination,” then **“a different Fourth Amendment violation cannot transform**

[that] reasonable use of force into an unreasonable seizure.” The Ninth Circuit’s “provocation” doctrine is rejected -- but the specific facts are remanded for possible Fourth Amendment damages.

Facts: County Sheriff’s deputies went to a home to look for a parolee-at-large said to be armed and dangerous. Although they did not have a warrant they knocked on the front door, identified themselves, and tried to force their way in. Meanwhile, two deputies went to search the backyard; they had been told during a briefing that a homeless man lived in the yard with a pregnant woman. The two deputies opened the door of a shack in the backyard – they did not have a warrant nor did they announce themselves. Mendez, lying on a bed inside, thought it was the owner. He moved a BB gun in order to stand up. The deputies saw this, yelled “gun!,” and both deputies fired a total of 15 rounds. Remarkably, Mendez and his (now) wife were not killed, although both were severely injured and Mr. Mendez’s leg had to be amputated below the knee. They sued for damages in federal court, alleging three Fourth Amendment violations: entry without a warrant, entry without knock and announce, and excessive force.

The district judge found for the Mendezes after a bench trial. He ruled for them on the warrantless entry and failure to knock claims, but found damages to be minimal because the BB gun was a “superceding cause” of their injuries. On “excessive force,” he found that it was reasonable for deputies to fire “given their belief that a man was holding a firearm rifle threatening their lives.” But following the Ninth Circuit’s “provocation” rule, he found that the officer’s had intentionally provoked the situation by their “independent constitutional violations” of warrantless and no-knock entry. Roughly \$4 million was awarded in damages.

The Ninth Circuit affirmed, on a slightly different theory. Because other officers had knocked at the house’s front door, the Court found the deputies were entitled to qualified immunity on the no-knock claim since the law was not “clearly established” that a separate knock and announce was needed at the backyard shack. But they affirmed that the warrantless entry was a separate constitutional violation that allowed liability under their “provocation” precedent. The panel also said that even without the “provocation” doctrine, the deputies were liable under “basic notions of proximate cause,” because the Second Amendment right to have a firearm in defense of the home made it “reasonably foreseeable” that an unannounced entry could be met by someone with a gun.

Alito (for 8): The “provocation” doctrine is rejected. Where officers engage in a shooting that is reasonable under the circumstances, the fact of a prior and independent constitutional violation cannot transform their reasonable action into an unreasonable constitutional violation. The provocation doctrine “mistakenly conflates” a reasonable Fourth Amendment action with a separate, prior constitutional violation.

We do not decide other questions here. In particular (footnote *), we do not decide whether our settled excessive force precedent, [Graham v. Connor](#) (1989), and its emphasis on the “totality of the circumstances,” might allow liability here by “taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it.” The Circuit’s alternative proximate cause ruling was based on the “unannounced” entry, but the Circuit found the deputies had qualified immunity for not announcing. Thus the Circuit’s “murky causal link” is remanded for further proceedings (and the Court directs the lower court to specific pages of the parties merits briefs here). **[Ed. note:** This last ruling seems specifically designed to prevent a 4-4 tie; while the “provocation” theory is rejected, the potential for upholding the damages on a “totality” proximate cause theory is preserved, in this tragic case in which, [as Justice Sotomayor pointed](#) out at [oral argument](#), the plaintiffs were entirely blameless.]

[Supplemental Ed. note: This case is eerily similar to *Hernandez v. Mesa*, below, in that unarmed individuals were shot by law enforcement and their claims are premised on a Fourth Amendment

“excessive force” theory. And like *Hernandez*, this case is remanded for further consideration on its facts. But this case was decided before *Ziglar v. Abbasi*, below at page __; and here, there is no suggestion that the *Bivens* theory itself is in danger.]

[Hernandez v. Mesa](#), 137 S.Ct. 2003 (June 26, 2017), 5-1 to 2 (**per curiam**; [Thomas](#) dissenting; [Breyer](#) dissenting with Ginsburg), reversing and remanding 785 F.3d 117 (5th Cir. 2015, *en banc*).

Headline: In this “tragic cross-border” shooting case, the issues are remanded for further consideration in light of our recent major decision that addresses [Bivens](#) actions and qualified immunity, [Ziglar v. Abbasi](#) (June 19, 2017). [**Ed. Note:** this much-publicized case has the aroma of a hard-fought 4-4 tie on the major issues]

Facts: Because the case is remanded in its entirety, the facts are sparsely reprised. A U.S. Border Patrol agent (Mesa) shot and killed a 15-year-old Mexican juvenile (Hernandez). Mesa was on the U.S. side of the border, Hernandez was on the other when he was shot. A group of Mexican boys were allegedly running across the dry culvert of the Rio Grande (the middle of which is the border, albeit unmarked precisely), touching the American fence, and running back. Some of the boys were allegedly throwing rocks, and some were detained by US authorities. (Justice Breyer’s dissent appends a diagram and a 1968 photograph of the culvert, which at that time had a little water in it.) The US Department of Justice declined to file any discipline or criminal charges; Hernandez’s family sued Mesa and others for damages in federal court. The Fifth Circuit ultimately affirmed dismissal, ruling that (1) there was no Fourth Amendment claim because Hernandez was a foreign national with “no significant voluntary connection” to the United States; and (2) Mesa was entitled to qualified immunity on any possible due process claim because there was no “clearly established” law establishing a constitutional cause of action.

Per curiam opinion for 5: We recently decided a major case on implied constitutional causes of action (i.e. *Bivens* claims), and on qualified immunity: *Ziglar v. Abbasi* (June 19). We clarified that before allowing an implied *Bivens* claim, a court must consider various “special factors counselling hesitation.” The Court of Appeals should have the first opportunity to consider this case under *Ziglar*. “The Fourth Amendment question in this case is sensitive and may have consequences that are far-reaching,” and it would be “imprudent” for us to decide it when reconsideration under *Ziglar* might render it “unnecessary” on these facts (because perhaps no *Bivens* remedy exists here at all).

As for qualified immunity, the Court of Appeals erred when it based its ruling on Hernandez’s Mexican nationality, because “facts an officer learns [only] after the incident ends ... are not relevant” to the question. [**Ed. Note:** There is a tiny grammatical twist here: the Court cites a precedent saying that qualified immunity analysis is limited to “facts that were **knowable** to the officers at the time.” It does not say “known. But this does not seem to have bothered any of the three opinions here.] So further analysis of qualified immunity is also remanded.

The Court closes by saying that “the facts alleged in the complaint depict a disturbing incident resulting in a heartbreaking loss of life. Whether petitioners may recover damages for that loss” is for remand. [**Ed. Note:** This final paragraph seems unnecessary, and it seems to me that it embodies a suggestion to “settle the case,” from at least four of the Justices, that couldn’t be more clear.]

Thomas dissenting: I would now decline to “extend” *Bivens* to “cross-border conduct.”

Breyer dissenting, joined by Ginsburg: I would rule that the Fourth Amendment does extend across the border in circumstances like these, and that a *Bivens* action would thus “ordinarily” exist.

Bivens itself was a Fourth Amendment case, and thus settles the question whether it creates its own damages remedy for violation. See my dissent in *Ziglar*. This empty culvert is a “special border-related area (sometimes known as a ‘limitrophe’)” in which the Fourth Amendment should apply (as “international law recognizes”). “Serious anomalies” would arise if the Fourth Amendment did not apply to this area.

C. FIFTH AMENDMENT (Double Jeopardy)

[Bravo-Fernandez v. United States](#), 137 S.Ct. 352 (Nov. 29, 2016), 8-0 (Ginsburg; Thomas concurring), affirming 790 F.3d 41 (1st Cir. 2015).

Headline: The factual “issue preclusion” double jeopardy doctrine of *Ashe v. Swenson* cannot apply to mixed inconsistent verdicts of acquittal and conviction, to prohibit retrial on a conviction count that is reversed on appeal.

Facts: Here a jury rendered inconsistent verdicts on multiple counts, convicting on one count and acquitting on the other even though both counts apparently turned on the same disputed fact. Bravo-Fernandez (“Bravo”) was federally prosecuted for allegedly paying a bribe to a Puerto Rican politician, in the form of an all-expenses paid trip to Law Vegas. The jury convicted on the substantive bribery count, but acquitted on counts that charged interstate travel, and conspiracy, to bribe, even though only the bribe itself was disputed. Inconsistent verdicts are constitutionally valid under *United States v. Powell* (1984). But on appeal, the First Circuit vacated the conviction count due to an error in the jury instructions. Bravo then argued that retrial should be prohibited under [Ashe v. Swenson](#) (1970) because the only disputed issue at trial had been whether the bribe had been paid (both travel and agreement were conceded), and the jury must have concluded that the bribe had not been paid in order to acquit on the two counts. *Ashe* stands for the proposition that once a factual issue has been validly determined in a criminal case, “it cannot be litigated again in future criminal prosecutions” [endorsing constitutional “issue preclusion” *res judicata*, as the idea is known to civil procedure wonks.] The district court and First Circuit rejected Bravo’s argument, ruling that the inconsistent verdicts simply make it “impossible to determine what [the] jury necessarily decided.”

Ginsburg (for 8): The First Circuit was correct. The normal rule is that a conviction reversed on appeal may be retried, “shorn of the error” that required reversal. The addition of an acquittal on another count does not change this rule, because under *Ashe* the defendant “bears the burden of demonstrating that the jury necessarily resolved [the disputed fact] in their favor.” Here, the inconsistency could have been a result of leniency or compromise, rather than resolution of the factual issue in Bravo’s favor. Our precedent in [Yeager](#) (2009), which extended *Ashe* to bar retrial of “hung” counts rendered together with acquittals, is distinguishable, because hung jury verdicts “have never been accorded” meaning in our system. But convicted counts do mean something, even if reversed on appeal. “Inconsistent verdicts shroud in mystery what the jury necessarily decided.” So Bravo is entitled to a new trial without the erroneous jury instruction [which, **ed. note**, might actually not have been erroneous at all] – but he is “entitled to no more.”

Thomas concurring: “As originally understood, the Double Jeopardy Clause d[id] not have an issue preclusion prong,” and “in an appropriate case we should reconsider the holdings of *Ashe* and *Yeager*.”

D. SIXTH AMENDMENT

[Buck v. Davis](#), 137 S.Ct. 759 (Feb. 22, 2017), 6-2 (**Roberts**; Thomas dissenting, joined by Alito), reversing 623 Fed.Appx. 668 (5th Cir. 2015).

Buck includes a ruling on ineffective assistance of counsel, but its holdings are also based on the Eighth Amendment and habeas corpus law. Its detailed summary appears below at p. 26 under “Habeas Corpus.”

[Pena-Rodriguez v. Colorado](#), 137 S.Ct. 855 (Mar. 6, 2017), 5-3 (**Kennedy**; Thomas dissenting; Alito dissenting, joined by Roberts and Thomas), reversing 350 P.3d 287 (Colo. 2015).

Headline: Where a juror makes a clear statement showing that racial animus may have motivated their criminal verdict, the no-impeachment rule for jury deliberations must give way to the Sixth Amendment’s guarantee of a fair jury trial.

Facts: Pena-Rodriguez (“Pena”) was prosecuted on sexual assault charges. The jurors, who had all said nothing in response to various “any bias?” *voir dire* questions, convicted. They were instructed that they did not have to discuss their deliberations with anyone. But two jurors soon volunteered to defense counsel that another juror had voiced anti-Hispanic sentiments during deliberations. Counsel reported this to the court, and with the court’s supervision obtained affidavits from the two jurors, who swore that the juror had said: that “Mexican men ... believe they c[an] do whatever they want[] with women;” that Mexican men are physically controlling of women; that “I think he did it because he’s Mexican;” and that Pena’s alibi witness was not credible because he’s “an illegal” (when in fact he was not).

The trial court acknowledged that the juror appeared biased about race, but denied a motion for new trial because Colorado, like every other state, has a rule protecting jury deliberations from post-verdict inquiry and prohibiting jurors from testifying about matters “occurring during the course of the jury’s deliberations.” Pena was sentenced to probation and sex offender registration. The closely-divided Colorado appellate courts affirmed. At least 17 jurisdictions have an exception to their “no impeachment” rules for race bias. So *cert* was granted.

Kennedy (for 5): Although the American jury system “has its flaws,” it is “a central foundation of our justice system and our democracy.” It is “a necessary check on governmental power.” Acceptance of jury verdicts is “essential to respect for the rule of law.” Thus a strong version of the no-impeachment rule has evolved (from the “Mansfield rule” of 1785) to protect secrecy and candor in jury deliberations, and protect jurors from harassment. By 1915 a strong federal rule had emerged, although we have always recognized that exceptions might arise “in the gravest and most important cases” where “the plainest principles of justice” were at issue (*Reid*, 1852). See Fed. R.Evid. 606(b) today.

Race animus is also treated with special sensitivity in our constitutional system. (We and the parties use “race” and “ethnicity” as equivalent here.) The “imperative to purge racial prejudice from the administration of justice” is given great “force ... by the ... Civil War Amendments.” Today, “discrimination on the basis of race” is “odious in all respects.” “Permitting racial prejudice in the jury system damages ... the jury’s role as a vital check” in our system.

