

**THE CRIMINAL JUSTICE SECTION
OF THE
AMERICAN BAR ASSOCIATION**

August 10, 2021 – Via Zoom

ANNUAL REVIEW
of the
**U.S. SUPREME COURT’S
CRIMINAL LAW CASES
(2020-2021)**

Summaries of all Opinions (including Concurrences and Dissents)
in argued and non-argument cases and Orders;
certiorari grants for the upcoming Term;
a chart of “Who Wrote What;”
and a brief Overview of the Term,
regarding all
Criminal Law-and-related cases before the U.S. Supreme Court
October Term 2020 Term (Oct. 2020-August 2021)
(with clickable links to the cases).

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THE 2020 “PANDEMIC LOCKDOWN” TERM (OCT. 2020- JULY 2021)

CRIMINAL LAW (AND RELATED) DECISIONS OF THE U.S. SUPREME COURT

TABLE OF CONTENTS

	<u>Page</u>
List of Cases with Brief Descriptions	2
2021 ABA Annual Meeting Panelists	9
Editor’s Brief Overview of the Criminal Docket, OT 2020	9
(Explanatory Notes)	13
Detailed Summaries of All Decisions	
I. Constitutional Decisions	15
A. Fourth Amendment	15
B. Sixth Amendment	17
C. Eighth Amendment.....	17
II. Federal Criminal Statutes	19
A. Computer Fraud and Abuse Act	19
B. Federal Criminal Sentencing	20
C. The Uniform Code of Military Justice	23
III. Habeas Corpus	24
IV. Native American Tribal Authority	25
V. Immigration Law	26
VI. Civil Cases Related to Criminal Topics	31
A. Alien Tort Statute	31
B. Federal Tort Claims and <i>Bivens</i> Actions	32
C. Securities Law Cases	32
Summary Reversal (without full briefing or argument) Opinions	33
Writings Related to Orders	34
A. Applications for Stays	34
B. Denials of <i>Certiorari</i> : Death Penalty Cases & Others	35
C. Orders to Grants <i>Certiorari</i> , Vacate, and Remand (GVRs)	37
Criminal Law <i>Certiorari</i> Grants for the Upcoming 2021-22 Term	37
Chart: “Who Wrote What” in Criminal Law-and-Related Cases (2020-21 Term) ...40	

LIST OF CASES SUMMARIZED, WITH BRIEF DESCRIPTIONS

(divided topically, and chronologically within topics. Their detailed Summaries begin on p. 15)

I. CONSTITUTIONAL DECISIONS

A. Fourth Amendment

[Torres v. Madrid](#) (March 25, 2021): Application of physical force to the body of a person with intent to restrain is a 4th A “seizure,” even if the person does not submit..... 15

[Caniglia v. Strom](#) (May 17, 2021): There is no open-ended “community caretaking” exception to the Fourth Amendment’s warrant requirement. “Exigency” must be shown... 15

[United States v. Cooley](#) (June 1, 2021): A Native American tribal police officer with probable cause of state or federal criminal violations, may temporarily detain and search non-Indian persons traveling on public roads that run through a reservation (the detailed summary is found under “**Native American Tribal Authority**”)..... 16

[Lange v. California](#) (June 23, 2021): “Hot pursuit” of a suspected misdemeanor offender does not categorically allow warrantless home entry absent a “law enforcement emergency.” 16

B. Sixth Amendment

[Edwards v. Vannoy](#) (May 17, 2021): The *Ramos* unanimous-jury-rule does not apply retroactively on federal habeas corpus review; more broadly, the “watershed rule exception” to our normal non-retroactivity position, established in *Teague* (1989), is hereby abolished (the detailed summary is found under “**Habeas Corpus**”) 17

C. Eighth Amendment

[United States v. Briggs](#) (Dec. 10, 2020): The Uniform Code of Military Justice’s generally applicable five-year statute of limitations for non-capital offenses does not apply to prosecutions of rape, because the offense statute still says “punishable by death,” despite rulings (*Coker* in 1977, *Kennedy* in 2008) prohibiting the death penalty for rape (the detailed summary is found under “**Uniform Code of Military Justice**”)..... 17

[Jones v. Mississippi](#) (April 22, 2021): *Miller* and *Montgomery*, which held that mandatory LWOP (life without parole) for juveniles violates the Eighth Amendment and applies retroactively, **do not require an explicit finding that a juvenile is “permanently incorrigible** before a discretionary LWOP sentence is imposed..... 17

II. FEDERAL CRIMINAL STATUTES

A. Computer Fraud and Abuse Act (“CFAA”)

[Van Buren v. United States](#) (June 3, 2021): individuals “exceed authorized access,” and thus violates the CFAA, only when they accesses a computer with authorization and obtain

information located in particular areas of the computer that are off-limits to them (such as files, folders, or databases), not just prohibited to them by policies..... 19

B. Federal Criminal Sentencing

Borden v. United States (June 10, 2021): “Reckless” prior offenses do not qualify as “violent offenses” to support ACCA repeat offender sentencing 20

Terry v. United States (June 14, 2021): Sentence reductions under the First Step Act are available only if an offender’s prior crack cocaine offense triggered a mandatory minimum sentence..... 20

Greer v. United States (June 14, 2021): On appeal, an unobjected-to failure to instruct, in a felon-in-possession case, that the defendant must know they are a felon (a *Rehaif* error), is not “structural error” requiring automatic reversal; and to show “plain error” a defendant must propose a sufficient basis for a “reasonable probability” that “the outcome would have been different.” These defendants here did not do that, because “**convicted felons ordinarily know that they are convicted felons.**” 22

C. The Uniform Code of Military Justice

United States v. Briggs (Dec. 10, 2020): The Uniform Code of Military Justice’s generally applicable five-year statute of limitations for non-capital offenses does not apply to prosecutions of rape, because the offense statute still says “punishable by death” 23

III. HABEAS CORPUS

Jones v. Mississippi (April 22, 2021): *Miller* and *Montgomery*, which held that mandatory LWOP (life without parole) for juveniles violates the Eighth Amendment and applies retroactively, **do not require an explicit finding that a juvenile is “permanently incorrigible** before a discretionary LWOP sentence is imposed (the detailed summary is found under “**Eighth Amendment**”) 24

Edwards v. Vannoy (May 17, 2021): The *Ramos* unanimous-jury-rule does not apply retroactively on federal habeas corpus review; more broadly, the “watershed rule exception” to our normal non-retroactivity position, established in *Teague* (1989), is hereby abolished 24

IV. NATIVE AMERICAN TRIBAL AUTHORITY

United States v. Cooley (June 1, 2021): A Native American tribal police officer with probable cause of state or federal criminal violations, may temporarily detain and search non-Indian persons traveling on public roads that run through a reservation..... 25

V. IMMIGRATION LAW

Pereida v. Wilkinson (March 4, 2021): Noncitizens bear the burden to prove they are eligible for relief from removal – and so when a prior conviction for a disqualifying offense is ambiguous, the noncitizen does not carry this burden merely by proving the ambiguity. Instead, they must prove they were not convicted of the disqualifying offense 26

Niz-Chavez v. Garland (April 29, 2021): Under IIRIRA, only a notice to appear that is a single document containing all the information required under §1229(a)(1) about an individual’s removal hearing, is sufficient to trigger IIRIRA’s stop-time rule..... 27

United States v. Palomar-Santiago (May 24, 2021): Under the statute criminalizing unlawful reentry after deportation, a non-citizen bringing a collateral challenge to the underlying deportation order is required to demonstrate all three of the requirements under §1326(d); each statutory criteria in §1326(d) is mandatory 28

Garland v Ming Dai (consolidated with *Garland v. Alcaraz-Enriquez*) (June 1, 2021): The Ninth Circuit’s judge-made rule—that a reviewing court “must treat a noncitizen’s testimony as credible and true absent an explicit adverse credibility determination”—cannot be reconciled with the INA’s terms and is wrong..... 28

Sanchez v. Mayorkas (June 7, 2021) A foreign national who enters the U.S. unlawfully, and who later receives Temporary and Permanent Status, is nonetheless *ineligible* for Lawful Permanent Residency because it requires both “nonimmigrant status” *and* an “admission” (which by definition cannot be conferred by TPS)..... 29

Johnson v. Guzman Chavez (June 29, 2021): Noncitizens subject to reinstated removal orders and who request or are granted a “withholding only” hearing, may be mandatorily detained under INA §1231..... 30

VI. CIVIL CASES RELATED TO CRIMINAL TOPICS

A. Alien Tort Statute (28 U.S. C. 1350)

Nestle USA v. Doe (June 17, 2021): For a valid Alien Tort Statute case – here, alleging child slavery committed in Africa on foreign farms from which U.S. companies buy products and to which U.S. companies provide equipment and technical assistance – plaintiffs must allege more conduct in the U.S. than common general corporate activity ... 31

B. Federal Tort Claims and *Bivens* Actions

Brownback. King (Feb 25, 2021): Dismissal of a FTCA claim under Federal Rule 12(b)(6) for failure to state a claim or summary judgement constitutes a “judgement on the merits” that is sufficient to trigger the FTCA’s judgement bar on future or pending claims against the same defendant and arising from the same set of facts and injuries..... 32

C. Securities Law

[Goldman Sachs Group v. Arkansas Teacher Retirement System](#) (June 21, 2021): The generic nature of a misrepresentation in connection with the sale of securities is important evidence of “price impact” that courts should consider at class certification. Defendants bear the burden of persuasion to prove a lack of price impact..... 32

SUMMARY REVERSAL OPINIONS 33

[Taylor v. Riojas](#), 7-1 (November 2, 2020; Fifth Circuit): Error to grant **Qualified Immunity** to prison officials in this “deliberate indifference” case. 33

[McKesson v. Doe](#), 7-1 (November 2, 2020, Fifth Circuit): Error to permit a police officer’s **personal injury claim against a Black Lives Matter movement leader** to go forward without first interpreting the state statute 33

[Shinn v. Kayer](#), 6-3 (December 14, 2020, Ninth Circuit): Error to grant habeas relief to **death row inmate** when there is room for “reasonable disagreement” about the law 33

[Mays v. Hines](#), 8-1 (March 29, 2021, Sixth Circuit): Error to grant **habeas relief to state murder** convictee, because “fair-minded disagreement” is possible here..... 34

[Alaska v. Wright](#), 9-0 (April 26, 2021, Ninth Circuit): Error to find state Petitioner still “**in custody**” for habeas, when sentence has been fully served and completed. 34

[Lombardo v. St. Louis](#), 6-3 (June 28, 2021, Eighth Circuit): Error to find no “**excessive force per se**” in use of a “prone restraint” tactic [quite similar to George Floyd restraint]. 34

[Dunn v. Reeves](#), 6-3 (July 2, 2021, Eighth Circuit): For **ineffective assistance of counsel**, there is no *per se* rule in habeas procededing that Petitioner must call and question his former lawyer. But on fact-specific analysis in this case [26 pages between the majority and the dissent!], the Alabama state court did not err in denying relief here. 34

WRITINGS RELATING TO ORDERS

A. Denials of Stay Applications 34

[Valentine v. Collier](#) (November 16, 2020): **COVID-19 rules**. Sotomayor (joined by Kagan) dissenting, in a case regarding geriatric prison health and safety measures. 34

[Francois v. Wilkinson](#) (January 22, 2021): **Immigration**. Sotomayor dissenting from the denial of a stay of removal against a Haitian national with mental illness. 34

B. Denials of Certiorari..... 35

Death Penalty Cases

[Hennes v. DeWine](#) (October 5, 2020, Sixth Circuit): **Sotomayor respecting** the denial in a case involving Ohio’s planned use of a three-drug cocktail including midazolam, alleged to “induce sensations of suffocation and drowning, terror, and panic” under *Bucklew* (2019). 35

<u>Bernard v. United States</u> (December 10, 2020): <u>Sotomayor dissenting</u> , in federal death penalty case. <u>Breyer</u> and <u>Kagan</u> would also grant the petition and application for a stay.	35
<u>Bourgeois v. Watson</u> (December 11, 2020): <u>Sotomayor</u> , (joined by Kagan) <u>dissenting</u> , in federal death penalty case involving an intellectual disability claim.	35
<u>United States v. Higgs</u> (January 15, 2021): <u>Breyer dissenting</u> , in federal death penalty Case alleging an unconstitutionally “cruel” method of execution method for inmate with COVID.	35
<u>Dunn v. Smith</u> (February 11, 2021, Eleventh Circuit): 6-3 [interesting Justice division]: <u>Kagan</u> , joined by <u>Breyer</u> , <u>Sotomayor</u> , and <u>Barrett</u> , <u>concurring</u> in denial of application to vacate an injunction <i>granted</i> by the Eleventh Circuit to permit Alabama prisoner to have “spiritual advisor” present during execution. Thomas would grant the application. <u>Kavanaugh</u> , (joined by <u>Roberts</u>), <u>dissents</u>	35
<u>Johnson v. Precythe</u> (May 24, 2021, Eighth Circuit). 6-3. <u>Breyer dissents</u> ; <u>Sotomayor</u> (joined by Breyer and Kagan) <u>dissents</u> where petitioner’s request for death by firing squad in lieu of standard execution procedure was deemed by CA-11 “too late.”	35
Other Denials of Certiorari	36
<u>Kaur v. Maryland</u> (October 5, 2020, the Maryland Court of Special Appeals): Sixth Amendment, Ineffective Assistance of Counsel . <u>Sotomayor</u> respecting the denial, in a case where defendant was tried and retried by the same state prosecutors who were permitted access to defendant’s privileged documents.	36
<u>MalwareBytes Inc. v. Enigma Software Group USA, LLC</u> . (October 13, 2020, Ninth Circuit): Immunity for Online Platforms (“Section 230”) . <u>Thomas respecting the denial</u> , argues that the Court should, in the future, reexamine to scope of immunity y under Section 230 of the Communications Decency Act.	36
<u>Bovat v. Vermont</u> (October 19, 2020, Vermont Supreme Court): Fourth Amendment . <u>Gorsuch</u> , joined by <u>Sotomayor</u> and <u>Kagan</u> , <u>respecting denial</u> in a case involving the “plain view doctrine” for warrantless searches.	36
<u>Silver v. United States</u> (January 21, 2021, Second Circuit): Hobbs Act Extortion vs. Bribery . <u>Gorsuch</u> , (joined by Thomas), <u>dissenting from the denial</u> in a case regarding whether extortion and bribery are distinct crimes under the Hobbs Act when a public official is the defendant.	36
<u>Thompson v. Lumpkin</u> (March 22, 2021, Fifth Circuit): <u>Kagan</u> (joined by <u>Breyer</u> and <u>Sotomayor</u>) <u>concurring</u> in the denial, in a case where a prisoner sought an evidentiary hearing in his habeas proceeding.	36
<u>Smith v. Titus</u> (March 22, 2021, Eighth Circuit): <u>Sotomayor dissenting</u> from the denial in a case where defendant alleges his murder convicted was an act of	

self-defense.	36
<u>Longoria v. United States</u> (March 22, 2021, Fifth Circuit): Federal Sentencing Guidelines. Sotomayor (joined by Gorsuch) respecting the denial, regarding rules for permitting a one-level sentence reduction.	36
<u>Brown v. Polk County</u> (April 19, 2021, Seventh Circuit): Fourth Amendment. Sotomayor respecting the denial in a case involving rules for physically penetrative cavity searches for pretrial detainees.	36
<u>Whatley v. Warden</u> (April 19, 2021, Eleventh Circuit): Sotomayor dissenting from the denial in case, saying that the defendant was prejudicially and unnecessarily shackled during trial.	37
<u>Doe v. United States</u> (May 3, 2021, Second Circuit): Military Rape and Federal Tort Claims Act. Thomas dissenting from the denial in a case involving whether the FTCA bars petitioner’s rape claims.	37
<u>Calvert v. Texas</u> (May 17, 2021, Texas Court of Criminal Appeals): Eighth Amendment, Sentencing. Sotomayor respecting the denial in a case involving allegedly prejudicial admission of evidence.	37
<u>Hernandez v. Peery</u> (June 28, 2021, Ninth Circuit): Sotomayor dissenting from the denial in a case where California allegedly interfered with defendant’s right to consult with counsel.	37
<u>Standing Akimbo, LLC v. United States</u> (June 28, 2021, Tenth Circuit): Commerce Clause and the Federal Prohibition of Marijuana. Thomas respecting denial and arguing that the Court should reconsider <i>Raich</i> (2005).	37
<u>Hoggard v. Rhodes</u> (July 2, 2021, First Circuit): Qualified Immunity and Free Speech. Thomas respecting denial in a case involving qualified immunity for campus officers against student free speech claims.	37
C. Orders to Grant <i>certiorari</i>, Vacate and Remand (“GVRs”).....	38
<u>Sanders v. United States</u> (June 1, 2021, Eighth Circuit): GVR’d in light of <i>Caniglia v. Strom</i> . <i>Kavanaugh concurs</i> , arguing warrantless home entries are permissible under <i>Caniglia</i> where officers have reasonable belief of an occupant’s serious injury (see <i>Brigham City v. Stuart</i>).	37
<u>Mast v. Fillmore</u> (July 2, 2021, Minnesota Appeals Court): GVR’d in light of <i>Fulton v. Philadelphia</i> . <i>Alito concurs</i> ; <i>Gorsuch concurs</i> , providing detailed discussion of religious exemptions for Amish petitioners to sanitation laws.	37

CRIMINAL LAW CERTIORARI GRANTS FOR UPCOMING (Oct. '21) TERM

A. Already Scheduled for Argument 38

Wooden v. U.S. (argument scheduled for Oct. 4, 2021): Armed Career Criminal Act case. 38

Brown v. Davenport (argument scheduled for Oct. 5, 2021): Harmless error on habeas. 38

U.S. v. Zubaydah (argument scheduled for Oct. 6, 2021): Application of “state-secrets privilege.38”

Hemphill v. New York (argument scheduled for Oct. 12, 2021): Confrontation Clause case. 38

U.S. v. Tsarnaev (argument scheduled for Oct. 13, 2021): Boston Marathon bomber” capital case. First Circuit vacated the death penalty, U.S. under Trump petitioned. 38

B. Granted but Not Yet Scheduled for Argument (as of August 2021)..... 38

Thompson v. Clark: Must §1983 plaintiff in suit against police show innocence? 38

F.B.I v. Fazaga: Does FISA displace the “state-secrets privilege”? 38

N.Y. State Rifle & Pistol v. Corlett: Application of the 2nd Amendment to concealed-carry permits..... 38

Patel v. Garland: Immigration. Judicial review and determination of inadmissibility. 38

Shinn v. Ramirez: Does ineffective habeas counsel allow development of evidence beyond the state court record? (8-judge dissent from denial of rehearing en banc in CA9). 39

U.S. v. Taylor: ACCA: Does “crime of violence” included an attempted Hobbs Act robbery? 39

Pivotal Software v. Tran: Securities law. Does the discovery-stay provision of the Private Securities Litigation Reform Act apply to state court securities lawsuits? 39

IX. CHART: Who wrote What in OT '20 40

The ABA’s Criminal Justice Section proudly presents a panel discussion:

**Annual Review of the
Criminal Law (and Related) Opinions of the
U.S. Supreme Court
Issued During the October 2020 Term**

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The Editor’s Brief Overview of the 2020-21 Term, Criminal Cases

In this unprecedented, completely all-remote Term, the Supreme Court decided only 54 full merits cases (after full briefing and oral argument), the lowest total since the Civil War (other than last Term’s pandemic-truncated session, 53). There were 19 merits decisions related to criminal law – and another 7 were “summary reversals” (decided solely on the *certiorari* filings, without oral argument or full briefing). All oral arguments were conducted remotely, with “live streaming” audio – enabling real-time listening (no video, of course) to the arguments without having to brave the line at 1 First Street! The Justices’ questioning was conducted by the Chief Justice “seriatim,” meaning that each Justice was given a limited time for questioning, in order of seniority (Chief Justice Roberts first, of course). This new practice gave Justice Thomas a “voice” that he previously seldom used – and many were impressed with Thomas’s questions and style. As of the date of this booklet, it is uncertain whether arguments will go back in person (although the current “Delta Covid surge” makes that seem unlikely) or whether, if in-person, seriatim questioning might continue. Observers debate the merits of seriatim questioning – but there seems to be universal agreement that the live streaming audio or oral arguments will be permanent, even when arguments go back to in-person. (Can video be far behind?).