In two prior cases, this Court has refused to find an exception to the no-impeachment rule: [Tanner](#) (1987) (jurors allegedly under the influence of drugs during the trial) and [Warger](#) (2014) (it came out during deliberations that juror had allegedly lied in voir dire about disqualifying factors). *Warger*

recognized, however, that an exception might arise for “jury bias so extreme that ... the jury trial right has been abridged.” We think that evidence of juror race bias is such a case. Unlike “anomalous behavior from a single jury or juror,” racial bias is a “familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.” Voir dire and other measures are also “insufficient” to expose race bias, particularly because of the “stigma” attached both to admitting it and making an accusation of it. **While “not every offhand comment” will justify further jury inquiry, a showing “that racial animus was a significant motivating factor in the juror’s vote to convict” may.** Trial courts have “substantial discretion” in determining whether remarks merit further inquiry, the proper procedure, and the appropriate remedy. And state rules that prohibit affirmative contact of jurors by counsel are still valid -- but here, the jurors “came forward of their own accord.” Other safeguards exist, that should “help ensure that the exception [for race bias, constitutionally required here,] is limited to rare cases.”

Thomas dissenting: “The Court’s holding cannot be squared with the original understanding of the Sixth or Fourteenth Amendments.” There is no “definitive common-law tradition” supporting exceptions to the no-impeachment rule [although Justice Thomas does cite some early state common-law exceptions], and the strong no-impeachment rule was dominant when the Fourteenth Amendment was adopted. The Court should not use the Constitution to “end the political process and impose[] a uniform, national rule” that the Constitution does not require.

Alito dissenting, joined by Roberts and Thomas: The Court’s “intrusion” is a “startling development” that disrupts an “age-old rule” that has been in place “for centuries.” [Ed. note: this is undoubtedly an overstatement, as both the majority and Thomas’s opinion, and indeed Justice Alito’s own historical account, demonstrate.] Other well-developed mechanisms “protect a defendant’s Sixth Amendment rights:” voir dire; observation of jurors by court personnel, counsel, and judges; juror reports of bias pre-verdict; and evidence that does not come from jurors. *Tanner* and *Warger* found these mechanisms sufficient, and the majority does not make “a sustained argument” to the contrary here. Meanwhile, the Sixth Amendment guarantees an “impartial jury” and does not distinguish “some sort of hierarchy of partiality or bias.” Race bias may indeed be unique and special,” but this does not address each individual defendant’s right to be free of bias of all kinds. “This disparate treatment is unsupportable under the Sixth Amendment.” At the very least it seems likely that today’s decision will be “expanded” to other disfavored categories like sex or religion, and the “harms that the no-impeachment rules were designed to prevent” will be invited. I question whether “our system of trial by jury can endure this attempt to perfect it” in the Court’s “well-intentioned” decision” today.

McWilliams v. Dunn, 137 S.Ct. 1790 (June 19, 2017), 5-4 (**Breyer**; Alito dissenting), reversing and remanding 634 Fed.Appx. 698 (11th Cir. 2015).

Headline: *Ake v. Oklahoma* (1985), **requires the State to provide, to an indigent defendant whose mental condition is at issue, a competent psychiatrist to examine the defendant and then assist in evaluation, preparation, and presentation of the defense.**

Facts: McWilliams was convicted of rape and capital murder in Alabama in 1986. He was found competent to stand trial, but he had suffered serious head injuries as a child and had a history of psychiatric and psychological evaluations, was on psychotropic medications while in prison, and a prior psychologist had concluded that he had “blatantly psychotic thought disorder” and needed treatment. Three examining psychiatrists testified for the state at trial, but were unaware of much of McWilliams’ history. The State failed to provide mental health records before the trial.

Five weeks before the sentencing hearing before the judge (a jury having already recommended death by a 10-2 vote), the state was ordered to provide mental health records. Some arrived the day before the hearing, others the morning of. A state psychiatrist also evaluated McWilliams at this time and, two days before the hearing, reported “diagnostic dilemmas” because although McWilliams was perhaps trying to appear mentally ill, it was also “quite apparent that he had some genuine neuropsychological problems” and an “obvious neuropsychological deficit.” McWilliam’s counsel repeatedly asked for time to evaluate the information, and for expert assistance to “understand” it. When those motions were denied, defense counsel moved to withdraw because “the arbitrary position taken by this Court” made the proceeding a “mockery.” That motion was also denied (the judge falsely saying that “I would have given you the opportunity”), and the judge sentenced McWilliams to death. The Alabama Court of Criminal Appeals found that *Ake* required only a “competent psychiatrist” and that this was satisfied here. Further appeals and habeas were unsuccessful.

Breyer (for 5): *Ake v. Oklahoma* clearly established that when an indigent defendant’s mental condition is “relevant,” **the State is required “to provide the defense with ‘access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense’”** (brackets and emphasis in the Court’s opinion). The mental health expert provided must be “sufficiently available to the defense and **independent** from the prosecution to effectively assist.” This is a constitutional rule based on the right to “prepare an effective defense.”

Preliminarily, “no one denies” that the preconditions for an *Ake* expert were present. And “the episodic assistance of an outside volunteer” psychiatrist is insufficient. Finally, “the record does not support” the State’s claim that McWilliams “never asked for more assistance.” **[Ed. note:** A remarkably understated way of saying that the State’s argument on this point is simply, and blatantly, false.] Finally, we do not need to decide today whether *Ake* requires “a qualified expert retained specifically for the defense,” although “as a practical matter” that may be “the simplest way” to meet the constitutional requirement. A narrow ruling on how *Ake* was applied here is “sufficient to resolve the case.” (This is so even though we granted *cert* on the “independent expert” question and did not grant on the specific “as applied” question here. Our *cert* grants do “not bind us to issue a sweeping ruling when a narrow one will do.”)

On these facts, Alabama’s provision of mental health assistance fell so dramatically short of what *Ake* requires” that it was “contrary to or an unreasonable application of clearly established Federal law” as the federal habeas statute requires. And “we do not see how” any expert could have performed the required *Ake* functions in the short time granted by the trial court. However, we leave for the Eleventh circuit on remand the question whether Alabama’s “error” had the “substantial and injurious effect or influence” on the capital decision apparently required by *Davis v. Ayala* (2015). This Court is a “court of review, not of first view.” **[Ed. note:** This phrase became a frequent incantation to support remands in close cases decided during the 14 month eight-Justice Court after Justice Scalia’s death in February 2016, until Justice Gorsuch joined the Court in April 2017.]

Alito dissenting, joined by Roberts, Thomas, and Gorsuch: First, we should have answered the question we granted review on; and we think it “plain” that “*Ake* did not clearly establish that a defendant is entitled to an expert that is a member of the defense team.” Second, the Court ought not answer the as-applied “separate question on which it expressly declined review.” Instead, the decision below should be affirmed based on the negative answer to the question we granted on. The Court’s avoidance of this is “a most unseemly maneuver.” Not following our own rules is endorsing

a “bait and switch tactic” that we have condemned in litigants. Deciding this case on a question we expressly denied review on is also “acutely unfair to Alabama.”

Ake clearly had “ambiguous” language in it, “perhaps deliberately so,” pointing in both directions on the “independent expert” question, which means the law was not “clearly established” as is required to grant federal habeas relief. “The opinion in *Ake* has all the hallmarks of a compromise.” [Ed. note: Justice Alito is certainly right about this understanding of *Ake*. Also, to support his point, he notes that “commentators” have noted this “time and time again,” and provides what I think must be the longest string cite ever found in text (as opposed to footnotes) in a USSCt opinion.] In any case, any error in this case was “harmless” and “nothing in the majority opinion prevents the Court of Appeals from reaching the same result on remand.” The Court’s decision today “represents an inexcusable departure from sound practice.”

[Lee v. United States](#), 137 S.Ct. 1958 (June 23, 2017), 6-2 (**Roberts**; Thomas dissenting with Alito), reversing 825 F.3d 311 (6th Cir. 2016).

Headline: It is **ineffective assistance to erroneously advise client that his guilty plea will not result in mandatory removal**. Prejudice is shown when **defendant shows he would not have accepted the plea offer but for that erroneous advice**.

Facts: Lee moved with his parents to the United States from Korea in 1982 when he was 13. He never returned to South Korea and he lived in the U.S. throughout as a lawful permanent resident. In 2009, he was indicted for possessing Ecstasy with intent to distribute, and the evidence showing Lee’s guilt was overwhelming. He apparently had no prior criminal record, and was offered a plea bargain to a one-year sentence (thereby avoiding five-years in prison). In response to Lee’s repeated inquiries, his retained lawyer advised Lee – erroneously – that he would not be deported after his plea. That was wrong – removal was mandatory for Lee’s conviction. At the plea hearing, when the judge advised that “conviction could result in your being deported,” Lee said “I don’t understand” and turned to his lawyer, who advised that this was a “standard warning” but that Lee would not be deported.

Upon learning that in fact the government intended to deport him, Lee filed a collateral §2255 motion, alleging constitutionally ineffective assistance of counsel. At the evidentiary hearing, among other things, Lee’s lawyer admitted his erroneous advice and that it had been the “determinative issue in Lee’s decision” to accept the plea. A Magistrate recommended granting Lee’s motion, but the district court denied it, because the “overwhelming evidence of Lee’s guilt” meant that he would have been convicted even if he had rejected the plea and gone to trial, so there was no “prejudice” under *Strickland* -- the “result” would not have been different. The Sixth Circuit affirmed, noting that even if the proper test was “would not have pleaded guilty and would have insisted on going to trial (quoting [Hill v. Lockhart](#) (1985)), “no rational defendant ... facing overwhelming evidence ... would proceed to trial rather than take a plea deal with a shorter prison sentence.”

Interestingly, Lee chose to remain in immigration detention for six additional years beyond his one-year sentence, while this appeal was resolved, rather than be deported to Korea.

Roberts (for 6): The government concedes deficient attorney performance in this case. We think there is “prejudice” because “**Lee’s claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence.**” [Ed. note: Very interesting to speculate what exactly will happen on remand; unless acquitted, Lee is still subject to mandatory deportation. But there may be creative lawyering, and judging, still to come – such as bargaining to a non-deportable offense.] “Common sense ... recognizes that there is more to

consider than simply the likelihood of success at trial.” The relevant question is not whether the outcome of a trial would be different, but rather whether the result of the lawyer’s mis-advice was to deny Lee a trial altogether. Thus *Lockhart* sets the correct test for this situation. “Lee ... would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal.” There is a difference between “certain” deportation, and “almost certain.” This is not allowing Lee to claim the benefit of an idiosyncratic “lawless decisionmaker.” It is simply evaluating the effect of deficient performance on the decision to claim the right to jury trial, or not. (We “do not reach” Lee’s argument that he might have also bargained for a non-deportable plea offer.) These circumstances are “unusual,” but a “case-by-case examination” is appropriate, not a “categorical rule” where we judges decide that the evidence is overwhelming.

Thomas dissenting, joined by Alito in all but Part I: First, I dissented in *Padilla* (2010) from applying *Strickland* to plea bargaining, and I adhere to that [Alito does not join this statement]. I also think the majority’s “novel standard for prejudice ... does not follow from our precedents.” It is “inconceivable” that Lee would have obtained “a more favorable result” had he rejected this offer and gone to trial. It is not “reasonably probable” that Lee would have ended up “better off.” *Strickland* does not permit “relying on the possibility of a ‘Hail Mary’ to establish prejudice.” The “single line from *Hill [v. Lockhart]*” relied on by the Court is not controlling. And the “pernicious consequences” for the value of the finality of plea bargains “imposes significant costs on courts and prosecutors.” Lee has “admitted his guilt, ... has no bona fide defense strategy,” and faces overwhelming evidence of guilt. The costs of rendering plea bargains non-final are not justified.

E. EIGHTH AMENDMENT

Buck v. Davis, 137 S.Ct. 759 (Feb. 22, 2017), 6-2 (**Roberts; Thomas** dissenting, joined by Alito), reversing 623 Fed.Appx. 668 (5th Cir. 2015).

Buck is a capital case but its rulings are based on points related to habeas corpus law. So its detailed summary appears below at page 26 under “Habeas Corpus.”

Moore v. Texas, 137 S.Ct. 1039 (Mar. 28, 2017), 5-3 (8-0 in part) (**Ginsburg; Roberts** dissenting, joined by Thomas and Alito), vacating and remanding 470 S.W.3d 481 (5th Cir. 2015).

Headline: States do not have “unfettered discretion” in determining whether a defendant is mentally disabled so that his execution would be unconstitutional, **must utilize “the medical community’s current standards,” not old ones or “non-clinical” factors.**

Facts: Moore received a death sentence for killing a clerk during a convenience store robbery in 1980 when Moore was 20. In *Florida v. Hall* (2014), we ruled that “adjudications of intellectual disability should be informed by the views of” medical experts. After a two-day evidentiary hearing, a Texas state habeas judge applying “current medical diagnostic standards” concluded that Moore is intellectually disabled and therefore may not be executed under the Eighth Amendment and *Atkins v. Virginia* (2002). The Texas Court of Criminal Appeals (“CCA”) reversed, saying that the state habeas judge should have applied the 1992 guidance adopted by the CCA in *Briseno* (Tex. 2004). In *Briseno*, the CCA relied on “stereotypes” and “lay perceptions of intellectual disability” while expressing suspicion of current medical standards as “exceedingly subjective.”