Nineteen criminal cases represent about 35% of the total of 54 decisions. This percentage is about normal; the Court’s docket is traditionally comprised of around one-third criminal-law-and-related cases. Meanwhile, for those of you who enjoy watching the Ninth Circuit – whose immense workload produces an outsized number of cases for potential Supreme Court review – the Court reversed 15 or the 16 granted CA9 cases this past Term. The Ninth Circuit takes comfort in [Justice Jackson’s caution about the Supreme Court from 1953](#): “We are not final because we are infallible; we are infallible only because we are final.”

While there were no “blockbuster” criminal law decisions – which I would define as cases that grab the consciousness of the non-lawyering public across the nation – this Term, the Court’s criminal law decisions were still of immense importance to many. There were three interesting Fourth Amendment cases – remarkably all decided in the criminal defendant’s favor! Although each came with a number limiting footnotes and qualifications; and sometimes with separate opinions that showcase what I would call the new “3-3-3” Supreme Court. There was also one decision (*Cooley*) addressing the authority of tribal officers to stop and seize non-Indians – hard to decide what category to put that in, but I think it has more to do with Native American authority than the Fourth Amendment.

Perhaps the Court’s most influential criminal law decision was a statutory case, affecting many aspects of our daily, now-computerized, lives. *Van Buren* defines, somewhat narrowly, under what circumstances a person can be criminally charged with “exceeding authorized access” under the federal Computer Fraud Act. Interestingly, this was also new Justice Amy Coney Barret’s first “major” decision for the Court (she also wrote the *Goldman Sachs* securities law decision at the end of the Term). Criminal law was not the focus of Justice Barret’s speedy confirmation process last October. It will be interesting to see what directions she takes in this area over the coming years.

Three other federal statutory cases address important aspect of federal criminal sentencing. *Greer* is particularly important, for apparently adopting a general rule that “convicted felons ordinarily know they are convicted felons.” I would question whether, empirically, that is true. *Borden* has an important majority discussion of *mens rea* and the differences between “reckless” and “knowing,” often an issue in criminal prosecutions, and always a difficult concepts for law students as well as lawyers to fully grasp.

Meanwhile, in *Briggs* the Court addressed the statute of limitations for military rape prosecutions – and remarkably suggested that perhaps the death penalty for rape still survives in the military! That suggestion would seem to run contrary to the Court’s decisions in *Kennedy v. Louisiana* (2008) and *Coker* (1977) – yet the “liberal” Justices held their fire on that point (being in the minority these days, they need to choose their battles carefully).

There were also two fascinating decisions that arose in the habeas corpus procedural context, although they addressed different, specific, substantive legal issues. *Edwards v. Vannoy* and *Jones v. Mississippi* both addressed aspects of the “retroactivity” of landmark constitutional decisions: the *Ramos* (2020) rule that all criminal jury convictions must now be unanimous; and the *Miller* (2012) rule that mandatory LWOP sentences for juveniles are unconstitutional. *Vannoy* also abolished the “watershed change in the law” exception to habeas non-retroactivity that had been around for over 30 years (since *Teague*, 1989). Both majority opinions were written by Justice Kavanaugh – yet in the second decision, he did not cite the first decision that had been issued only three weeks earlier – why not? In any case, both these decisions were solidly against the criminal defendant, and the 6-3 split in each case showcases the more traditional “conservative-liberal” tilt of the current Court. Finally, Justices Kagan and Sotomayor expended passionate firepower in their dissents, one in each case.

An interesting if entirely tangential point about the *Jones* decision: it addressed two prior opinions authored by Justice Kennedy (*Miller* (2012) and *Montgomery* (2016)), both about LWOP sentences for juveniles. The Justices disagreed vehemently about what those two prior decisions mean. And yet: Justice Kennedy is very much alive, albeit retired; and Kavanaugh, the author of *Jones*, clerked for Kennedy and has great loyalty to him. Do you think Justice Kavanaugh called his old boss to consult, before or after? Highly doubtful. Do you think Kennedy will ever say publicly what he thinks about the Court’s current statements about his opinions? Only time will tell.

There were also six decisions in the Immigration Law field. Each was of course very important to the individuals affected by them, as well as to any lawyer or judge practicing in this highly controversial field. I'm grateful to my Research Assistant, Senya Merchant—whose parents are themselves courageous immigrants to our county—for her work on these summaries in particular.

There were an unusually large number of Justice “Writings” (not really binding Opinions) in connection with “Orders” on the docket (stay applications; dissents from denial of *certiorari*; and Orders to Grant *certiorari*, Vacate and Remand (GVRs). Similarly, “Summary Reversals” are likewise decided without the benefits of full briefing or oral argument, and are often decided very quickly, without the deliberative slowness that many believe actually benefits good decision-making (and writing). Professor Steve Vladeck and others have noted the dramatic use of the Court’s [“shadow docket”](#) (unargued, speedy “motions” decisions) to push major rulings or positions over the four years of the Trump Administration. As one example of the importance of these “summary reversals,” I would point you to *Dunn v. Reeves*, where the Court divided 6-3 and issued 26 pages of opinions (that is a lot!), all in a case supposedly so “obvious” that full briefing and argument was not needed. Keep your eye on these categories of non-argued, non-“merits,” cases (although “Summary” opinions are said to “count” as merits rulings). Much can be learned there.

There are of course additional merits cases addressing criminal law or contexts, not mentioned in this Brief Overview. Everyone tends to have their own favorites! The following 30 pages or so attests that there is always more to say. And remember that the Supreme Court’s docket is like a river: it is always “flowing.” The Court has now already granted *certiorari* in 29 cases for next Term (which begins by tradition on the “First Monday of October”) – and 12 of those granted cases are criminal-law-or-related.

Indeed, the first week of OT ’21 oral argument should be a blockbuster. Five of the 9 cases to be argued are criminal – but that number could change as the Biden Administration determines its final positions. For example, *Tsarnaev*, currently set for argument on October 13, was a request from the Trump Administration to reverse the First Circuit’s vacation of the death penalty for the “Boston Marathon bomber.” Whether the current Department of Justice will pursue that position is still up in the air, given the expressed opposition of some in the new Administration to capital punishment. Indeed, Attorney General Merrick Garland (who was instrumental in prosecuting, and securing a death penalty for, the “Oklahoma City Federal Building bomber” back in the 1990s) recently [announced a moratorium](#) on the federal death penalty (which the prior administration pursued with a vengeance in the last days of its existence, carrying out an unprecedented thirteen federal executions in its final seven months).

But without a doubt, the real criminal law “blockbuster” for next Term will be the Court’s decision in the *Corlett* case, involving a claimed Second Amendment right to transport or carry a concealed firearm outside the home for self-defense. So far, 46 amicus briefs have been filed for the petitioner in the case (who was denied a conceal-carry permit in New York). New York’s brief, and those of its amici, are due in September. Significantly, the United States has not yet taken an official position. So many large questions – what is the extent of the right? what is the appropriate constitutional standard of review? etc. – may (or may not) be answered in that case.

By the way, some Court observers have asked why we don’t yet have a nominated, let alone confirmed, U.S. Solicitor General? When that position is so important to the consistent intellectual leadership of the U.S. Department of Justice, as well as for guidance for the Court? I will suggest to

you it is because the “Acting” SG, Elizabeth Prelogar, is so talented, so well-connected, and so trusted, that the Administration sees no need to speedily (or ever?) replace her. She clerked not just for AG Merrick Garland when he was on the D.C. Circuit, but also for Justice Ginsburg in OT ’09 and then a Term later for Justice Kagan. Prelogar was appointed as “Acting” SG just days after President Biden took office. So far I have heard nothing for high praise for the job she is doing.

As for other “personality of the Court” type of comments, let me just say that I perceive a Court that, while basically conservative, is really a “3 to 3 to 3” Court, not 6-3. Justices Alito, Thomas, and Gorsuch clearly stake out the very conservative side in most criminal cases. The Chief Justice and Justices Kavanaugh and (in her first Term) Barrett, sometimes take more moderate, “go slow and don’t decide more than we have to,” positions. You know who the “liberals” are – and none of them appear to be retiring this summer. Finally, Justice Kavanaugh seems sincerely committed to sounding conciliatory and more moderate when he can; his majority in *Jones* is one good example.

To bring this Overview to a close, take a look at the last page of this booklet: a Chart showing “who wrote what” opinions in all the criminal law merits cases. This includes separate opinions (concurrences, dissents), not just majorities. There were 49 separate writings, spread over the 19 criminal cases. None of the truly criminal” cases were unanimous with no separate writings; only three Immigration decisions received that treatment. Justice Thomas was clearly the criminal law “workhorse” this Term, with ten separate writings. With four majorities (the most of any Justice) and four concurrences, the criminal law really appears to be a special interest of his these days. I think the same is true of Justices Kavanaugh and Sotomayor (for different reasons). And it is usually true of Justice Alito – but this Term I think he was more devoted to non-criminal issues (and some disappointment that the Court is not ruling as broadly conservatively as he would like). Finally, Justice Gorsuch’s majority assignments were all (three) Immigration cases. That could be either a special interest of his, or an accidental “assignment category” engineered by the Chief Justice.

In conclusion, our fantastic panelists will have more to say about these cases, and maybe about others not mentioned here. Stylistically, I hope that the “clickable” links in the electronic version of this booklet are useful to you, and I hope that posting it during the Panel has worked for you (if not, you can request a copy by emailing Professor Little or the staff at the Criminal Justice Section). I am always grateful to the ABA and the Criminal Justice Section -- and most prominently to its hard-working and unheralded staff – for the opportunity to organize this panel every year. I particularly want to thank Patrice Payne, a lawyer who works silently and unceasingly for the best interests of not just the Criminal Justice Section but for all persons interested in, and affected (for better or worse) by, our criminal justice structures. Finally, the [website](#) for the Criminal Justice Section can give you a wealth of information.

I look forward to sharing more fascinating and significant rulings with you next summer. Meanwhile, remember to “Do Justice” in whatever you do!

— Professor Rory K. Little
UC Hasting College of the Law
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Explanatory Notes for these Materials

The pages that follow provide detailed summaries of all the U.S. Supreme Court’s criminal law decisions (and civil cases that the author deems “related”) that were issued during the most recent Term of the Court, grouped by subject matter. **For a quick review** of the Term’s work, the “Detailed Table of Contents” above provides one-sentence descriptions for each decision and provides the later page number below where its more-detailed summary is located.) Some decisions address more than one subject; Professor Little 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 develop as a Term progresses.

The goal of these summaries is to be broadly inclusive, for the fully-informed criminal law practitioner. For this reason, civil cases that even mildly relate to criminal law topics or fact-areas are included. For example, we include civil securities law cases, immigration law decisions, and others, because such “civil” issues often arise in a criminal factual milieu, or they can be useful to practitioners and judges for applying the criminal law (if not immediately, then in the future). The relevance of immigration issues to criminal liability and sentencing; and the similarities between civil securities fraud and criminal fraud, are (or should be) well-known to the competent criminal lawyer.

Each summary below begins with the case name, its date and publication cite, the Justices’ votes, who wrote what type of opinion within the case, and citation to the lower court’s opinion. A “**Headline**” description of the holding is then immediately provided. Then follows a somewhat detailed summary of the case’s facts, majority opinion(s), and any separate opinions (concurrences as well as dissents). We believe that all the opinions in any case, including concurrences and dissents, 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.

In each summary, the name of the majority writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. While we try to be succinct, providing an accurate representation of each opinion’s content is the goal, rather than “sound-bite” brevity. Sometimes we **bold certain important phrases** in the summaries, to aid the time-pressed “skimming” reader. We also try to use quotes from the decisions (not just paraphrases) wherever possible, because we firmly believe that the words of the Justices themselves best reflect the substance of their opinions. Finally, comments that appear in [brackets] are the (sometimes opinionated) thoughts of Professor Little, not the Justices’. We signal most of these with a bolded “[**Ed. note...**],” unless that signal interferes with the “flow” of the summary.

Following the Summaries of Opinions in argued cases, we provide brief descriptions of opinions in cases that were “summarily reversed” – that is, decided on just the certiorari filings, without full merits briefing or oral argument. Following that, we provide interesting dissents or concurrences (“Writings”) regarding Orders issued this Term (most often, dissents from denial of stays or *certiorari*, or GVR (grant, vacate and remand) Orders in cases similar to merits decisions issued during the Term.

At the end of this booklet, we provide a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, so that you can get a preview of what may be coming. Finally, 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 sort of opinions they are spending their time on, and how much work they are devoting, in the field of criminal law.

These materials are the product of Professor Little alone (with drafting and formatting 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 even in “quoted” sentences, minor changes from the Court’s original opinion 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 even verb tenses or singular-plurals, as well as other non-substantive changes, may have been made. Finally, remember that what follows 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.

The Detailed Summaries follow on the next page.

DETAILED SUMMARIES OF THE COURT'S CRIMINAL LAW (AND RELATED) OT 2020 OPINIONS

I. CONSTITUTIONAL DECISIONS

A. FOURTH AMENDMENT

Torres v. Madrid (March 25, 2021), 5-3 (**Roberts**; Gorsuch dissent, Barrett not participating), vacating and remanding 769 Fed.Appx 654 (10th Cir. 2019).

Headline: The application of **physical force to the body of a person with intent to restrain is a Fourth Amendment “seizure,”** even if the person does not submit and is not subdued; and **shooting with bullets counts as physical force even without a “touching.”**

Facts: In this civil lawsuit for damages, Roxanne Torres sued New Mexico police; so the facts are in the light most favorable to her. She alleged that Albuquerque police officers (wearing IDs she did not see; she was high on meth) approached her car with guns drawn. Thinking they were car-jackers, she sped off. The officers fired 13 shots at her, hitting her twice and severely injuring her. But she kept driving; then stole another car and drove 75 miles. Unfortunately for Torres, the hospital there airlifted her back to Albuquerque where she was arrested. Torres pled no contest to various charges, then sued the officers, alleging excessive force. The Tenth Circuit affirmed a summary judgment for the officers, ruling that there was no Fourth Amendment “seizure” without physical touching, because Torres had not been stopped by the shots.

Roberts (joined by Breyer, Sotomayor, Kagan, and Kavanaugh): *Hodari D* (1991), written by Justice Scalia for six Justices, “largely covered this ground”: “the mere application of physical force” was an arrest at common law, and thus a Fourth Amendment seizure. We don’t decide whether *Hodari D* must be followed as *stare decisis* because “we independently reach the same conclusion.” An “ordinary user of the English language” would say the police “seized” someone even if “he broke out of [the officer’s] grasp.” “The slightest touch was an arrest” (*Nicholl*, British 1828, citing a 1615 decision). As to touching versus shooting, “We see no basis for drawing an artificial line between grasping with a hand and other means of applying physical force.” “We will not carve out [a] greater intrusion ... just because founding era courts did not confront apprehension by firearm.”

Importantly, “accidental force will not qualify;” there must be objective “intent to restrain” the specific person. Moreover, **the seizure “lasts only as long as the application of force.”** This may affect “what damages a civil plaintiff may recover,” and “what a criminal defendant may exclude from trial.” [Lengthy common law debate with the dissent, omitted].

Gorsuch, dissenting with Thomas and Alito: *Hodari D* has generated considerable confusion. Today the majority relies on inapposite debt collection cases, and “conflates a seizure with its attempt.” “Neither the Constitution nor common sense” sustains this. The text of the Fourth Amendment (“seizure”) has always meant “taking possession.” *Hodari D*’s statement to the contrary was unnecessary dictum. Moreover, the majority’s new rule leaves many questions unsettled; and “offers Ms. Torres little more than false hope.”

Caniglia v. Strom (May 17, 2021): 9 (5+2+1+1) to 0 (**Thomas**; *Roberts* concurring with *Breyer*; *Alito* concurring; *Kavanaugh* concurring), vacating and remanding 953 F. 3d 112 (1st Cir. 2020).

Headline: There is **no open-ended “community caretaking” exception** to the Fourth Amendment’s warrant requirement. “Exigency” must be shown.

Facts: Another civil suit. Caniglia argued with his wife and suggested he’d commit suicide by his gun. Wife left the house and later called police, requesting a “welfare check.” Caniglia agreed to go to a hospital if police promised not to confiscate his guns. But after Caniglia was gone, they entered and

seized his guns, allegedly without the wife’s consent. There was no criminal offense; Caniglia sued for damages. But the district court and First Circuit ruled for the officers, citing a free-standing “community caretaking” exception to the Fourth Amendment if “reasonable.”

Thomas for 5 (the shortest majority opinion of the Term, 4 pages): We have previously held that officers may sometimes enter private property without a warrant when certain exigent circumstances exist” (*Kentucky v. King* (2011); *Brigham City* (2006)). And we once said, in a case involving “cars on public highways” (*Cady*, 1973), that police may sometimes perform “noncriminal community caretaking functions.” But we have never recognized “an open-ended license to perform them anywhere.” Here the lower courts “declined to consider whether any recognized exigent circumstances were present;” but a general “community caretaking” rule goes beyond anything this Court has recognized.” [Editor’s note: Is it a surprise that a gun-owner wins with this conservative Second Amendment court?] Vacated and remanded for further proceedings.

[Editor’s note: the three “liberal” Justices are silent in this case—a trend this Term—even though they might disagree with things that the four opinions say.]

Roberts concurring with Breyer: I wrote in *Brigham City* 15 years ago that no warrant is required for police to enter a home “when there is a need to assist persons who are seriously injured or threatened with such injury.” There is nothing to the contrary in today’s opinion.

Alito concurring: I want to highlight some issues not decided today. Police have “many tasks that go beyond criminal law enforcement.” We ought to recognize some; for example, entering to prevent a suicide; “red flag” laws allowing police to seize guns where there is danger; and entering “to ascertain[] whether a resident is in urgent need of medical attention. [Editor’s note: Justice Alito, a former prosecutor and strongly pro-law enforcement, is well aware, but does not mention, that all such entries could then support prosecutions for anything then seen “in plain view.”]

Kavanaugh concurring: I “underscore and elaborate on” the Chief Justice’s point. “[E]xigency precedents permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now.” These need not be criminal probable cause; merely some “risk of serious [immediate] harm.”

[United States v. Cooley](#) (June 1, 2021): 9 (8+1) to 0 (**Breyer**; *Alito* concurring), vacating and remanding 919 F. 3d 1135 (9th Cir. 2019).