Ginsburg (for 5): We vacate the CCA’s judgment and remand. *Hall’s* ruling “cannot sensibly be read to give courts leave to diminish the force of the medical community’s consensus.” The

state's *Briseno* non-clinical factors "create an unacceptable risk that persons with intellectual disability will be executed." [The technical details of the Court's opinion, while of great importance in capital sentencing, are omitted here. The majority conducts an extremely detailed review of the state habeas court's findings, the Texas caselaw in and after *Briseno*, and the flaws in the *Briseno* analysis.] *Hall* "does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." In fact, even in Texas the *Briseno* analysis is limited to capital cases -- Texas itself does not apply it in other contexts where it determines intellectual disability, like medical evaluations of elementary school students. *Briseno* "pervasively infected the CCA's analysis," so this case is remanded to that Court "for further proceedings not inconsistent with" our opinion today.

Roberts dissenting, joined by Thomas and Alito: I agree that the *Briseno* factors "are an unacceptable method of enforcing ... *Atkins*." But I would affirm because the CCA made an "independent" determination of Moore's intellectual functioning that was not unconstitutional. And I have a "broader concern" because the majority does not follow our precedent requiring "society's standards as reflected in the practices of the States" (quoting *Hall*). The CCA conducted a "painstaking review" of the clinical evidence in Moore's case, under standards still included in the "DSM-5" manual, but not included in the latest version of the AAIDD manual – so there was a conflict in "current medical standards". "The Court constitutionalizes rules for which there is not even a clinical consensus." Moreover, "state consensus" was an essential part of our analysis in *Atkins* and *Hall* – but today the Court does not even examine what other states do in determining intellectual disability. Finally, today's decision is an expansion of *Hall*, not dictated by it, and the Court appears to "insist on absolute conformity to medical standards." The Eighth Amendment does not require that. There is a "real danger" here that the Court is merely applying the "subjective views of individual Justices."

[**Ed. note:** This is pure speculation, but the detail of the beginning of the Chief Justice's dissent suggests to me that it may have started as an attempt at an opinion for the Court, since all Justices agreed that *Briseno* was wrong, only to see Justice Kennedy join Justice Ginsburg at some point, perhaps to avoid affirmance of a flawed capital proceeding with a 4-4 tie]

F. DUE PROCESS (Fifth and Fourteenth Amendments)

Beckles v. United States, 137 S.Ct. 886 (Mar. 6, 2017), 7 (4-1-1-1) to 0 (**Thomas**; *Kennedy* concurring; *Ginsburg* concurring only in the judgment; *Sotomayor* concurring only in the judgment; Kagan not participating, one seat vacant), affirming 616 Fed.Appx. 415 (11th Cir. 2015).

Headline: In contrast to *Johnson v. United States* (2015), which held that a federal statutory definition of "crime of violence" is unconstitutionally vague, **the Federal Sentencing Guidelines are categorically not subject to "void-for-vagueness" challenges under the Due Process Clause**, even though they employ the same definition that was struck down in *Johnson*.

Facts: Beckles was convicted of felon-in-possession of a firearm (a sawed-off shotgun). Because he had prior felony drug convictions, the firearms offense made him a "career offender" under the federal Sentencing Guidelines if that offense was a "crime of violence." Guideline §4B1.2(a) defined "crime of violence" with the exact same words (in a "residual clause") as did a different federal statute, the Armed Career Criminal Act ("ACCA"). In *Johnson* (2015) the Court struck down the ACCA definition as unconstitutionally vague. Unlike the ACCA, however, here the Commentary to the career offender sentencing Guideline (§4B1.2, comment n.1) expressly said that possession of a

sawed-off shotgun qualified as a crime of violence. The district court found that Beckles was a career offender and sentenced him to a 360-month term.

In 2015, while Beckle's second *cert* petition was pending, the Court ruled the ACCA crime-of-violence provision void for vagueness under the Due Process Clause. However, after a GVR (grant, vacate and remand) of Beckle's *cert* petition in light of *Johnson*, the Eleventh Circuit ruled that *Johnson* did not control the Guidelines, while the Guidelines Commentary, expressly addressing sawed-off shotguns, did.

Thomas (for 5): Although the identical language as was struck down in *Johnson*, “we hold [broadly here] that **the advisory [federal sentencing] Guidelines are not subject to vagueness challenges [at all] under the Due process Clause.**” “Unlike the ACCA,” the Sentencing Guidelines do not set the permissible range of sentences; “to the contrary, they merely guide ... a court’s discretion.” Thus the statutory context of *Johnson* is distinguishable from the sentencing Guideline context here. Indeed, prior to the Guidelines, federal sentencing was wholly discretionary within broad legislative ranges. “Our cases have never suggested,” and “no party to this case suggests, that a system of purely discretionary sentencing could be subject to a vagueness challenge.” “If ... unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be.”

The “twin concerns” of constitutional vagueness doctrine – providing notice and “preventing arbitrary enforcement” – are not implicated by advisory sentencing Guidelines. Federal courts “retain discretion” not to follow the Guidelines, and federal courts do not “enforce” the Guidelines, they rely upon them “merely for advice.” While Justice Sotomayor says that judges might rely on arbitrary “gut instincts” or “feelings,” this is also true under a wholly discretionary system, which “we have never suggested” violates the Due Process Clause. This is different from *ex post facto* Due Process analysis, which still applies; and from Eighth Amendment precedents that might invalidate “a vague sentencing factor in a capital case.” [Ed. note: Justice Thomas does not explain why the Eighth Amendment analysis is different.] Meanwhile, holding that Guidelines are subject to vagueness challenge “would cast serious doubt on the[] validity” of various statutory factors Congress has required judges to consider in sentencing [and, he implies, this we are unwilling to do]. “In fact, the Guidelines generally offer more concrete advice” than do the statutory factors in, say, 18 U.S.C. §3553(a).

[Ed. note: An interesting “inside baseball” aspect of this decision is that the SG (under the Obama administration) conceded that the Due Process Clause did apply, so the Court appointed a former law clerk to Justice Thomas to argue the other position. That lawyer/law professor is thanked by name in the body of Thomas’s opinion -- usually Court-appointed *amici* are thanked only in a footnote.]

Kennedy concurring: “I join” Thomas’s opinion, but certain “considerations inform my reading” of his opinion. [Ed. note: This is a necessary 5th vote concurrence (it’s a seven-Justice Court for this case, Kagan recused and Gorsuch not yet there) which could be seen as limiting the broad implications of Thomas’s opinion in the future.] “Cases may arise” in the future where a sentence, “or pattern of sentencing,” is “so arbitrary that it implicates constitutional concerns.” But the constitutional concept of vagueness as applied in *Johnson* is not applicable to sentencing guidelines “by automatic transference.”

Ginsburg concurring in the judgment: “This case has a simple solution,” because the express Commentary at the time Beckles committed his offense told him that a sawed-off shotgun would qualify. “This Court has routinely rejected ... vagueness claims where a clarifying construction

rendered an otherwise enigmatic provision clear as applied to the challenger.” “I would accordingly defer any more encompassing ruling.”

Sotomayor concurring “only in the judgment”: First, Ginsburg is right that the Court’s holding today is unnecessary. I also think it is “deeply unsound.” “The Guidelines anchor every” federal sentence and “are, in a real sense, the basis for sentence.” Consequently “the Due Process Clause” requires them to be drafted “with sufficient definiteness that ordinary people can understand them.” *Johnson* requires us to hold that this standard is not met here. The majority’s distinction between rules that “fix” a sentence and the “guidance” of the Guidelines is mere “formalism.” “How can the Guidelines carry sufficient legal weight to warrant scrutiny under the Eighth Amendment and the Ex Post Facto Clause, but not ... Due Process ...?” As for our prior wholly discretionary system, an “inscrutably vague guideline” is worse than no guideline at all. Reliance on such a guideline “does not comport with ordinary notions of fair play.”

Turner v. United States, 137 S.Ct.1885 (June 22, 2017), 6-2 (**Breyer**; **Kagan** dissenting, joined by Ginsburg), affirming 116 A.3d 894 (D.C.Ct.App. 2015).

Headline: In these two “fact-intensive cases” addressing a notorious Washington DC murder, evidence not disclosed by the government was not “material” under *Brady v. Maryland* (1963), because it does not produce a “reasonable probability that the result would have been different.”

Facts: In 1984, Catherine Fuller was brutally assaulted and murdered by, the government alleged, a gang of people in Washington DC. After a lengthy jury trial, eight defendants were convicted and sentenced to lengthy prison terms; two defendants were acquitted. The case generated a great deal of publicity. After the trial and convictions, investigative journalists revealed that various pieces of information that might have been helpful to the defendants had not been disclosed by the government. [The Court gives a detailed account of the evidence at trial as well as the undisclosed evidence.] Turner and Overton pursued collateral attacks, arguing that if they had had the undisclosed evidence, they could have pursued a “single perpetrator” theory, as opposed to the government’s “group attack” theory of prosecution. While seven pieces of undisclosed evidence are discussed, one seems most central: a man named McMillan had been seen at the scene of the crime; McMillan had recently been arrested for beating and robbing two women, and seven years after trial he had robbed, assaulted and murdered a young woman in an alley not dissimilar to the alley where Catherine Fuller was attacked, robbed and murdered. [The *cert* petitions had presented the question whether *Brady* allows consideration of events known to the government that occur after a trial. But the Court *sua sponte* amended the Question Presented to ask simply whether *Brady* requires reversal in this case, and its opinion does not answer the “after-acquired evidence” question.]

Breyer (for 6): “Considering the withheld evidence in the context of the entire record, ... it is too little, too weak, or too distant to meet *Brady*’s [materiality] standards.” The evidence that there was, in fact, a group attack on Fuller, was overwhelming and entirely consistent through every witness. Any undisclosed evidence that might have impeached witnesses was “largely cumulative of impeachment evidence petitioners already had and used.” Our opinion announces no broad rules but applies “only ... in the contest of this trial.”

We note favorably that the government has improved its discovery policies since this case was tried, and it agrees that when a prosecutor is uncertain of the effect of evidence, the better course is to turn it over to the defense.

Kagan dissenting, joined by Ginsburg: The undisclosed evidence in this case could have led to a different result, because instead of fighting each other individually during the trial, the defendants could have adopted a “unified defense built around an alternative account of the crime.” The Court has held that a “reasonable probability” is “less than a preponderance.” [Ed. note: Yes the Court has said this – but what in the world it pragmatically means is hard to figure out. How a “probability” can be “less than a preponderance” is puzzling at best.] “I part ways with the majority in applying that standard to ... this case.” The alternative defense that the undisclosed evidence would have supported “had game-changing potential.” “The Government’s case wasn’t nearly the slam-dunk the majority suggests.” The jury took “more than a week” to render its verdicts. [Ed. note: Unsurprising in a 10-defendant case?] The undisclosed evidence “could have mattered to the trial’s outcome.” [Ed. note: This “could have mattered” standard was the rule advocated in Justice Marshall’s dissent in *Strickland*, the case from which *Brady*’s materiality standard was drawn. Justice Kagan clerked for Justice Marshall, although in a different Term.]

[Weaver v. Massachusetts](#), 137 S.Ct. 1899 (June 22, 2017), 7-2, (**Kennedy**; Thomas concurring, joined by Gorsuch), [affirming](#) 54 N.E.3d 495 (Mass. 2016).

Headline: When a courtroom is closed only for jury selection, and this “public trial” violation is not preserved by objection and not raised on direct review, the defendant must show prejudice under normal ineffective assistance analysis even if the error is deemed “structural.”

Facts: Weaver, who was 16, was tried in Massachusetts state court for the murder of a 15-year-old boy. On the first day of jury selection in 2006, the courtroom was too small for all the potential jurors, so the judge had a number of them wait outside in the hallway. When Weaver’s mother and other supporters arrived, a court officer told them they could not come into the courtroom. Weaver’s mother told Weaver’s lawyer, but the lawyer raised no objection with the court. (At that time it was apparently common in Massachusetts to “close” the courtroom during jury selection, and the Supreme Court did not rule that the Sixth Amendment’s “public trial” rule applied to jury selection until 2010 in [Presley v. Georgia](#).) After the jury was selected the next day, the courtroom was open to all for the remainder of the trial. Weaver was convicted and sentenced to life in prison.

Weaver did not raise the issue on direct appeal, but filed a motion for new trial alleging ineffective assistance based on his lawyer’s failure to object. The trial court found a Sixth Amendment “public trial” violation, and that counsel’s failure to object was ineffective performance. However, applying the normal two part *Strickland v. Washington* (1984) test for ineffective assistance, the court denied the motion because Weaver “had not offered any evidence or legal argument establishing prejudice.” The Massachusetts Supreme Court recognized that a court-closure violation was “structural” constitutional error, but affirmed because no prejudice was shown.

Kennedy (for 7): [Ed. note: Justice Kennedy’s opinion provides a useful, and I think new, analysis of structural error doctrine generally. So this is an important opinion.] The term “structural error” has been used to describe violations of “basic constitutional guarantees that should define the framework of any criminal trial,” and are usually not subject to “harmless error” analysis. But the “precise reason why ... varies ... from error to error,” with “at least three rationales:” (1) violation of constitutional rights that protect “some other interest” besides the defendant’s, like the right to self-representation; (2) errors whose “effects ... are simply too hard to measure” such as denial of the right to counsel of choice; and (3) errors that “always result in fundamental unfairness” such as a complete denial of any attorney or the failure to give a reasonable doubt instruction. “These categories are not rigid” and “more than one of these rationales may” apply to a specific error. However, “an error can count as structural even if the error does not lead to fundamental unfairness in

every case” – such as the public trial error here (if indeed it even was an error in the precise circumstances here – we assume that it was).