Headline: A Native American tribal police officer may, with probable cause regarding state or federal criminal violations, detain temporarily and search non-Indian persons traveling on public roads running through a reservation. (*Detailed summary below, under Native American Tribal Authority.*)

[Lange v. California](#) (June 23, 2021): 9 (6½ + 2½) to 0 (**Kagan**; *Kavanaugh* concurs; *Thomas* concurs except for Part II-A; *Roberts* concurring in the judgement), vacating and remanding Cal. Ct. App., Cal. SCt review denied (unpublished 2019).

Headline: “Hot pursuit” of a suspected **misdemeanor** offender does not categorically allow warrantless home entry, absent a “law enforcement emergency.”

Facts: Arthur Lange drove past an officer one night, playing music loudly and honking his horn repeatedly without other cars around. The officer followed, and about 100 feet from Lange’s home, activated his overhead lights. Lange did not stop -- which is a misdemeanor, although Lange later said he did not notice the lights. Lange then turned into his driveway and drove inside his garage. The officer got out, put his foot inside the closing garage door (which sent it back up), and after observing signs of Lange’s intoxication, arrested Lange. But the trial court later ruled the arrest was unlawful, rejecting the argument that “hot pursuit of a misdemeanant” allowed warrantless entry into the garage. The state Court of Appeal affirmed, and the California Supreme Court denied review.

Kagan (for 6 [and Thomas joins all but Part II-A]): [Part Thomas does not join:] A warrant is generally required before officers may enter a home without permission. “Exigent circumstances” is

“one important exception,” which generally must be “applied ... on a case-by-case basis.” We did hold back in 1976 that a warrantless entry was permissible when police entered in “hot pursuit” of a person suspected of felony drug-dealing (*Santana*, 1976). But we today reject a “broad understanding of *Santana*” -- and even if it did establish a “categorical rule” for hot pursuit of felons, it “said nothing about fleeing misdemeanants.” What is a “misdemeanor” varies from place to place, and misdemeanors are “minor” offenses -- not usually ... an emergency.” “Waiting for a warrant is unlikely to hinder a compelling law enforcement need.” “Case by case exigencies” must be examined “cases by case;” But “[w]hen the officer has time to get a warrant, he must do so.” [Part that Thomas joins:] “Common law at the Constitution’s founding leads to the same conclusion.”

Kavanaugh concurring: [Ed. Note: “the Peacemaker.”] “I join the Court’s opinion; I also join” the part of Thomas’s concurrence on the exclusionary rule; and I “underscore that ... there is almost no daylight” between the Court’s opinion and the Chief Justice’s” concurrence.

Thomas concurring I agree that there is no categorical exception. However, there are some historical, common-law exceptions. And the exclusionary rule should not apply at all to evidence discovered in a warrantless hot pursuit of any kind, period.

Roberts concurring in the judgment, with Alito: Hot pursuit “is itself an exigent circumstance.” “The flight justifies the [warrantless] entry.” The Court’s case-by case analysis is too complicated; it is “absurd and dangerous.” I concur only that the court, on remand, should be allowed to examine whether Lange’s particular case should be exempt from what I view as the general rule approving warrantless entries when in hot pursuit of a criminal offender.

B. SIXTH AMENDMENT

Edwards v. Vanoy (May 17, 2021): 6-3 (**Kavanaugh**; *Thomas* concurring; *Gorsuch* concurring; *Kagan* dissenting with Breyer and Sotomayor), affirming 2019 WL 8643258 (unpublished denial of COA, 5th Cir. 2019).

Headline: The *Ramos* jury-unanimity rule does not apply retroactively on federal habeas corpus review; more broadly, **the “watershed rule exception”** to our normal non-retroactivity position, established in *Teague* (1989), **is hereby abolished.** (*Detailed summary under “Habeas Corpus.”*)

C. EIGHTH AMENDMENT

United States v. Briggs (Dec. 10, 2020): 8-0 (**Alito**; *Gorsuch* concurring; Barrett not participating), reversing and remanding 79 M. J. 199 (CAAF 2020).

Headline: Because the military rape statutes still say that rape is “**punishable by death**” – despite *Coker* in 1977 and *Kennedy* in 2008 -- the Uniform Code of Military Justice’s generally-applicable five-year statute of limitations for non-capital crimes does not apply to prosecutions of rape. (*Detailed summary at p.23 below under Uniform Code of Military Justice*)

Jones v. Mississippi (April 22, 2021): 6-3 (**Kavanaugh**; *Thomas* concurring in judgement; *Sotomayor* dissenting with Breyer and Kagan), affirming 285 So. 3d 626 (Miss. Ct. App. 2020).

Headline: *Miller* and *Montgomery*, which held that mandatory LWOP (life without parole) for juveniles violates the Eighth Amendment and applies retroactively, **do not require an explicit finding that a juvenile is “permanently incorrigible** before a discretionary LWOP sentence is imposed.

Facts: In *Miller v. Alabama* (2012), the Court ruled that the Eighth Amendment does not permit a mandatory Life Without Parole (LWOP) sentence to be imposed on juveniles (persons who commit their crimes when under age 18) convicted of homicide; but a discretionary LWOP sentence for a juvenile could be constitutional. Then in *Montgomery v. Louisiana* (2016), the Court ruled that the *Miller* ruling could be applied retroactively. Here, when Jones was only 15, he killed his grandfather

[in somewhat sympathetic circumstances] and was convicted by a jury of murder. Mississippi's law at that time (2004) required a mandatory LWOP sentence, which Jones received. After *Miller*, Jones received a new sentencing hearing in which the judge "could consider Jones's youth and exercise discretion." Jones's attorney argued for less based on, *inter alia*, Jones's youth, but the judge, while acknowledging his discretion, again imposed LWOP. Lower courts had disagreed about whether *Miller* requires a specific finding of "permanent incorrigibility;" there was no such finding here.

Kavanaugh (for 5): "In *Montgomery*, the Court unequivocally stated that '*Miller* did not impose a formal fact-finding requirement' and added that 'a finding of fact regarding a child's incorrigibility ... is not required.'" We reject Jones's arguments here in light of this "clear language." "A State's discretionary sentencing system [for juvenile murderers] is both constitutionally necessary and constitutionally sufficient." "While mentioned in *Miller*, 'incorrigibility' is not a requirement for 'eligibility' for LWOP; it is merely a "sentencing factor" to be considered, "akin to a mitigating circumstance." A judge must merely have "an opportunity" to consider it.

Montgomery did not add to *Miller*'s requirements: although *Montgomery* found *Miller* to be a "substantive" rather than "procedural" ruling [thereby permitting it to be applied retroactively], it did not require a substantive requirement of "incorrigibility." [Ed. note: Here there is a brief discussion of the "procedural/substantive" distinction and disagreements, for retroactivity. The irony is that this is not discussed, or even cited, three weeks later in *Edwards v. Vannoy*, a decision also about retroactivity and also written by Kavanaugh.] Although *Miller* stated that the Court expected that LWOP sentences for juveniles would be "relatively rare," that does not require a separate explicit finding now. Similarly, *Miller* does not require an "on-the-record sentencing explanation" demonstrating consideration of incorrigibility. We have never held that sentencing judges must expressly state on the record every factor and circumstance that they have considered. *Miller* makes it clear that LWOP for juveniles must be discretionary to consider youth; and Jones's record shows it was considered here.

Finally, we "respectfully but firmly disagree" that we are implicitly "overruling" *Miller* and *Montgomery*; "we simply have a good-faith disagreement with the dissent about how to interpret" them. [Ed. Note: Kavanaugh sounds conciliatory and almost apologetic here.]. We don't say we agree with Jones getting LWOP here; many juveniles have now received less than LWOP due to *Miller*, and we aren't deciding any disproportionality argument that might apply here. Finally, "our holding today is far from the last word," as state officials may consider whether Jones should now, or someday, get relief.

Thomas concurring in the judgment: Look, the dissent is right that the majority has misinterpreted *Miller* and *Montgomery*. But I think we should overrule both. *Montgomery* was especially wrong because it said its rule was substantive, when it is obviously procedural. So I concur in the judgment that Jones should get no relief from his statutorily permitted LWOP sentence here.

Sotomayor dissenting, with Breyer and Kagan [a lengthy and passionate dissent, only briefly explained here]: "The Court is fooling no one." Four Justices agree that the Court misconstrues Justice Kennedy's opinions in *Miller* and *Montgomery*; its "conclusion would come as a shock to [those] Courts." [Ed. Note: Note that **Justice Kennedy is very much alive** and active in Sacramento, although retired (and replaced by his former clerk, Kavanaugh) -- yet he has been silent, so far as we know, as to what he thinks, here.]. *Montgomery* said that LWOP "is a disproportionate sentence for all but the rarest children, those whose crimes reflect 'irreparable corruption.'" Again *Montgomery*: even if discretionary, an LWOP sentence "still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." There is also racial disparity here; and it has not been "rare" -- Mississippi has still imposed LWOP on 25% of its juvenile offenders; in Louisiana the figure is "an astonishing 57 percent." "Brett Jones deserves an answer;" and his facts show he is not "permanently incorrigible" [Sotomayor goes into detail here]. The other 1,500 persons serving juvenile LWOP sentences also deserve a hearing. By affirming this LWOP sentence without any explicit finding or specific explanation from the sentencing judge, "the Court distorts *Miller* and *Montgomery*

beyond recognition.” “How low this Court’s respect for *stare decisis* has sunk.”

II. FEDERAL CRIMINAL STATUTES

A. Computer Fraud and Abuse Act.

Van Buren v. United States (June 3, 2021): 6-3 (**Barrett**; Thomas dissent joined by Roberts and Alito), reversing, and remanding 940 F. 3d 1192 (11th Cir. 2019). Note: this is **Justice Barrett’s first “major” decision for the Court** since she joined the Court on October 27, 2020.

Headline: An individual “exceeds authorized access,” and thus **violates the CFAA, only when he accesses a computer with authorization and obtains information located areas of the computer that are off-limits to him –such as files, folders, or databases, not just prohibited from seeing by policy.**

Facts: A police sergeant (Van Buren or VB) ran a license-plate check in a law enforcement databank he was allowed to access – but he did it on the sly in return for an expected \$5,000 payment from a questionable character (Mr. Albo, “no stranger to legal troubles”). Van Buren “knew that the search breached department policy.” He was federally prosecuted for violation of the Computer Fraud and Abuse Act of 1986 (as amended), which **makes it illegal to “access a computer with authorization and ... obtain ... information ... that the accessor is not entitled to so obtain....”** He was convicted and sentenced to 18 months in prison. The 11th Circuit affirmed, ruling that a person can be convicted for obtaining information from a computer they are authorized to access if they do it knowingly for an improper reason. The Circuits were split on that point.

Barrett (for 6): “We start where we always do: with the text.” And **“so” is the key statutory word.** Here is means “in the same manner as has been stated” already, “thereby avoiding the need for repetition.” VB was “entitled” to see and acquire license-plate information for his job. “Not entitled *so* to obtain” is “best read,” or “plainly refers to,” obtaining information one is “not entitled to obtain by using a computer he is authorized to access.” Our reading of “so” does not violate “the rule against superfluity,” because it limits the information to “digital” information obtained from the computer. And “entitled *so*” limits the non-entitlement to the computer; not just any “circumstance-based limit appearing anywhere” (like in the police department’s rules, or the “terms of service” in a website agreement). Similarly, “exceeds authorized access” is limited to the “entitled so” definition in the statute, not just exceeding authorizations found anywhere. (The Court stresses that this text must be interpreted in “the computer context,” not just in the minds of “ordinary” speakers.)

The statute’s “design and structure” also helps here. As for statutory history [**ed. note:** the phrase “legislative history” is clearly out of bounds these days, ☺], Congress removed an “improper purposes” clause, and we should assume that Congress’s intended this to have substantive “effect.” Finally, “to top it all off,” extending the statute as broadly as the government requests **“would attach criminal penalties to a breathtaking amount of commonplace computer activity.”** (And meanwhile, VB might well suffer other adverse consequences, such as being fired). By the way, this point is not “rule of lenity” or “constitutional avoidance.” “Because the text, context, and structure” support out conclusion, this is merely “extra icing on a cake already frosted,” **quoting a 2015 Kagan dissent in *Yates*.** “Millions of otherwise law-abiding citizens” would “be criminals.” [A list of examples is given.] Even “checking sports scores” [silent tip-of-the-hat to Kavanaugh?] or paying bills at work.” And we won’t endorse a textual interpretation “controlled by the drafting practices of private parties.” Reversed and remanded for further consistent proceedings.

Thomas dissenting, with Roberts and Alito: Common law and statutes have “long punished those who exceed the scope of consent when using property that belongs to others (e.g., valet parkers can’t take car for a joyride). This is the plain meaning of the statutory language here, to the ordinary English reader. Because VB had no “right” to use the license-plate info as he did, he was not “entitled” to

obtain it, even if he was “authorized” to use the databank. He “exceeded authorized access.” If this is ambiguous, that should be resolved in favor of the “plain meaning,” not against it. As for the possible “breathtaking” amount of possible liability, Congress did not know in 1986 “how computers would be used in 2021.” “Common activity” is often criminalized (citing 40 U.S.C. 8103(b) which “punishes a person who removes a single grain of sand from the National Mall”). We should not presume unreasonable enforcement. The conduct here was plainly wrong and should be criminal.

B. Federal Criminal Sentencing

Armed Career Criminal Act (ACCA) -- *Borden v. United States* (June 10, 2021): 5-4 (**Kagan** announced the judgement of the court and delivered the opinion for a plurality; *Thomas* concurred in the judgement; Kavanaugh dissents, joined by Roberts, Alito, and Barrett), reversing and remanding 769 Fed.Appx. 266 (CA6 2020).

Headline: An offense with a mental state of “recklessness” **does not qualify as a “violent felony” under the Armed Career Criminal Act.** [Sorry; summary much longer than it’s worth.]

Facts: The federal Armed Career Criminal Act (ACCA) requires a 15-year mandatory minimum prison sentence for persons convicted of illegal gun possession who have three or more prior convictions for “violent felonies.” Borden pled guilty to “felon in possession” and had three prior convictions BUT one prior was for a “reckless” aggravated assault under Tennessee law. The Sixth Circuit affirmed Borden’s ACCA sentence, although noting a Circuit split on whether a “violent felony” includes reckless (“a less culpable mental state”) offenses, as opposed to “purposeful or knowing” conduct.

Kagan, for four (Breyer, Sotomayor, and Gorsuch): [Note: the Court begins by adopting, without discussion, the Model Penal Code’s four-level hierarchy of mens rea (mental states), “in descending order,” purposeful, knowing, reckless and negligent.] In *Leocal* (2004), the Court ruled that “negligent” offenses do not fall within a “relevantly identical” federal definition of “violent felony” (18 U.S.C. 16(a)). Like the ACCA, that federal definition of “violent felony” covers the “use, attempted use, or threatened use of physical force against the person of another.” This “naturally suggests a higher degree of intent than negligent conduct,” a “category of violent, active crimes.” By contrast, in a third federal statute lacking the “against another” phrase, the Court ruled (in *Voisine*, 2016) that a “crime of domestic violence” does include reckless offenses: “use” of force is “indifferent” to recklessness in that context. The Court’s approach is thus “statute specific;” “a difference in text [can] yield a difference in meaning.” **We now hold that, in the ACCA, “use of physical force against another” does not include reckless offenses; it “demands that the perpetrator direct his action at, or target, another individual.” “Use of force denotes volitional conduct.” “Against” has been so construed before, by “one of the Court’s great wordsmiths,” Justice Scalia, in *Heller* (2008). [Ed. note: the irony in citing *Heller*, finding a Second Amendment right to possess a gun for self-defense, a holding with which Kagan undoubtedly disagrees, is pretty delicious.] A reckless offender does not necessarily (using the “categorical approach”) intend to apply force “against another.” (Kagan gives an example of a red light runner who hits a person they did not see: intending to use force and recklessly indeed, but not directing it “against” another.)**

This textual reading also “finds support in context and purpose: otherwise, “large sentencing enhancements” would be imposed “far afield from the “armed career criminals the ACCA addresses – the kind who ... could well use a gun deliberately” (quoting *Begay*, 2008). [lengthy discussion of this, and the “types of crimes” that “recklessness” could reach, is omitted here.]. Remember the ACCA applies to gun offenders, and many of the examples do not pose the “exceptional danger of doing harm” that Congress was trying to reach. The dissent’s theory “runs pretty much [against] all sentencing law.” The “categorical” approach is “under-inclusive by design,” leaving out some violent crimes if not all

the crimes in the category are “violent.” The misdemeanor “domestic violence” statute at issue in *Voisine* was not only different in text, but also in purpose and context.

We reject the dissent’s “term of art” theory, which no one has ever advanced before for the ACCA. That is not an “ordinary meaning” approach; it is “no way to do statutory construction” [**ed. note:** stressing the textual ordinary meaning is undoubtedly directed to keeping Justice Gorsuch in this plurality opinion]. We also reject relying on “headings and captions” in statutory codes, as opposed to the statutory text itself. “The dissent is once again putting the rabbit into the hat,” by trying to insert the word “recklessly” in a statute where Congress did not use it. [And in a great footnote, Kagan merely counts the Justices that agree with her conclusion, and says “that makes five,” echoing Justice Brennan’s famous, if somewhat apocryphal, “five can do anything around here” phrase].

Thomas concurring in the judgment: We wrongly held in *Johnson* (2015 [written by Scalia]) that a “residual phrase in the ACCA was unconstitutionally vague; that phrase would affirm Borden’s conviction here because his individual offense was indeed “violent.” We should overrule *Johnson*. Meanwhile, I agree [with Kagan] that the “particular provision here does not encompass” reckless conduct. I will not “commit a new error” [distorting the meaning of the phrase at issue here]; I choose instead to “aggravate a past error” [accepting *Johnson* even though I disagree with it.]

Kavanaugh dissenting, with Roberts and Alito: First, the phrase “against the person of another” has been used in criminal law for centuries to separate crimes against the person from crimes against property. It is a “term of art” and was never connected to *mens rea*. Second, the “ordinary meaning” of the statute here should encompass reckless crimes, as they clearly involved the use of force, and when that force injures someone, it has been “used (the statute does not say “directed”) against” that person. Third, *Voisine* (2016) should have made this an easy case; four Circuits all decided after *Voisine* that the ACCA also must include reckless offenses. The criminal law has always extended criminal liability to reckless offenses [true], and nothing in the ACCA suggests that Congress meant to exclude them here. Meanwhile, there are “significant real-world consequences” here: dangerous habitual violent offenders will not be imprisoned as long as Congress wanted (and that is their policy judgment, not ours). The recidivism rate among ACCA offenders who do not receive the enhancement is “very high” – there will be “human costs.”

[**Ed. note:** I must note that Kavanaugh seems to not fully appreciate the difference between “reckless” and “negligent” offenses – it is not just the “degree of risk,” it is a failure to perceive risk (negligence) versus a knowledge of the risk and a conscious decision to disregard that risk. This is a subtle yet essential difference, that is always very difficult to get 1L law students to understand.]

Fair Sentencing Act of 2010 (crack cocaine sentencing) – *Terry v. United States* (June 14, 2021): 8½ - ½ (Thomas; Sotomayor concurring in part and concurring in the judgement), affirming 828 Fed. Appx. 563 (11th Cir. 2020)).

Headline: Sentence reductions under the First Step Act are available only if an offender’s prior crack cocaine offense triggered a mandatory minimum sentence.