“The term structural error carries ... no talismanic significance,” although if it is objected to at trial, not remedied, and raised on direct appeal, we generally say it results in “automatic reversal.” But when raised in a collateral proceeding alleging that counsel was ineffective for failing to object, we think the normal two-part *Strickland* test applies, and the “prejudice showing is in most cases a necessary part.” We assume that this inquiry might sometimes turn on a showing of “fundamental unfairness,” not necessarily the “mechanical” test of “reasonable probability that the result would have been different.” [Ed. note: This is a very interesting assumption, which might suggest a small doctrinal shift in ineffective assistance analysis, and is bound to sow some confusion in the future.] We think it is fair to place the burden to show prejudice on the defendant when there has been no objection (that could have cured the error) at trial, and no “direct judicial supervision” opportunity via direct appeal. In a more delayed collateral attack, damage to “the finality interest” can be present.

Even with [a number of assumptions in Weaver’s favor](#), we don’t think that prejudice or fundamental unfairness is present here. There were lots of observers in the courtroom, the closure was “limited to ... *voir dire*,” and there is no suggestion of anything improper happening during the jury selection.

Thomas concurring, joined by Gorsuch [Ed. note: This is the first dissent in a merits case noted by Justice Gorsuch]: I would be open to reconsidering whether closure during jury selection is a violation of “the original understanding of the right to a public trial.” And I don’t think that “fundamental unfairness” is properly part of the *Strickland* prejudice analysis (as Justice Alito says).

Alito concurring in the judgment, joined by Gorsuch: A “straightforward” application of *Strickland* supports the result here. And it is reliability of the result, not “fundamental fairness,” that *Strickland* seeks to preserve. Whether an underlying error is “structural” is “irrelevant under *Strickland*.” Absent “prejudice” from counsel’s deficient performance, “there was no Sixth Amendment violation.”

Breyer dissenting, joined by Kagan: Structural errors are “categorically exempted ... from case-by-case harmless” error review. Consequently, “a defendant who shows that his attorney’s constitutionally deficient performance produced a structural error should not face the additional – and often insurmountable – *Strickland* hurdle of demonstrating that the error changed the outcome.” We should not “parse which structural errors are the truly egregious ones.” As the majority says, structural errors like the one here “have effects that are simply too hard to measure.” If this is so, how can an “actual-prejudice analysis” under *Strickland* be performed? Moreover, the “complex job of deciphering which structural errors really undermine fundamental fairness ... is not worth the candle.” [Ed. note: Justice Breyer does not explain why he thinks it is not worth the effort.]

II. FEDERAL CRIMINAL STATUTES

A. Securities Fraud (15 U.S.C. §§ 78FF, 78(j) (b); 17 C.F.R. § 240.10b-5)

[Salman v. United States](#), 137 S.Ct. 420 (Dec. 6, 2016), 8-0 (Alito), affirming 792 F.3d 1087 (9th Cir. 2015).

Headline: The “personal benefit” that caselaw requires for an “insider trading” conviction is not limited to benefits with pecuniary value; simply giving a tip to a relative can qualify.

Facts: Salman’s sister married Maher, who worked for Citigroup and had confidential “insider” knowledge about various deals involving publically-traded companies. Maher began to give his brother, Michael, inside information, “in part to appease” Michael’s “incessant[] pester[ing],” but also to “help” Michael, and “fulfill” Michael’s needs. Once when Michael asked for a “favor,” Maher offered to give him money, but when “Michael asked for information instead ... Michael then disclosed an upcoming acquisition. Although he asked Michael not to, Maher “expected” that his brother would trade in the information. Michael also shared the information with Salman (who also traded), and told him the information was from Maher. **[Ed. note:** It appears to be irrelevant, whether Maher knew that his brother was further sharing the information with Salman.] Salman made over \$1.5 million on his “insider” trades. When indicted, Michael and Maher pled guilty and testified for the government. Salman went to trial, and the jury which convicted him was instructed that for insider trading, a “personal benefit includes the benefit that one would obtain from simply making a gift of confidential information to a trading relative.” The Ninth Circuit affirmed, rejecting the Second Circuit’s contrary rule in *Newman* (2014) which had held that the required benefit must be “consequential” and “at least a potential gain of a pecuniary or similarly valuable nature.”

Alito (for a unanimous 8): In *Dirks v. SEC* (1983), we explained that, for “misappropriation” (as well as “direct”) insider trading liability, a “tippee” must “participate in a breach of the tipper’s fiduciary liability.” “Whether the tipper breached that duty depends in large part on the purpose of the disclosure,” and “the test ... is whether the insider personally will benefit, directly or indirectly, from his disclosure.” “Disclosure without benefit is not enough.” However, we noted in *Dirks* that “personal benefit” may often be inferable, and we said expressly that it can exist “when an insider makes a gift of confidential information to a trading relative or friend.”

“*Dirks* ... easily resolves the narrow issue presented here.” Salman concedes that if Maher had himself traded on inside information, and then made a gift of the profits to his relatives, he would have breached his fiduciary duties. *Dirks* “appropriately prohibits that approach,” and making a gift of inside information, instead of money, to a relative “is the same thing.” “When a tipper gives information to a ‘trading relative or friend’ the jury can infer that the tipper meant to provide the equivalent of a cash gift.” This is a “commonsense point,” and is not undermined by our mail fraud decisions that have limited liability to frauds intended to obtain “money or property.”

“We [also] reject” the argument that “*Dirks*’ gift-giving standard is unconstitutionally vague” under *Johnson* (2015). We think *Dirks* created a simple and clear guiding principle,” and as we noted in *Johnson*, “even clear rules ‘produce close cases.’” **[Ed. note:** Of course Justice Alito, the author here, was the lone dissenter in *Johnson*. *Johnson*’s author, Justice Scalia, is not here to opine upon its meaning.] Even if applying *Dirks* in some cases will be “difficult,” it is not here, because Salman’s case “involves ‘precisely the gift giving of confidential information to a trading relative’ that *Dirks* envisioned.” **[Ed. note:** Contrary to stereotype, here the Court *affirms* the Ninth circuit and quotes from its opinion. Although to be fair, the Ninth Circuit opinion was authored by a Second Circuit judge sitting by designation who plainly disagreed with his own Court’s *Newman* ruling.]

B. Bank Fraud (18 U.S.C. § 1344(1))

[Shaw v. United States](#), 137 S.Ct. 462 (Dec. 12, 2016), 8-0 (**Breyer**), vacating and remanding 781 F.3d 1130 (9th Cir. 2015).

Headline: Subsection of the bank fraud statute **does not require proof that the defendant intended to take the bank’s property, as opposed to property of a depositor-customer.**

Facts: Federal law makes it a crime to “knowingly execute a scheme ... to defraud a financial institution,” 18 U.S.C. §1344(1). Shaw deceptively obtained and then used the identifying numbers for Stanley Hsu’s bank account, to take over \$275,000 from Hsu’s bank account by transfers to Paypal. For various reasons, the bank ultimately suffered no loss, although Paypal and Hsu did. Shaw was convicted under 1344(1). He argued that he had not defrauded the “financial institution,” that is, the bank, but rather only Hsu and possibly Paypal. The district court rejected, and the Ninth Circuit affirmed, Shaw’s request for an instruction to support his theory.

Breyer (for a unanimous 8): Shaw’s arguments are wrong. First, **a bank has “property rights in [a customer’s] bank account,” once a customer deposits funds there, “like a bailee.”** So “Shaw’s scheme” was one “to obtain property from a financial institution,” as well as from the customer. Also, a “loss” or “financial harm” to the bank is not required. Neither is “legal knowledge” of this property right required by the statute. Shaw clearly knew he was fraudulently obtaining monies possessed by the bank. “Purpose” is also not required. Also, the fact that subsection (2) of this same statute “substantially overlaps” with subsection (1), does not matter. Finally, “the statute is clear enough that we need not rely on the rule of lenity.” Any other arguments Shaw may have about the jury instruction can be addressed by the Ninth Circuit on remand.

C. Federal Sentencing Guidelines

[Beckles v. United States](#), 137 S.Ct. 886 (Mar. 6, 2017), 7 (4-1-1-1) to 0 (**Thomas; Kennedy** concurring; *Ginsburg* concurring only in the judgment; *Sotomayor* concurring only in the judgment; Kagan not participating), affirming 616 Fed.Appx. 415 (11th Cir. 2015).

Headline: In contrast to [Johnson v. United States](#) (2015), which held that a federal statutory definition of “crime of violence” is unconstitutionally vague, **the Federal Sentencing Guidelines are not subject to “void-for-vagueness” challenges under the Due Process Clause** even if they employ the same definition. [See the detailed summary at page 16 above under “Due Process.”]

[Dean v. United States](#), 137 S.Ct. 1170 (Apr. 3, 2017), 8-0 (**Roberts**), reversing and remanding 810 F.3d 521 (8th Cir. 2015).

Headline: When choosing a reasonable sentence for one count, the judge may consider a lengthy mandatory minimum term imposed on another count.

Facts: Levon Dean, Jr., and his brother were convicted of “a host of crimes related to” two robberies of drug dealers they committed of drug dealers with a “modified semiautomatic rifle.” Under 18 U.S.C. §924(c), Dean was subject to a mandatory consecutive 30-year sentence for the firearms used in connection with the robberies. In addition, his Guidelines imprisonment range on four other counts was 84-105 months. Dean argued that the court should depart downward on those other counts in light of the 30-year mandatory sentence he would receive on the §924(s) counts. He asked for one additional consecutive day. But the district court and the Eighth Circuit, ruled that because §924(c) sentences are mandatory under the statute, they cannot be considered as a mitigating factor to reduce an otherwise-appropriate Guidelines sentence.

Roberts (for a unanimous 8): Title 18 U.S.C. §3553(a) generally “permits a court ... to consider sentences imposed on other counts.” Section 924(c) does not change the “durable tradition” of allowing judges discretion in considering information for sentencing. “Nothing in the law requires [the Government’s] approach” of calculating sentences for each count without regard to other counts or the overall sentence. Indeed, the government’s approach “is at odds with its own practice in ‘sentencing package’ cases.” And nothing in the statutory text prohibits imposing an additional sentence of only one day, so long as it is consecutive to the lengthy §924(c) terms. It is “particularly inappropriate” to try to read “an additional limitation” into §924(c) based on Congressional silence, because “Congress has shown that it knows how to direct sentencing practices in express terms.” Even if Congress had some contrary intent regarding §924(c), “no such intent finds expression in the [statutory] language.”

D. Appellate review of Restitution Orders (18 U.S.C. § 3742; Fed.R.Cr.P. 4)

[Manrique v. United States](#), 137 S.Ct. 1266 (Apr. 19, 2017), 6-2 (**Thomas**; Ginsburg dissenting), affirming 618 Fed.Appx. 579 (11th Cir. 2015).

Headline: To appeal the amount of restitution, **defendant must file a notice of appeal from the actual restitution order, not just from the initial imposition of sentence.**

Facts: Manrique pled guilty to possessing a visual depiction of a minor engaging in sexually explicit conduct, after federal agents found over 300 files containing child pornography on his computer. At sentencing, the judge imposed 72 months and deferred “determination of restitution” (restitution was mandatory under the statute) until a later hearing. Manrique filed a notice of appeal from that judgment. Three months later, at a restitution hearing, the court entered a \$4,500 restitution order against Manrique for the one victim that came forward. Manrique did not file a notice of appeal from that amended judgment. In his brief to the Eleventh Circuit, Manrique acknowledged that restitution was mandatory, but he challenged the amount, arguing that no “proximate cause” or “rational relationship” for the amount had been shown. The Circuit ruled that because Manrique had not filed a notice of appeal from the specific restitution order, it would not consider those arguments.

Thomas (for 6): Manrique “failed to properly appeal” the restitution order. Both the sentencing appeal statute and Rule 4 of the Federal Rules of Appellate Procedure textually assume that a notice of appeal will be filed “after” the judgment that will be contested. Restitution is mandatory, but the amount is not always known at the time of sentencing. In such a case, the court may enter an initial judgment imposing other aspects of a defendant’s sentence, while deferring determination of the amount until later. **A notice of appeal that is filed in-between the initial judgment and the amended judgment is insufficient to invoke appellate review of the later-determined restitution amount.** In such a case, “there are two appealable judgments, not one.” Neither is this saved by the “prematurely-filed” notice of appeal exception in Rule 4, because that applies only after the “announcement” of sentence – here, the restitution was not announced until later. Finally, it is not “harmless error,” under an old precedent, because Fed.R.App.Pro. 3 now directs that errors “*other than*” an untimely notice of appeal may be overlooked.

(We do not decide if this is a “jurisdictional” requirement that may be dispositive even if the government fails to raise it. It is at least a “mandatory claims-processing rule,” and here the government did timely object.)

Ginsburg dissenting, joined by Sotomayor: First, the Court “leaves undisturbed” our “settled” precedents holding that the time limits of Rules 32 and 4 are not jurisdictional.

Moreover, on the facts of this case, I would not “trap[] an unwary defendant.” The government concedes that the district judge was required under Rule 32 to expressly advise Manrique of his right to appeal. The court here did so after the first judgment, but not the second; and the district court and Circuit clerks then proceeded as though the appeal was timely. Thus both courts “appear to have assumed that no second notice was required,” until the government later raised the issue. “It was no surprise to the government” that the amount was challenged on appeal. On these facts I would reverse and allow Manrique’s appeal of the restitution-amount to proceed.

E. Fair Debt Collection Practices Act

Midland Funding, LLC v. Johnson, 137 S.Ct. 1407 (May 15, 2017), 5-3 (**Breyer**; Sotomayor dissenting), reversing 823 F.3d 1334 (11th Cir. 2016).

Headline: Debt collectors who file claims they know are outside the statute of limitations do not violate the “false, deceptive, misleading, unconscionable or unfair” prohibitions of the Fair Debt Collection Practices Act.

Facts: In 2014, Aledia Johnson filed for personal bankruptcy in Alabama. In response, Midland Funding filed a “proof of claim” asserting that Johnson owed Midland a credit-card debt of \$1,879.71. The claim noted that the last charge on Johnson’s account had been in May 2003 (more than 10 years before she filed for bankruptcy). The Alabama statute of limitations for such claims is six years. Midland’s claim did not tell Johnson this. But Johnson had counsel, who objected to the claim, and when Midland did not respond the Bankruptcy Court disallowed it (so Johnson did not pay it). Johnson then filed a lawsuit against Midland for damages and attorney’s fees under the Fair Debt Collection Practices Act (“FDCPA”), which prohibits “false, deceptive or misleading representations” and “unfair and unconscionable means” in debt collection. The district court ruled that the statute did not apply here, but the Eleventh Circuit reversed and reinstated Johnson’s lawsuit.

Breyer (for 5): When a proof of claim accurately indicates “on its face” that the applicable statute of limitations has run, then filing such a proof of claim “does not fall within the scope or the five relevant words” of the statute. We think it is “reasonably clear” that the claim was not false, misleading or deceptive.” [Ed. note: I have to say, on first blush, this is surprising to me.] Alabama’s law, like many States’, provides that “a creditor has the right to payment of a debt even after the limitations period has expired.” They have a “right” but no “remedy.” The Bankruptcy Code does not say that a claim must be “enforceable.” A “claim” is a “right to payment;” if “unenforceable” it will be “disallowed,” but is not improper to claim. Moreover, “misleading” “requires consideration of the legal sophistication of [the]audience.” Here, bankruptcy trustees are sophisticated in what are enforceable claims.” [Ed. note: Why the “audience” is not the person who has filed for bankruptcy, is not addressed.]

Whether Midland’s practice is unfair or unreasonable is “a closer question.” But we think it less likely in the bankruptcy context that an enforceable claim will be paid by an unsuspecting debtor. “Knowledgeable trustees” should “investigate” and “point out that a claim is stale.” And “defining the boundaries of the exception” that Johnson advocates might prove difficult. We do not want to “upset the delicate balance” established by Congress in bankruptcy between “a debtor’s protections and

obligations.” The Advisory Committee on Rules of Bankruptcy affirmatively rejected a requirement that creditors certify that they know of no valid limitations defense, in 2009.

Sotomayor dissenting, joined by Ginsburg and Kagan: The practice of buying up stale debts, filing claims for them in bankruptcy, and “hoping that no one notices” but instead pays them, is “unfair and unconscionable.” (So I don’t have to address the additional “false, deceptive or misleading” argument.)

Americans owe trillions of dollars in consumer debt to creditors, and many cannot repay their debts. Because many consumers fail to defend themselves against stale claims, “debt buyers have won billions . . . in default judgments” that they have no right to collect. The FDCPA’s prohibitions have “largely beaten back such conduct,” and every court to consider the question has held that “a debt collector that knowingly files suit in court to collect a time-barred debt” violates the FDCPA.

So now the debt collectors have turned to bankruptcy courts. Debt buyers’ pursuit of stale claims can entrap debtors, because many consumers respond by offering to pay a small amount to forestall suits. Debt collectors do not file claims in good faith; they file them hoping and expecting that the bankruptcy system will fail. The majority does not take a position on whether a debt collector violates the FDCPA by filing a suit in an ordinary court that it knows to be time barred. It only finds that a debt collector does not violate the Act by doing the same things in bankruptcy proceedings. The majority argues that the structural features of the bankruptcy process reduce the risk of stale debt going unnoticed. But, this is unsupported in practice. Actual practice refutes the “rosy” picture the majority paints. Debtors will often make payments on stale debts and thus “resuscitate” them, and they walk out of bankruptcy court owing more than they did when they entered. It does not take a “sophisticated attorney to understand” why this practice is unfair; it requires only common sense. The law should not be a trap, but today it has become one.

Congress can now amend the FDCPA to make explicit what is already implicit in the law, and stop this wrongful practice.

F. Criminal Forfeiture (21 U.S.C. § 853)(1)

Honeycutt v. United States, 137 S.Ct. 1626 (June 5, 2017), 8-0 (**Sotomayor**), reversing 816 F.3d 362 (6th Cir. 2016).

Headline: There is no “joint and several liability” under federal forfeiture statute, which is limited to “property . . . obtained” by a convicted defendant.

Facts: Terry Honeycutt worked managing sales and inventory for a hardware store owned by his father and his brother Tony. When Terry noticed “edgy looking folks” repeatedly buying “Polar Pure,” an iodine-based water purification product, he called the police. They told him that Polar Pure was used in manufacturing methamphetamine. The Honeycutts continued to sell large quantities of Polar Pure, grossing roughly \$400,000 from selling over 20,000 bottles in a three-year period.

The Honeycutt brothers were indicted for various federal crimes relating to selling Polar Pure while knowing it was used to manufacture meth, and the government sought forfeiture of \$269,000. Tony pled guilty and agreed to forfeit \$200,000. Terry was convicted at trial and sentenced to five years. The government argued that Terry was “jointly” liable for the entire forfeiture amount, and sought an order for the remaining \$69,000, despite “conceding that Terry had no ‘controlling interest in the store’ and ‘did not stand to benefit personally’ from the sales. [Ed. note: The case is decided based on this assumption, although one can imagine arguments to the contrary for even just a salaried

employee.] The district court declined to order forfeiture, but the Sixth Circuit reversed, finding that “joint and several liability” was appropriate for the proceeds of any “conspiracy.”

Sotomayor (for 8): Although forfeiture statutes “serve important governmental interests,” they are limited by their plain language. 21 U.S.C. §853(a)(1) applies by its terms to “property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of” the crime. Section (a)(3) applies to “any of his [the defendant’s] interest in” property. All the provisions apply only to property “tainted” by the crime. But joint and several liability, a civil damages concept, would compel a defendant like Terry Honeycutt to pay out of untainted assets, for “property” that he had never “obtained” by his crimes. “Neither the dictionary definition nor the common usage” of “obtain” supports the idea that property that went to some other conspirator was still somehow “obtained” by the defendant.

“Directly or indirectly” does not change this conclusion; indirectly means, for example, property that a defendant ultimately obtains even if initially paid to “an intermediary.” Similarly, the conspiracy *Pinkerton* doctrine, which allows conviction of each conspirator even for crimes committed by their co-conspirators (if “in furtherance of” the conspiracy), cannot alter the meaning of the forfeiture statute, which is part of a “carefully constructed statutory scheme.” Nothing suggests that Congress intended to incorporate *Pinkerton* as a “traditional background principle” when it wrote the forfeiture statute. In fact, that would fail to acknowledge the deep “background principle” of forfeiture: that defendants should disgorge only property that they have “actually acquired.”

[**Ed. note:** At the very last paragraph of this simple and unanimous decision, untested by any dissent, the Court notes that Honeycutt did not “personally benefit from the Polar Pure sales.” Does this extend forfeiture to “personal benefits” beyond property that the person “actually acquired”? Only time, and the next case, will tell. But you can bet that the government will argue it.]

III. HABEAS CORPUS

[Buck v. Davis](#), 137 S.Ct. 759 (Feb. 22, 2017), 6-2 (**Roberts**; Thomas dissenting, joined by Alito), reversing 623 Fed.Appx. 668 (5th Cir. 2015).

Headline: Appellate court must grant a Certificate of Appealability (“COA”) if the issue presented is “debatable,” and should not determine the merits at that stage. Here, on highly unusual facts, it was ineffective assistance for defense to present expert testimony saying that race is a predictor of future violence; and the fundamental error of allowing race to influence a capital sentencing makes this case “extraordinary” despite the “labyrinth” of procedural default objections.

Facts: In 1995 Buck committed a terrible murder of his ex-girlfriend and her boyfriend, in front of her children. At his capital sentencing proceeding, the jury could sentence to death only if it found a probability of future violence and dangerousness. Defense counsel introduced, among other evidence, an expert (Dr. Quijano) and his report; defense counsel knew that Quijano would say that, in part, Buck’s “race” of “black” created an “increased probability” of future violence. The prosecutor emphasized this point in cross-examination and again in closing, and in deliberations the jury requested and was provided the experts’ reports, including Dr. Quijano’s. They sentenced Buck to death which was affirmed on direct appeal.

Buck's "case then entered [in the Chief Justice's words] a labyrinth of state and federal collateral review." His first state habeas petition did not mention Dr. Quijano's testimony. But later, over the course of three years, the State of Texas conceded error and waived all procedural objections in six other capital cases in which Dr. Quijano had provided the same race-based testimony. "It is inappropriate to allow race to be considered as a factor in our criminal justice system," said then-Texas Attorney General John Conryn. But the state did not concede in Buck's case, due to a change in prosecutors and the fact that it was the defense, not the state, who had presented Dr. Quijano's evidence. Buck's second state habeas, which did raise the argument, was dismissed as successive, and in Buck's federal habeas the state argued that this was an "adequate and independent state ground," precluding federal review. The federal district court agreed; and no Circuit review was allowed because a Certificate of Appealability ("COA"), required under federal habeas law, was denied. A second federal habeas was also denied, including denial of *certiorari*. After a new state habeas was denied, Buck returned to federal court, arguing that his federal habeas should be reopened under Rule 60(b) because Supreme Court precedent had changed. *Martinez* (2012) and *Trevino* (2013) had opened a door to procedurally-defaulted claims when appointed appellate counsel is ineffective for not pursuing a claim with some merit. But the district court denied the motion, finding that Buck's case was not "extraordinary," and that there had been no ineffective assistance in any case because Buck was not "prejudiced" by the introduction of race at his sentencing. The Fifth Circuit again denied a COA; and now *cert* was finally granted.

Roberts (for 6): [Ed. Note: the majority works extraordinarily hard to wend its way through the "procedural labyrinth," showing, I think, the pre-eminent force that race-based errors have in capital cases.] First, it was error to deny a COA. A COA should be granted if the question presented is "debateable," and the court should not resolve the merits at that threshold stage. It is a "limited inquiry." A claim that is non-meritorious can still logically be debatable, and the habeas appeal should be allowed.

Second, unlike the Court of Appeals, we can examine the underlying merits now. The statutory COA requirement does not apply to us [!!], and the parties have briefed the merits, so we will review them.

Thirdly, there was ineffective assistance here. "No competent defense attorney would introduce" Dr. Quijano's evidence "about his own client." And it is "reasonably probable" that "at least one juror" might have decided against death had Dr. Quijano's testimony not been introduced and emphasized. "Appeal[] to a powerful racial stereotype," "a particularly noxious strain of racial prejudice," created a "perfect storm" for Buck's jury. "The impact of that evidence cannot be measured by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."

Finally, we think the district court "abused its discretion" in not finding "extraordinary circumstances" to reopen Buck's federal habeas under Rule 60(b). "Buck may have been sentenced to death in part because of his race." "This is a disturbing departure from a basic premise of our criminal justice system." "Discrimination on the basis of race, odious in all aspects, is particularly pernicious in the administration of justice." The state's concession in six of seven capital cases, and waiver of all procedural defenses, is itself "extraordinary" (as Justice Sotomayor, joined by Kagan, had said in their 2011 dissent from denial of *cert* in this case). The fact that Buck rather than the government introduced this noxious evidence is simply "beside the point." As for finality, the "whole purpose of Rule 60(b) is to make an exception to finality." Here it is "entitled to little weight," because Texas itself, in the other six cases, "effectively acknowledged that the people of Texas lack an interest in enforcing a capital sentence obtained on so flawed a basis.... We do no more [here] than acknowledge what Texas itself recognized 17 years ago" in the other six cases.

Lastly regarding Rule 60(b), any argument that *Martinez* and *Trevino* don't apply to Buck's case has been waived by the state's failure to ever raise it until the merits briefing here. The case is remanded to the Fifth Circuit [**ed. note:** presumably to hear the merits of Buck's habeas appeal, since only the denial of the COA is reversed, although the majority here seems to have decided much if not all of the merits here.]

Thomas dissenting, joined by Alito: "The court bulldozes procedural obstacles and misapplies settled law." However, its decision is limited to "the highly unusual facts presented here," and "leaves entirely undisturbed" the principles of collateral review, ineffective assistance, and Rule 60(b). The majority's errors are of application only; it "does not alter" any principles of law. [**Ed. note:** Justice Thomas says this three or four times, and methinks Justice Thomas doth protest too much. The fact that he feels the need to stress this, shows that perhaps the majority does not agree. The *Buck* decision is likely to have significant impacts on current habeas litigation, particularly with regard to the granting of COAs in the capital-intensive Fifth and Eleventh Circuits.]

[The details of Justice Thomas's objections to the majority's rulings are omitted here. Needless to say, he disagrees with the majority at almost every point, and some of his objections are indeed at least debatably correct. He says the majority is "focus[ed] on providing relief ... in this particular case," and I think he is right. That focus, however, does not deprive the majority opinion of precedential force.]