Facts: In 1986, Congress passed a statute targeting crack cocaine “possession with intent to distribute” crimes, and set three levels of penalty: (a) 10 mandatory-minimum years for 50 grams or more; (b) 5 mandatory-minimum years for 5 grams or more; and (c) no mandatory-minimum penalty for any lower “unspecified” amount. The first two penalties required 100 times more powder cocaine to trigger the same mandatory-minimums; the third one (c) did not distinguish between crack and powder cocaine and did not require prison time at all. Terry pled guilty in 2008 to a (c) offense (an unspecified amount of crack); the judge later determined it to be 3.9 grams. But due to prior convictions, Terry was a “career offender” under the Federal Sentencing Guidelines, and he received 188 months in prison under those Guidelines.

Thomas: Meanwhile, the U.S. Sentencing Commission criticized the 100-to-1 ratio for powder to crack cocaine; Congress in 2010 reduced the statutory ratio to 18-to-1, and the Sentencing Commission

applied that change retroactively; and in 2018 Congress (in the “first Step Act”) gave courts authority to apply to new lower ratio retroactively. But that retroactive sentencing opportunity applied only to persons who had received “a sentence for a covered offense” -- and a “covered offense” was defined as one for which “the statutory penalties ... were modified” by the prior Acts. Lower courts held this applied only to the two mandatory-minimum (a) and (b) offenses, although the Biden Administration told the Court that it could no longer defend those judgments (as the Trump DOJ had).

Thomas for 8½ (Sotomayor does not join the “sanitized history” of the crack cocaine saga, that “egregiously” “ignores” the racialized history and disparate effects): The statutes plainly applies only to offenses for which the statutory penalties were “modified” by them. But they “did not modify” the penalty for Terry’s offense, because his (c) offense did not depend at all on the crack-versus-powder cocaine ratio. The penalty available for Terry’s offense “remain[ed] exactly the same” throughout, and “his sentence was based on his recidivism, not his drug quantity.” We reject the argument that the Act modified “the penalty statute;” that is simply not what it says. The “clear text” did not reach Terry’s offense.

Sotomayor concurring in part and in the judgment: “I agree with the Court’s interpretation of the” legislation. But the Court “ignores” the racialized history of the saga, and “barely references the real-world impact.” Crack offenders like Terry received sentences that were “unduly influenced by the 100-to-1 ratio.” Amicus briefs from “Retired Federal Judges” and the “bipartisan lead sponsors” of the legislation both say that it would have a “meaningful effect.” In addition, Sotomayor makes the explicit point that “Black people bore the brunt of th[e crack-versus-powder] disparity, which had no scientific basis and appears to have been motivated and maintained for racial reasons.” “Congress has numerous tools to right this injustice.”

Greer v. United States (consolidated with *United States v. Gary*) (June 14, 2021): 8½ -½ (**Kavanaugh**; Sotomayor concurring as to Greer, dissenting as to Gary), **affirming** 798 Fed. Appx. 483 (11th Cir. 2020) and **reversing** 954 F. 3d 194 (4th Cir. 2020).

Headline: On appeal, an unobjected-to failure to instruct, in a felon-in-possession case, that the defendant must know they are a felon (a *Rehaif* error), is **not** “**structural error**” **requiring automatic reversal**; and to show “plain error” a defendant must propose a sufficient basis for a “reasonable probability” that “the outcome would have been different.” These defendants did not do that -- “**convicted felons ordinarily know that they are convicted felons.**”

Facts: In *Rehaif* (2019), the Court ruled [contrary to the precedents in every Circuit] that in a federal “felon-in-possession” case, “the Government must prove not only that the defendant knew he possessed a firearm, also that *he knew he was a felon* when he possessed the firearm.” Prior to this ruling [but while on direct appeal, so not yet “final”], Greer and Gary were convicted as felons-in-possession. Greer was convicted by jury trial; he did not request (and did not receive) a *Rehaif* instruction. Gary pled guilty (two different counts) and the judge did not advise him that the government would have to prove he knew he was a felon. On appeal they raised *Rehaif* arguments (the decision having been issued by then). The 11th Circuit nevertheless affirmed Greer’s conviction, while the Fourth Circuit reversed Gary’s.

Kavanaugh for 9 in Greer and 8 in Gary: Under the four-step “plain-error” test of *Olano* (1993), for unpreserved (“forfeited”) errors (Fed.R.Crim.Pro. 52(b)), all agree that the *Rehaif* error occurred here, and was “plain.” Under step 3, the defendant bears the burden to show a “reasonable probability” that if the error had not occurred, the outcome would have been different (Greer: jury acquittal; Gary, would not have pled guilty). This is an “uphill climb” here, because we take it as a matter of “common sense,” a “simple truth,” that “**if a person is a felon, he ordinarily knows he is a felon.**” Although there are circumstances” where a defendant can make a contrary showing, these defendants “have not carried the burden.” Greer has “never argued or made any representation” that he did not know; moreover, his pre-sentence report showed it (we reject the argument that, on appeal, a court may not

look beyond “the record” in the trial court” – “case-by-case adjudication” is required.). As for Gary, we first **reject the claim that there is a “futility exception” to the contemporaneous objection requirement** of Rules 51 and 52. “All that matter[s] is] that the defendant” had an “opportunity.” And second, moreover, this is not a “structural error” that requires automatic reversal, because “the Court’s precedents make clear [that] the omission of a single element from jury instructions is not structural.” And like Greer, Gary did not argue to the 4th Circuit, when he knew about *Rehaif* and could have, that he in fact did not know he was a felon.

Sotomayor, concurring as to *Greer*, **dissenting** as to *Gary*: I agree as to the “plain error” rules application as to Greer. “Greer had notice of the *Rehaif* requirement and an opportunity to rebut the force of th[e] evidence” that he knew he was a felon. (As an aside, this same “must make a showing” requirement does not apply when a contemporaneous objection is made and rejected.). I note that today’s decision does not create a “legal presumption” that every felon knows they are a felon; “there are many reasons a defendant might not know (like no prison time, or other “confusing” facts). As for Gary, I would remand to allow him to make any “case-specific showing” that he can. The Question we granted review on there was the “automatic reversal” one; “I would limit our decision to” that.

C. The Uniform Code for Military Justice

[United States v. Briggs](#) (Dec. 10, 2020): 8-0 (**Alito**; *Gorsuch* concurring; Barrett not participating), **reversing and remanding** 79 M. J. 199 (CAAF 2020).

Headline: Because the military rape statues still say rape is “**punishable by death**” – despite *Coker* in 1977 and *Kennedy* in 2008 -- the Uniform Code of Military Justice’s generally-applicable **five-year statute of limitations for non-capital offenses does not apply to prosecutions of rape**. The prosecutions of three military service members for rape were timely under the Uniform Code of Military Justice.

Facts: The facts of the offenses, of three linked cases with three different defendants (Briggs, Collins, and Daniels) are not provided in this opinion. Each was prosecuted for under the Uniform Code of Military Justice (UCMJ), for rapes committed prior to 2006. The UCMJ provided that rape could be “punished by death,” even though the Supreme Court ruled in 1977 (*Coker v. Georgia*) that the Eighth Amendment bars the death penalty for rape. [**Ed. note:** see also *Kennedy v. Louisiana*, 2008, no death penalty even for the aggravated rape of a child. Alito cites *Kennedy* only to suggest that perhaps death IS still available for military rape. It is a bit surprising that no one writes separately here to contest that suggestion.] Only in 2016 did Presidents begin to say that the death penalty for rape in the military would not be available. The UCMJ also says that any offense “punishable by death” may be prosecuted “at any time without limitation.” Defendants here argued that *Coker* means their offenses are not “punishable by death,” so the five-year statute of limitation (SOL) should apply, and preclude their current prosecutions (well outside the five-year period). The UCMJ ruled that the five-year statute of limitations does apply, so defendants’ convictions should be reversed.

Alito, for unanimous 8-Justice Court: “At first blush” the decision below “finds support” in the plain language. but “on balance we find the government’s interpretation more persuasive. “Punishable by death,” in this statutory context, means punishable “under the UCMJ.” This is still “Congress’s answer.” SOLs should provide clarity, and if courts had to examine all possible applicable law [like *Coker*], the “deadline for filing rape charges would be unclear.” [**Ed. note:** as a general rule, perhaps. But in this context, the five-year SOL is also clear, no?] Finally, “we should not lightly assume that Congress” intended to tie the SOL here to the Eighth Amendment. “Some Justices” disagree with the “evolving standards of decency” approach to applying the Eighth Amendment. So we hold that these rape prosecutions “were timely.”

Gorsuch, concurring: “I continue to think this Court lacks jurisdiction to hear appeals directly from the CAAF (citing an Alito [author of the majority here!] dissent from 2018, in *Ortiz*). But “I agree

with the Court’s decision on the merits.”

III. HABEAS CORPUS

Jones v. Mississippi (April 22, 2021): *Miller* and *Montgomery*, which held that mandatory LWOP (life without parole) for juveniles violates the Eighth Amendment and applies retroactively on habeas, **do not require an explicit finding that a juvenile is “permanently incorrigible** before a discretionary LWOP sentence is imposed. (*Detailed case summary is above, under “Eighth Amendment.”*)

Edwards v. Vannoy (May 17, 2021): 6-3 (**Kavanaugh**; *Thomas* concurring; *Gorsuch* concurring; *Kagan* dissenting with Breyer and Sotomayor), affirming 2019 WL 8643258 (unpublished denial of COA, 5th Cir. 2019).

Headline: The *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review. More broadly, **the “watershed rule exception”** to our normal non-retroactivity position, established in *Teague* (1989), **is hereby abolished.**

Facts: Well over a decade ago, Thedrick Edwards was convicted by jury trial in Louisiana of multiple felonies including an “egregious” rape. At that time, Louisiana law permitted non-unanimous jury convictions, and the jury votes in Edwards’ case were either 11-1 or 10-2 (and one acquittal). [From the cert petition: “Interestingly, the sole African-American juror voted to acquit Edwards on each count.”] After various claims were denied and Edwards’ case became final after appeals, Edwards filed a federal petition for habeas corpus, arguing that the non-unanimous verdicts violated his Sixth Amendment right. The petition was denied, and the Fifth Circuit denied a Certificate of Appealability (COA). While Edwards’ cert petition was pending, the Court ruled in *Ramos v. Louisiana* (2020) that the Fourteenth Amendment now “incorporates” the Sixth Amendment rule that criminal jury convictions must be unanimous. Cert was granted here to determine whether this rule should apply retroactively to cases already “final,” on federal habeas corpus review.