Finally, on remand, "the Court's opinion does not require the lower courts to reflexively accord relief." The majority does not address whether defense counsel's performance was constitutionally ineffective [**ed. note:** ???? It sure seems to], "and the court on remand should not treat it as a foregone conclusion." [**Ed. note:** what a waste of resources and time it will be if Buck's sentence is not quickly vacated and he has to work through three layers of federal review again.]

[Davila v. Davis](#), 137 S.Ct. 2058 (June 26, 2017), 5-4 (**Thomas**; Breyer dissenting with Ginsburg, Sotomayor and Kagan), affirming 650 Fed. Appx 860 (5th Cir. 2016).

Headline: Ineffective assistance of habeas counsel does not excuse a procedural default of claims based on the ineffective assistance of direct appeal counsel; [Martinez v. Ryan](#) (2012) not extended to this context.

Facts: Davila was sentenced to death after jury trial in Texas, for killing a grandmother and her 5 year old granddaughter who were on the front porch when Davila shot at the group hoping to kill a rival gang member. At trial, Davila's counsel had objected to giving the jury an instruction about "transferred intent," but on direct appeal that issue was not raised. In a subsequent state habeas petition, Davila again did not raise the transferred intent issue nor did he challenge the failure of Davila's appellate counsel to raise it on appeal. On federal habeas, Davila argued that the failure of his direct appeal lawyer to raise the issue was constitutionally ineffective assistance, and that the ineffectiveness of his state habeas counsel in not raising the issue should excuse the procedural default of failing to raise the issue on appeal. He argued that *Martinez*, which permits ineffective assistance of counsel on direct appeal to serve as "cause" for procedural default, should be extended to ineffective assistance of habeas counsel as well. His petition was denied and that was affirmed by the Fifth Circuit.

Thomas (for 5): The requirement that a federal habeas petitioner must first "exhaust" available state remedies is a "fundamental tenet" of federal habeas review. So too is the general rule that procedurally defaulted issues – that is, issues that the state will not review based on an "adequate and independent state ground" such as the procedural failure to raise an issue -- are not reviewable on

federal habeas. The only exception is a showing of “cause” and “prejudice.” Constitutionally ineffective assistance of counsel can be “cause,” but attorney errors that are not unconstitutional are not. Finally, because “the Constitution does not guarantee the assistance of counsel at all” for post-conviction proceedings, errors of counsel in post-conviction [habeas] proceedings normally cannot supply “cause.” *Coleman* (1991).

Martinez recognized a “narrow equitable” exception to this *Coleman* rule, when state law requires (or “makes it unlikely,” *Trevino*, 2013) that ineffective assistance claims be raised in post-conviction rather than direct appeal proceedings. Here, ineffective assistance of post-conviction counsel can supply “cause” to overcome a procedural failure to raise ineffective assistance of trial counsel. But *Martinez* does not “displace *Coleman* as the general rule,” and its “underlying rationale” does not support an extension. *Martinez* was limited to ineffective assistance of trial counsel, and should not be extended to the additional ineffectiveness of appellate counsel. “Protection of a defendant’s trial rights” was the key in *Martinez*, not rights to appellate counsel. Moreover, when a defendant has objected at trial and the trial court has overruled the objection, at least “one court” [the trial court] “will have considered the claim on the merits,” so Davila’s extension is “unnecessary.” Also, “in most instances,” the failure of appellate counsel to raise an issue indicates that it is not “substantial.” States have not chosen this structure: claims of ineffective appellate assistance must necessarily be raised on post-conviction proceedings, where there is no constitutional right to counsel. Extending *Martinez* to such cases would, we think, “flood the federal courts with defaulted claims of appellate ineffectiveness” for “a host of trial errors,” not just ineffective assistance of trial counsel. It would therefore “impose significant systemic costs.” And we think that “the benefits would be small.” [Ed. note: of course, if it “flooded” the federal courts with valid claims, this might say something about the level of professional performance of States’ appointed appellate lawyers. Still, the court says, “separating the wheat from the chaff” is itself a significant cost.] Finally, *Martinez*’s extension would “aggravate the harm to federalism that federal habeas review necessarily causes.” [Ed. note: !! This of course challenges the entire theory of federal habeas review of state criminal convictions.]

Breyer dissenting, joined by Ginsburg, Sotomayor and Kagan: Because the Constitution requires effective assistance of appellate counsel just like trial counsel, I would extend the equitable *Martinez* exception to “substantial claims” of ineffective failures of appellate counsel to raise issues. The four factors that were analyzed in *Martinez*, apply equally here – I disagree with the majority which says to the contrary. Due Process requires a fair appeal just as it requires a fair trial.

IV. IMMIGRATION LAW

Sessions v. Dimaya, argued on Jan. 17, 2017, not decided, set for re-argument on October 2, 2017: Another *Johnson* (2015) follow-on (see *Beckles*, above): whether “crime of violence” as incorporated into alien removal statutes is unconstitutionally vague.

Jennings v. Rodriguez, argued on Nov. 30, 2016, not decided, set for re-argument on October 3, 2017: Whether aliens subject to mandatory detention are entitled to bond hearings, and possibly release, at some point in time?

Esquivel-Quintana v. Sessions, 137 S.Ct. 1562 (May 30, 2017), 8-0 (Thomas), reversing 810 F.3d 1019 (6th Cir. 2016).

Headline: In applying federal removal statute to generic “sexual abuse of a minor” statutory rape convictions, the victim must have been under 16.

Facts: Esquivel pleaded no contest to a California criminal offense of “sexual intercourse with a minor who is more than three years younger than the perpetrator.” California defines “minor” as under 18 years old. The Dept. of Homeland Security began removal proceedings against him, arguing that his conviction constituted the “aggravated felony” of “sexual abuse of a minor” under the federal immigration laws. That offense is not further defined in the federal statute. An Immigration Judge agreed and ordered Esquivel removed. The BIA agreed, saying that because the California statute required a “meaningful age difference” between the perpetrator and the victim, it qualified as a federal aggravated felony. The Sixth Circuit, deferring under *Chevron* to the BIA’s statutory interpretation, denied review.

Thomas (for a unanimous 8): We reverse. Under federal law, “aliens [are] removable based on the nature of their convictions, not ... their actual conduct.” Consequently, “we employ a categorical approach,” presuming that a conviction rested on “the least of the acts criminalized by the” state statute and then asking whether such an offense would “fall[] within the generic federal definition of sexual abuse of a minor. Here, the “least” offense under the California statute would be someone who “just turned 21” having consensual intercourse with a person “who is almost 18.”

The offense not being federally defined, we agree with Esquivel that “the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.” First, “reliable dictionaries provide evidence that the ‘generic’ age of a statutory rape victim” – in 1996 [when the federal statute was amended to include sexual abuse of a minor] and today – is 16. Second, the “structure” and context of the federal Immigration Act confirms that sexual abuse of a minor “encompasses only especially egregious felonies” like murder and rape. Other federal statutes addressing such crimes employ the age of 16. Third, 34 states set the age of consent for sex at 16 or younger in 1996. Others who set it above 16 also require a “special relationship of trust,” an additional element that is not required in California. (We don’t answer whether a “meaningful age difference” might also be required, since Esquivel prevails based on age of victim alone.)

Finally, we don’t decide whether *Chevron* deference might apply, or whether the “rule of lenity” might trump it, because “the statute, read in context, unambiguously forecloses the Board’s interpretation.” **[Ed. note:** This last point avoids the growing controversies regarding the appropriateness, interpretation, and application of *Chevron* deference.]

Maslenjak v. United States, 137 S.Ct. 1918 (June 22, 2017), 9-0 (**Kagan**), vacating and remanding 821 F.3d 675 (6th Cir. 2016).

Headline: To revoke a naturalized citizen’s citizenship based on claim that alien “procured” citizenship by a false statement, **the government must show more than falsity, but also that the statement also “played some role” in obtaining citizenship.**

Facts: Three federal statutes are at play in this case. Title 18 U.S.C. § 1015(a) prohibits making knowingly false statements in a naturalization proceeding; Title 18 U.S.C. § 1425(a) makes it a crime to “knowingly procure, contrary to law, the naturalization of any person;” and 8 U.S.C. 1451(e) provides for the automatic revocation of citizenship of a person who is convicted under §1425(a) of unlawfully procuring her own naturalization. Divna Maslenjak, an ethnic Serb residing in Bosnia in the 1990s, applied for (and was granted) refugee status in the U.S. by swearing to immigration officials that she and her family would be persecuted by the Serbs because her husband had evaded service in the Bosnian Serb Army. This was false; in fact, records showed that her husband had

served as an officer in the Bosnian Serb Army and not evaded conscription. But when Maslenjak applied for naturalization in 2006, she swore that she had never given “false or misleading information” to a government immigration official. She was granted citizenship. When officials later discovered the lies she had made in the refugee proceeding, as well as her lie in the naturalization process of saying she had never lied before, Maslenjak was prosecuted under §1425(a). Upon conviction, she was stripped of her American citizenship. The district court instructed the jury that it could convict Maslenjak “even if [her false] statement was not material [to] and did not influence the decision to approve her naturalization.” The Sixth Circuit affirmed.

Kagan (for 6½): “We begin, as usual, with the statutory text.” **[Ed. note:** Here we see the pervasive impact of the late Justice Scalia – his textualist approach has become accepted, at least as the starting point, by all.] “The most natural understanding” of the statutory words here “is that the illegal act” of a §1425 defendant “must have somehow contributed to the obtaining of citizenship.” “If the ripples from that [illegal] act could not have reached the decision to award citizenship, then the act cannot support a charge that the applicant obtained naturalization illegally.” Thus “a violation of law in the course of procuring naturalization” is insufficient. **“If ... a [false] statement (in an interview, say) has no bearing at all on the decision to award citizenship, then it cannot render that award ... illegally gained.”**

Our textual reading makes sense in “the broader statutory context.” By law, some false representations (such as misrepresentations made out of “embarrassment, fear, or a desire for privacy”) are not a basis for denying citizenship. But under the government’s theory, such lies along the way might later be used to revoke citizenship once granted. Such “wholly unmooring the revocation of citizenship from its award ... opens the door to a world of disquieting consequences,” (such as revoking citizenship for not disclosing a speeding ticket received years earlier).

We go on to discuss how our standard might operate in practice, although Justice Gorsuch says we ought not. “A halfway decision would fail to fulfill our responsibility to both parties and courts.” **To convict under §1425(a), “A jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.”** Even facts that are not themselves disqualifying, could support conviction if “they could have led to the discovery of other facts which would do so.” But a defendant can also try to rebut this standard by showing that they would have qualified for citizenship in any case. “Qualification for citizenship is a complete defense to a prosecution” under § 1425(a).

The jury instructions were in error under the standard we announce today; we leave the “harmless error” inquiry “for resolution on remand.”

Gorsuch concurring in part and in the judgment, joined by Thomas: I agree that the jury instructions were wrong on “causation.” But “there I would stop.” Although the majority’s “work here is surely thoughtful and may prove entirely sound,” the “operational” details were not briefed much and have not been worked on by lower courts. “The experience of our thoughtful colleagues on the district and circuit court benches [**ed. note:** from which Justice Gorsuch is only recently arrived] could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.” “This Court often speaks most wisely when it speaks last.”

Alito concurring in the judgment: While I agree that a charged false statement must have been “material,” I think this means (as it usually does) only that a prior false statement had a “natural tendency to influence” the prior naturalization, not that it actually had “a demonstrable effect.”

And “one additional point:” §1425(a) also applies to attempts. So if the person “thinks” there illegal act will procure naturalization, that is enough.

[Lee v. United States](#), 137 S.Ct. 1958 (June 23, 2017), 6-2 (**Roberts**; Thomas dissenting with Alito), reversing 825 F.3d 311 (6th Cir. 2016).

Headline: It is ineffective assistance to advise client that guilty plea will not result in mandatory removal. Prejudice is shown when defendant shows he would not have accepted the plea offer but for that erroneous advice. See detailed summary under “Sixth Amendment” at page 14 above.

V. CIVIL CASES RELATED TO CRIMINAL TOPICS

[Nelson v. Colorado](#), 137 S.Ct. 1249 (Apr. 19, 2017), 7 (6-1) to 1 (**Ginsburg**; *Alito* concurring in the judgment; Thomas dissenting), reversing 362 P.3d 1070 and 364 P.3d 866 (Colo. 2015).

Headline: Due process requires that State return fees costs and restitution taken from defendant whose conviction is invalidated, without requiring defendant to file a separate civil action and prove innocence.

Facts. Two consolidated cases here. First, Nelson was convicted of alleged abuse of her children - - after reversal on appeal, a jury acquitted Nelson of all charges. Madden was convicted of two crimes -- after reversals, “the State elected not to appeal or retry the case.” Both defendants had been made to pay court costs, fees, and restitution; both requested refunds after their not-guilty statuses were final. Although the trial courts refused, an intermediate appellate court granted relief. But the Colorado Supreme Court ruled that the only remedy for the defendants was in the State’s 2013 “Exonerated Persons” statute, which that court held provided sufficient “process” to satisfy the Constitution.

Ginsburg for 5: The statutory requirements that exonerated persons must file a separate civil action to recover moneys taken from them by the state, and prove their innocence by clear and convincing evidence, “does not comport with due process,” when evaluated under the “familiar” three-part analysis of *Matthews v. Eldridge* (1976). “Surely, it does not” (ftnt. 11). First, “absent conviction of a crime, one is presumed innocent,” and “once ... convictions [are] erased, the presumption of ... innocence [is] restored.” Their interest here is therefore strong, and the fact that their innocence was restored after appeal rather than established outright is “inconsequential.” “By what right does the State retain the amount paid out by the defendant,” whether acquitted outright or after appeal. Second, there is an “unacceptable” risk of erroneous deprivation of their property, because they have to prove their innocence by a high standard even though they are “presumed innocent.” Indeed, the Exoneration statute doesn’t even apply to invalidated misdemeanor convictions. While the statute may be valid to compensate for the loss of liberty an innocent defendant suffers, the taking of property is different. Third, “Colorado has no interest in withholding ... money to which the State currently has zero claim of right.” **“To comport with due process, a State may not impose anything more than minimal procedures on the refund.”**

Alito concurring in the judgment: While I agree with reversal here, “the proper framework” here should be *Medina v. California* (1992), not *Matthews v. Eldridge*. *Eldridge* applies to civil takings of property; *Medina* applies to evaluation of rules that are “part of the criminal process.” And *Medina* requires evaluation of “historical ... fundamental and deeply rooted principle[s] of justice.” But the majority here “turns its back on historical practice,” in favor of “balancing.” **The obligation that money erroneously taken must be repaid is a “long recognized” American principle. Colorado’s “harsh, inflexible” process fails under my analysis.** But the majority ignores “obvious implications” of its broad ruling, most clearly regarding the refund of restitution. Restitution

represents repaying victims for their losses from crime. Its “unique characteristics” might make a constitutional difference; but “the Court regrettably mentions none of this.” For example, it might not be unfair to require even a defendant who was convicted but then “restored” on appeal, to demonstrate that the victim would not have recovered losses even in a civil suit.

Thomas dissenting: “Both opinions” here “bypass the most important question” and “assume away the real issue.” do defendants like these have a “substantive entitlement” to refunds? If they do not, then it is not “property” protected by the due process clauses. I do not think petitioners have sufficiently demonstrated this; Colorado argues that once the money is paid, it becomes “public funds” or “property of the victims,” and so fair process to get it back is okay. Despite “intuitive and rhetorical appeal,” state law does not establish the “substantive entitlement” required, and the Due Process clause does not guarantee substance independently. [Ed. note: Here Justice Thomas quietly but clearly invokes the entire 20th-century jurisprudential debate regarding “substantive due process.”]

[Ziglar v. Abbasi](#), 137 S.Ct. 1843 (June 19, 2017), 4-2 (**Kennedy**; Thomas concurring in part and concurring on the judgment; Breyer dissenting, joined by Ginsburg. Justices Sotomayor and Kagan did not participate), reversing in part and remanding in part 789 F.3d 218 (2nd Cir. 2015).

Headline: In a lengthy and disputed set of opinions, a **six-Justice Court** dramatically **alters *Bivens* analysis and finds that no *Bivens* action lies here, against high-ranking government officials; and that the officials were also entitled to qualified immunity** for alleged civil rights “conspiracy” conduct. [Ed. note: I think this is the most important decision of this Term.]

Facts: “After the September 11 attacks . . . , the United States Government ordered hundreds of illegal aliens to be taken into custody and held . . . for days and weeks, stretching into months.” The detentions were allegedly based on race, ethnicity, and religion; and the conditions of detention were allegedly extremely harsh. Later civil rights lawsuits were filed, alleging both constitutional and statutory claims, against “high executive officers in the Department of Justice [including Attorney General Ashcroft, FBI Director Mueller, and INS Commissioner Ziglar] and two . . . Wardens . . . where the detainees had been held.” Constitutional violations were alleged directly under the Constitution, under the theory first allowed by *Bivens* (1971) (Fourth Amendment) and later extended under the Fifth (*Davis v. Passman*, equal protection) and Eighth (*Carlson*, cruel and unusual punishment) Amendments. A §1985 claim was also filed, alleging a conspiracy among the high-ranking officials to deny the detainees equal protections of the laws by detaining them in harsh conditions based on their race, religion, and national origin. Various lower court opinions permitted some of the claims to go forward; *cert* was granted.

Kennedy, for a majority (four Justices) in part, and for 3 in part: [This summary cannot do justice to the entire 33-page opinion.] After analysis, we conclude that **absent Congressional action, no direct constitutional cause of action should lie, under a *Bivens* theory, on these alleged facts.** Congress provided for civil rights damages against States in 1871. But it did not provide similar statutes for damages against federal officials. 100 years later, we decided in *Bivens* that persons whose Fourth Amendment rights are violated can sue federal officials directly under that Amendment, without any statutory cause of action. We extended this “implied constitutional cause-of-action” theory to other Amendments in *Davis* and *Carlson*. But in later years, the arguments for implied causes of action “began to lose their force” and we became “more cautious.” We have not extended *Bivens* since, and have ruled that the question is one of Congressional intent, due to “separation of powers” concerns. “The *Bivens* remedy is now a ‘disfavored’ judicial activity.”

Indeed, the three *Bivens* results “might have been different if ... decided today,” although “this opinion is not intended to cast doubt” on them. [Ed. note: Really?] “Most often” it is Congress and not the Court that should decide whether and how to provide a damages remedy, particularly when there are “special factors counselling hesitation.” The court of appeals “did not perform any special factors analysis at all,” and it erred in deciding that the alleged facts here are not a “new” *Bivens* context. This case is “different in a meaningful way from previous *Bivens* cases.” “A *Bivens* action is not a proper vehicle for altering ... policy.” And it is for an individual’s acts, “not the acts of others.” Plus, these cases challenge high-ranking Executive policy-making, on “sensitive issues of national security.” Congressional silence, despite repeated investigation, on damages for September 11 actions, “is telling.” “There is a balance to be struck,” but here a *Bivens* action might lead officers to “refrain from taking urgent and lawful action in time of crisis.” For all these reasons, we think it is up to Congress, and not this Court, to create any damages remedy here.

As for the Wardens of the detention facilities, this would be an “extension” of *Carlson*, and “even a modest extension is still an extension” requiring a “special factors” analysis. On these claims, we remand to the court of appeals to perform that analysis in the first instance. [Ed. note: This holding is only for three Justices, Justice Thomas not joining it.]

Finally, the defendants were entitled to qualified immunity on the statutory civil rights conspiracy allegations, because the relevant law was not “clearly established.” They “could not have predicted that ... their joint consultations and resulting policies” violated the law. In fact, we refer now to an antitrust law concept, the “intracorporate-conspiracy doctrine,” which holds that an agreement among “agents of the same legal entity,” when acting “in their official capacity,” cannot be guilty of an unlawful conspiracy. [Ed. note: !!!]. Whether this should apply to Executive Branch civil rights conspiracies is a “sufficiently open” question such that the officials here are entitled to qualified immunity.

The alleged facts are “tragic” and “nothing in this opinion should be read to condone the treatment” alleged. But the claims are not sufficient for money damages, except for the one claim remanded to the Court of appeals for a “special factors” analysis.

Thomas, concurring in part and concurring in the judgment: First, I concur in the judgment remanding the one claim to the court of appeals, “in order for there to be a controlling judgment in this suit.” But I would not extend *Bivens* there.

Moreover, I am not convinced that our entire qualified immunity doctrine is consistent with the common law. “We should reconsider our qualified immunity jurisprudence.” [Ed. note: Wow!]

Breyer dissenting, joined by Ginsburg: “I would affirm” because these claims “fall well within the scope of traditional constitutional tort law.” [Ed. note: Justice Breyer felt so strongly here that he read much of his dissent from the bench.] The majority “shrink[s] *Bivens*” here; the plaintiffs’s claims do not “extend” it. [Justice Breyer reviews the history of *Bivens* actions and explains why he believes these claims fall within the doctrine.] Congressional silence shows that Congress “accept[s] *Bivens* actions as part of the law,” not that it is against it. [Breyer goes through seven factors he says the majority relies on, and finds that none of them make a “meaningful difference.”] Finally, “history tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out to unnecessarily and unreasonably deprive American citizens of basic constitutional rights.” E.g., *Korematsu*. [Ed. note: Not to be too pedantic, but unlike *Korematsu*, this case involves claims by non-citizen detainees.]

VI. OPINIONS WITHOUT ARGUMENT (Summary Reversals)

[Bosse v. Oklahoma](#), 137 S.Ct. 1 (Oct. 11, 2016) (*per curiam*), vacating 360 P.3d 1203 (Okla. Crim. App. 2015): Death penalty sentencing. In [Payne v. Tennessee](#) (1991) we overruled one aspect of [Booth v. Maryland](#) (1987) and allowed admission of “victim impact evidence” in capital sentencing. However, lower courts “remain bound” by other aspect of *Booth*, such as its “prohibition on characterizations and opinions from a victim’s family members about the crime, the defendant and the appropriate sentence.” Thus it was error to allow the victim’s relatives to recommend a death sentence to the jury in this case. “It is this Court’s prerogative alone to overrule one of its precedents,” including rulings in a precedent that are untouched by later decisions.

Thomas concurring, joined by Alito: I agree that only this Court can overrule unaddressed aspects of *Booth*. But today’s opinion “says nothing about whether *Booth* was correctly decided in these other aspects or whether *Payne* swept away its analytical foundations.”

[White v. Pauly](#), 137 S.Ct. 548 (Jan. 9, 2017) (*per curiam*), vacating 814 F.3d 1060 (10th Cir. 2015): Qualified Immunity, Fourth Amendment. “Clearly established law” must be “particularized to the facts of the case,” not a “high level of generality.” Here, no law clearly established that a reasonable officer arriving late to the scene may not reasonably assess the circumstances as he finds them and use deadly force. The case is remanded for assessment of possible alternative grounds.

Ginsburg, concurring: I concur “on the understanding” that the Court’s opinion regarding Officer White “does not foreclose” denying summary judgment to the other two officers, or to White based on other “fact disputes” left open here.

[Rippo v. Baker](#), 137 S.Ct. 905 (Mar. 6, 2017) (*per curiam*), vacating 368 P.3d 729 (Nev. 2016): Due Process; Potential Judicial Bias. Rippo learned during his trial that the trial judge was the target of a federal bribery investigation, and he asked for recusal on the basis that the District Attorney’s office was assisting the feds so that the judge might act to curry favor with law enforcement. The Nevada Supreme Court rejected Rippo’s claim because he had not shown “actual bias.” But this was “the wrong legal standard.” Under the Due Process Clause, “recusal is required when, objectively speaking, the probability of actual bias ... is too high,” “even when a judge has no actual bias.” “The question our precedents require” is “whether ... the risk of bias was too high to be constitutionally tolerable.” The case is remanded for further proceedings under that standard.

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

[Elmore v. Holbrook](#) (Oct. 17, 2016): Sotomayor, joined by Ginsburg, dissenting from denial of *certiorari*: In a 15-page opinion in this capital case, Justice Sotomayor excoriates the decision not to address the “egregious constitutional errors” she sees, including the deficient, one-hour, “mitigation” case that counsel presented, beginning with “there are no excuses in this case and none are offered.”

[Tatum v. Arizona](#) (Oct. 31, 2016): **Alito**, joined by Thomas, dissenting from the decision to grant, vacate and remand (“GVR”). In five cases, the Court has GVR’d for courts to reconsider their sentencing decisions in light of [Montgomery](#), in which the Court ruled that [Miller v. Alabama](#) must be applied retroactively. But these cases were decided after *Miller*, so the Arizona

courts surely have already considered *Montgomery*. Moreover, the decisions are consistent with *Miller*'s central holding, that LWOP for juveniles is unconstitutional except in rare cases.

Sotomayor concurring in the decision to GVR: It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption;" whether the petitioners are among the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." That did not happen in these cases and there is "meaningful" work to do on remand.

[*Sireci v. Florida*](#) (Dec. 12, 2016), **Breyer** dissenting from denial of *certiorari*: Sireci has been under threat of execution for forty years; two other petitioners are similar; these are "especially cruel and unusual circumstances." "The time has come for this Court to reconsider the constitutionality of the death penalty."

[*Arthur v. Dunn*](#) (Feb. 21, 2017), **Sotomayor**, joined by **Breyer**, dissenting from denial of *certiorari*: Arthur has challenged his method of execution, lethal injection, as cruel and unusual, and has proposed an alternative: death by firing squad. In [*Glossip v. Gross*](#) we ruled that to challenge a method of execution, a defendant must allege that a "known and available alternative" exists (a "macabre" requirement from which I dissented). Arthur has done this. Yet because Alabama law does not expressly permit execution by firing squad, Arthur's challenge was dismissed. [In 18 pages, unusually long for an Order dissent, Justice Sotomayor explains why she dissents from the failure to review here.] The Court's decision to deny *certiorari* means that all that a State must do is pass a statute declining to authorize any alternative methods of execution. This cannot be right.

[Then in the same case on May 25, 2017]: [Sotomayor dissenting](#) from denial of stay and of *certiorari*: The State has now denied Arthur access to a cellphone on the evening of his scheduled execution. The State has "no legitimate reason" for this, and it "serves only to frustrate any effort by Arthur's attorneys to petition the courts in the event of yet another botched execution." But prisoners "possess a constitutional right of access to the courts." "When Thomas Arthur enters the execution chamber tonight, he will leave his constitutional rights at the door." I dissent. [Arthur was executed later that night.]

[*Reed v. Louisiana*](#) (Feb. 27, 2017), **Breyer** dissenting from denial of *certiorari*: Reed was sentenced to death in Caddo Parish, Louisiana, a county that has sentenced more people to death per capita than any other United States county. The arbitrary role that geography plays in the death penalty, along with other problems I have discussed elsewhere, "has led me to conclude that this Court should consider the basic question of the death penalty's constitutionality."

[*Leonard v. Texas*](#) (March 6, 2017), **Thomas** respecting the denial of *certiorari*. Leonard challenges the constitutionality of the civil forfeiture statutory procedures used to seize and then forfeit \$201,000 that she said were proceeds from sale of a house but the Texas police said were connected to drug sales. "This system—where police can seize property with limited judicial oversight and retain it for their own use— has led to egregious and well-chronicled abuses." "Forfeiture operations frequently target the poor and other groups least able to defend their interests." Only old British history supports the unique civil forfeiture regime; "I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice." Because Leonard did not raise her Due Process challenges below, I concur in denial of review. But these issues are "certainly worthy of consideration" in the future.

Baston v. United States (March 6, 2017), **Thomas** dissenting from denial of *certiorari*: Baston, a non-U.S. citizen, was prosecuted in federal court here for “sex trafficking” crimes committed abroad. Congress has statutorily granted “extra-territorial jurisdiction” over such conduct, and courts have upheld this under the Constitution’s “Foreign Commerce Clause” if the conduct has a “substantial effect” on U.S. foreign commerce. But the *Lopez* categories for regulating “interstate” commerce should not automatically be transferred to the extra-territorial context. We should grant review “to reaffirm that our Federal Government is one of limited and enumerated powers, not the world’s lawgiver.” “I am confident that whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity.”

Perez v. Florida (March 6, 2017), **Sotomayor** concurring in denial of *certiorari*: In *Elonis* (2015), we left open the question of what intent, precisely, is required to convict a person for making a “threat.” Perez’s conduct here “may have been nothing more than a drunken joke,” but the jury instruction permitted conviction merely for what Perez “stated,” regardless of intent. We should grant review to settle the question left open in *Elonis*.

Ruiz v. Texas (March 7, 2017), **Breyer** dissenting from denial of stay of execution: Ruiz has been on death row for 22 years, mostly in solitary confinement. Some of us have expressed constitutional concerns about solitary confinement, and I have maintained that lengthy time under penalty of death can be “cruel and unusual.” “If extended solitary confinement alone raises serious constitutional questions, then 20 years of solitary confinement, all the while under threat of execution, must raise similar questions, and to a rare degree, and with particular intensity.” We should grant the stay to examine the record more fully.

McGehee v. Hutchinson (April 20, 2017) (**Breyer** dissenting from denial of stay; **Sotomayor** dissenting from denial of stay and *certiorari*).

Sotomayor, joined by Ginsburg, dissenting from denial of *certiorari* and stay of execution. The courts of appeal are divided on the meaning of *Glossip* in challenges to the method of execution. Here the district court wrote a 101-page opinion finding that the risk of severe pain in his execution was substantial. A divided Eighth Circuit reversed. We should stay this execution and grant review “to provide clarification and guidance.”

Breyer, joined by Kagan, dissenting from the denial of the stay of execution: Arkansas selected 8 people to be executed over 11 days because the “use by” date of the State’s execution drug is about to expire. This is too random a factor and highlights the arbitrariness of executions. Issues here include (1) whether alternative methods of execution are available and (2) whether this compressed execution schedule constitutes cruel and unusual punishment. We should grant a stay so these issues can be sorted out.

Smith v. Ryan (April 24, 2017), **Breyer** dissenting from denial of *certiorari*: We should evaluate whether Smith’s **solitary confinement** violates the Eighth Amendment.

Salazar-Limon v. Houston (April 24, 2017), **Sotomayor** and **Ginsburg** dissenting from denial of *certiorari*. In this excessive force case, summary judgment was inappropriate because there was a genuine issue of fact for trial. It is not for a judge to “resolve differing versions of the truth.”

Alito and **Thomas** concurring in denial of *certiorari*. We only grant review if a lower court “conspicuously failed to apply a governing legal rule,” not when the “lower court simply erred in

applying a settled rule of law.” Whether or not one agrees with the grant of summary judgment, all that matters is whether that the lower court “attempted to faithfully apply the correct legal rule.”

[*Hicks v. United States*](#) (June 26, 2017): **Gorsuch** concurring in the vacation and remand of judgment: The Acting Solicitor General concedes that Hicks “was wrongfully sentenced to a 20-year mandatory minimum sentence under a now-defunct statute.” “I cannot think of a reason to say no” to the SG’s request to remand for consideration of the last two (of four) plain error factors. “We routinely” do this in similar cases. [Ed. note: How quickly Justice Gorsuch adopts the royal “we” for precedents decided before he joined the Court!] And “it’s clear that Mr. Hicks enjoys a reasonable probability of success.” Wouldn’t people “hold a rightly diminished view of our courts” if we allowed defendants like Hicks “to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?” “Respectfully, I am unaware of” the presence of any of the factors that might counsel us acting more cautiously.

Roberts dissenting, joined by Thomas: “My colleague [Gorsuch] says” this case is a “no brainer” on remand. But Hicks never raised his argument below, and the SG does not say the Fifth Circuit’s “judgment” was “wrong,” he says only that the case should be remanded for application of plain error doctrine. Unless the overall judgment was wrong, we should not vacate. [Ed. note: But the Chief Justice does not say what he thinks the Court should do. Leave the judgment in place and Hicks in prison while lower court habeas remedies play out? This is (apparently) Justice Gorsuch’s point: the Court ought not delay an obvious release from prison based on technicalities.]

[*Peruta v. California*](#) (June 26, 2017), **Thomas** dissenting, joined by Gorsuch, from denial of *certiorari*: We should grant review to address whether there is a Second Amendment right to “open carry” firearms in public, and if so, its contours. (The Ninth Circuit’s decision to address only “concealed carry” is untenable on the litigation record of this case.) This California county has decided that “concern for one’s personal safety” does not “alone” allow it. 26 States have asked us to resolve the question here and many lower courts have produced “thorough opinions on both sides.” Other constitutional rights are treated with more regard than the Second Amendment, which is a “distressing trend.” “For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.”

[*Otte v. Morgan*](#) (July 25, 2017), Sotomayor, joined by Ginsburg, dissenting from denial of stay of execution and of *certiorari*: The district court here held an evidentiary trial on Ohio’s execution protocols and found in a 119-page opinion that plaintiffs were likely to prevail in their challenge. That was ultimately reversed by the Sixth Circuit *en banc* with six judges dissenting. This fails to give the district court the deference that [*Glossip*](#) (2015) requires. See my earlier dissent in *McGhee* (above). I dissent again here from our failure to review these issues.

VII. Criminal Law Certiorari Grants for the Upcoming (Oct. '17) Term

Here are brief descriptions (my own) of the questions presented in criminal cases that have been granted for review in the coming Term:

1. [*Sessions v. Dimaya*](#), No. 15-1498 (holdover from last Term, scheduled for re-argument for the first hour of the new Term on Oct. 2): Is the phrase “crime of violence” in 18 U.S.C. 16(b), which is incorporated into the Immigration and Nationality Act as a ground for removal, unconstitutionally vague, as the Court ruled regarding the identical phrase in *Johnson* (2015)? [*Compare to Beckles*, page 16 above, distinguishing *Johnson* and holding that Sentencing Guidelines are categorically not subject to due process vagueness challenge.]

2. [*Jennings v. Rodriguez*](#), No. 15-1204 (re-argument from last Term; scheduled for re-argument on Oct. 3): Whether criminal or terrorist aliens subject to mandatory detention under 8 U.S.C. 1225(b) must be given bond (bail) hearings if detention exceeds a certain amount of time, despite statutory silence on the topic; and if so, what standards should apply?

3. [*Class v. U.S.*](#), No. 16-424 (scheduled for argument on Oct. 4, 2017): Whether an unconditional guilty plea inherently waives a defendant’s right to challenge the constitutionality of the statute under which he is convicted.

4. [*District of Columbia v. Wesby*](#), No. 15-1485 (scheduled for argument on Oct. 4, 2017): (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest them for trespass; and (2) whether those officers are entitled to qualified immunity because the law on the first question is not “clearly established.”

5. [*Jesner v. Arab Bank, PLC*](#), No. 16-499 (scheduled for argument on Oct. 11, 2017): Whether the Alien Tort Act, 28 U.S.C. 1350, categorically forecloses corporate liability, where the defendant banks are alleged to have acted in the United States as “paymasters” for international terrorists abroad.

6. [*Wilson v. Sellers*](#), No. 16-6855 (argument TBD): Whether the presumption of [*Ylst v. Nunnemaker*](#) (1991) that a federal habeas court should “look through” a summary State Supreme Court ruling to review the “last reasoned decision” in state court applies, or whether the 1996 AEDPA statute and this Court’s decision in [*Harrington v. Richter*](#) permits a federal habeas court to consider any “reasonable basis” that might have underlain the state Supreme Court’s decision.

7. Two Securities Cases:

[*U.S. Bank National Associations v. Village at Lakeridge*](#), No. 15-1509 (scheduled for argument on Oct. 11, 2017): Whether the United States Courts of Appeals for the Third, Seventh, and Tenth Circuits’ *de novo* standard of review is the appropriate standard for determining non-statutory insider status (as opposed to the Ninth Circuit’s “clearly erroneous” standard applied in this case).

[*Leidos, Inc. v. Indiana Public Retirement System*](#), No. 16-581 (argument date TBD): Whether Item 303 of the Securities and Exchange Commission Regulation S-K creates a “duty to disclose” that is privately enforceable under 15 U.S.C. §78j and SEC Rule 10b-5.

9. [*Ayestas v. Davis*](#), No. 16-6795, (argument date TBD): Whether 18 U.S.C. §3599(f), which permits a federal habeas court to grant funding for “reasonably necessary” investigate services, requires an

additional showing of “substantial need,” and whether a §3599(f) request may be denied because the court concludes that the underlying ineffective-assistance claim will ultimately fail?

10. [*Rubin v. Islamic Republic of Iran*](#), No.16-534 (argument date TBD): How should the federal statutory “terrorism exceptions” to the general immunity of a foreign state’s property from attachment of execution, specifically 28 U.S.C. §§1610(a) and (g), operate, in a case seeking to attach various artifacts that belong to Iran but which the University of Chicago currently possesses?

11. [*Carpenter v. U.S.*](#), No. 16-402 (argument date TBD): **A major 4th Amendment case.** Does the seizure and review of cell-tower location information, from third-party cell provider businesses, require a Fourth Amendment warrant because it reveals private information regarding the cell-subscriber’s likely locations and movements?

12. [*Marinello v. U.S.*](#), No. 16-1144 (2nd Cir) (argument date TBD): Is knowledge that an IRS action is “pending” required to convict for obstruction of the due administration of the tax laws under 26 U.S.C. §7212(a), as it is under the general federal obstruction of justice statute, 18 U.S.C. §1503?

-- E N D as of August 7, 2017 --

WHO WROTE WHAT in the 2016-17 Term

(All writings in argued cases, not just majorities)

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

ROBERTS

Buck
Dean
Lee
Moore

KENNEDY

Packingham
Pena-Rodriguez
Weaver
Ziglar
Beckles

THOMAS

Beckles
Marique
Davila
Esquival-Quintana
Bravo-Fernandez
Ziglar
Weaver
Lee
Hernandez
Manuel
Buck
Pena-Rodriguez
Nelson

GINSBURG

Bravo-Fernandez
Moore v. Texas
Nelson
Beckles
Manrique

BREYER

McWilliams
Turner
Shaw
Midland Funding
Hernandez
Weaver
Davila
Ziglar

ALITO

LA v. Mendez
Salman
Packingham
Maslenjak
Nelson
Weaver
Manuel
McWilliams
Pena-Rodriguez

SOTOMAYOR

Honeycutt
Beckles
Midland Funding

KAGAN

Manuel
Maslenjak
Turner

GORSUCH

Maslenjak

Per Curiam opinions

Hernandez (merits opinion)
Bosse v. Oklahoma (Summary rev.)
White v. Pauley (summary rev.)
Rippo v. Baker (Summary rev.)

Total Criminal Law-and-Related decisions in argued cases: 23 (out of 62 total argued cases)
(plus 3 *per curiam* Summary Reversals).

Total Writings in argued Criminal Law-and-Related cases: 52 (plus 3 summary reversals).

Criminal Law Workhorse: Justice Thomas: 13 writings. 6 were dissents, plus 3 concurrences. **Thomas** and **Alito** have become the reliable “conservative” dissenters; Justice **Breyer** has become the reliable “liberal” dissenter in criminal law cases.

Note that Justices **Ginsburg** and **Breyer**, as the senior “liberal” Justices, wrote 7 criminal law majorities, as opposed to only three for Justices **Sotomayor** and **Kagan**. For Justice **Kagan** this is unsurprising, as her main interests do not lie with criminal cases. The surprise here is Justice **Sotomayor** – she wrote much less in criminal cases this Term than in years past.

Dissents or other writings from orders (*see* pp. 35-38 above): The death penalty is clearly driving separate writings in connection with Orders: 8 of 16 plus 2 other Eighth Amendment writings. Expect this to continue in the future – although the addition of Justice Gorsuch may now temper Justice Breyer’s enthusiasm for granting an overall review of capital punishment, cf. his dissent in *Glossip*.