Kavanaugh, for 6: *Ramos* announced a new rule of criminal procedure. We have repeatedly held that new procedural (as opposed to substantive) constitutional rules do not apply retroactively once a case is “final” (after all direct appeals have been exhausted). *Teague v. Lane* (1989). “The costs imposed” on the States, and their interest in the “finality” of convictions, “far outweigh” the benefits. We did, in *Teague*, say that there might be an exception for “watershed” rules, such as the “right to counsel” ruling in *Gideon* (1963). But “in the 32 years since *Teague*, this Court has *never* found that even “important new rules of criminal procedure” satisfy the “watershed rule” exception. So, today, “the only candid” thing to say is that **the “watershed rule exception” to our normal non-retroactivity position for new constitutional procedural rules, is moribund, ... retaining no validity.**” It “gives false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts.” **It is hereby abolished.** Flatly stated, “new procedural rules do not apply retroactively on federal collateral review.” Period.

We reject multiple arguments from the dissent. We are being true to *Ramos*, not eliminating its “promise.” And we are not eliminating the “watershed rule exception” just so we can not apply *Ramos* retroactively. As for the statement of the exception in *Teague*, “no *stare decisis* values would be served by continuing to indulge in the fiction that *Teague*’s purported watershed exception endures.” “The rhetoric in today’s dissent is misdirected. ... [e]ach Member of the Court has acted in good faith” here.

Thomas concurring, joined by Gorsuch: We could also reach this same result (not applying *Ramos* on federal habeas) by just applying the text of the governing 1996 habeas statute (AEDPA). Given that, prior to *Ramos*, we had ruled that nonunanimous criminal jury convictions were okay (*Apodaca*, 1972), we could just rule that lower courts not applying *Ramos* retroactively were not plying an “unreasonable” view of the law. [“unreasonable application of clearly established federal law” is the AEDPA standard]. Also by the way, *Teague* has other problems.

Gorsuch concurring, joined by Thomas: “We abandon Teague’s test” today “because it poses a question this Court has no business asking.” **Habeas historically was, and today should be, limited to asking whether the initial trial court had “competent jurisdiction” over the case.** If it did, then any federal question is at an end. [Ed. note: Gorsuch writes out a remarkably revisionist view of habeas corpus -- but not unsupported by some scholars and not without some historical roots. Watch for it in future cases, both in the Supreme Court and lower federal courts.]. The expansive doctrine of habeas today was established in *Brown* (1953). We should go back to the original view of habeas, adopting Jackson’s concurring wisdom in *Brown* and rejecting Frankfurter’s majority opinion there.

Kagan dissenting, with Breyer and Sotomayor: [Ed. note: I would call this Justice Kagan’s most powerful dissent of the Term. A brief summary cannot do it justice, you should read it in full. Indeed, footnote 8 succinctly gives Kagan’s overall mature, if understated (calmly rebuking Kavanaugh) theory of judging: The fact that she dissented in *Ramos*, does not mean she can’t argue for its universal application, now. “Judging [is not] scorekeeping ... No one gets to bank capital.... The focus should be on getting the cases before us right.”].

Undoubtedly the new rule adopted last Term in *Ramos* was historic – “in a thesaurus, it would be described as ‘watershed.’” So “everything rests” here on the decision to abandon that long-established exception. “But in taking that road, the majority breaks a core judicial rule: respect for precedent. *Stare decisis*. ... [H]ere the majority crawls under, rather than leaps over, the *stare decisis* bar.” It doesn’t even apply the usual factored analysis. Moreover, no party even argued that Teague should be overruled here. “I respectfully dissent.”

IV. NATIVE AMERICAN TRIBAL AUTHORITY

[United States v. Cooley](#) (June 1, 2021): 9 (8+1) to 0 (**Breyer**; *Alito* concurring), vacating and remanding 919 F. 3d 1135 (9th Cir. 2019).

Headline: A Native American tribal police officer may, with probable cause regarding state or federal criminal violations, detain temporarily and search non-Indian persons traveling on public roads running through a reservation.

Facts: Late one night within a Native American reservation, a Crow police officer stopped to speak with the driver (Cooley) of a truck pulled over on the side of a highway. Seeing two semiautomatic rifles on the front seat, and Cooley’s “watery, bloodshot eyes,” the officer ordered Cooley out of the car, conducted a pat-down search of Cooley, and radioed for assistance to tribal and State county officers. Other officers (including one with the federal Bureau of Indian Affairs) arrived, and directed the tribal officer to seize any contraband in plain view, which included some methamphetamine. In a subsequent federal prosecution, the District Judge and the Ninth Circuit ruled the evidence should be excluded, holding that a tribal officer has no authority to investigate non-”apparent” violations of state or federal law on a public road within the Reservation, at least not without first trying to determine the person’s Indian or non-Indian status.

Breyer (for 9): Indian tribes have “sovereign authority,” although it is “unique and limited,” and it “remains subject to the plenary authority of Congress.” Specifically, we have ruled that tribes “lack inherent sovereign power to exercise criminal jurisdiction over non-Indians (*Oliphant v. Suquamish Tribe*, 1978). However, “no treaty or statute explicitly divests tribes of the policing authority at issue” here. And the “general” rule that “the inherent sovereign powers of an Indian tribe do not extend to ... nonmembers of the tribe” is subject to exceptions, including “when conduct threatens or has some direct effect on the ... health or welfare of the tribe.” *Montana v. U.S.* (1981). This exception “fits [here] almost like a glove.” See *Strate* (1997) and *Atkinson Trading* (2001). There is no basis for the Ninth Circuit’s qualifiers. “Apparent” violations is a “new standard” that we reject. And asking first a person’s Indian status “would produce an incentive to lie.” “We see nothing” in

Congressional acts that would “deny tribes the authority at issue (amicus briefs from Members of Congress and former U.S. Attorneys agree).

Alito concurring: “I join the opinion on the understanding that it holds no more than the following” (and he then gives a three-part, one long sentence, description).

V. IMMIGRATION LAW

Pereida v. Wilkinson (Mar. 4, 2021), 5-3 (**Gorsuch**; Breyer dissenting; Barrett not participating), affirming 916 F.3d 1128 (CA8 2019).

Headline: When requesting cancellation of a removal order, **a noncitizen must prove each criteria** of eligibility—including the requirement that the noncitizen not be convicted of a “disqualifying offense.” Noncitizens with a criminal conviction must then overcome any ambiguity as to whether their conviction is a “disqualifying offense.”

Facts: Noncitizens seeking cancellation of removal orders under the INA must prove that they have not been convicted of any “disqualifying offense” 8 U. S. C. 1229b(b)(1). Mr. Pereida, who entered the U.S. without authorization, was later charged by state officials with using a fraudulent social security card to obtain employment—a disqualifying offense under the INA. DHS subsequently placed him into removal proceedings. In the state’s criminal action, Mr. Pereida pled *no contest* to “attempted criminal impersonation,” but the resulting criminal records did not specify whether he was convicted of the charging crime—use of a fraudulent social security card—or for some other “crime of impersonation” under the statute. Because Pereida, in requesting removal relief, declined to submit any evidence related to the conviction, the immigration judge assessing Pereida’s eligibility for relief could only consult Pereida’s charging documents which supported a conviction for use of a fraudulent social security card. Thus he ruled that Pereida was ineligible for relief. The BIA and the Eighth Circuit affirmed, noting that Pereida bore the burden of proving that his conviction was not for a disqualifying offense.

Gorsuch (for 5): “The INA expressly requires individuals seeking relief from lawful removal orders to prove all aspects of their eligibility—that includes proving they do not stand convicted of a disqualifying criminal offense” which the statute defines as a “crime involving moral turpitude.” We hold this even where “a noncitizen is convicted under a state statute listing multiple offenses, [only] some of which are disqualifying.” This is because “Congress kn[e]w how to impose the burden on the government to show that an alien has committed a crime of moral turpitude” (citing provisions) and yet here “it chose to flip the burden when it comes to applications for relief.” The “categorical approach” that we have developed for prior offense convictions in other contexts [**ed. note**: which has been much criticized], does not require a different result. When the INA burden of proof is applied to a “divisible” statute like Nebraska’s, **it is the noncitizen’s burden to affirmatively prove that he was convicted** of a non-CIMT offense. Ruling otherwise “would require us to cast a blind eye over a good many precedents.” It is possible that state record-keeping problems” could harm a noncitizen’s interests. But that is a policy decision for Congress to make.

Breyer dissenting, joined by Sotomayor and Kagan: “This case has little or nothing to do with burdens of proof.” We have held that the “categorical approach” applies to INA proceedings; and that this approach “ask[s] what offense a person was ‘convicted’ of, not what acts he ‘committed’” (*Moncrieffe* (2013)). This is therefore a legal question, not a factual one, and “legal questions are not affected by a burden of proof.” Undoubtedly, Pereida could have committed the offense he pled guilty to without committing fraud (and thus “a crime of moral turpitude”); and the evidentiary documents do not show otherwise. The Court’s opinion is directly contrary to *Moncrieffe*. Given the evidentiary gap, “the Immigration Judge cannot characterize the conviction as a crime involving moral turpitude.”

“Today’s decision will result in the practical difficulties and unfairness that Congress intended to avoid by adopting a categorical approach.” In “many lower criminal courts, misdemeanor convictions

are not on the record,” and a “noncitizen may agree to plead guilty to a specific offense in a divisible statute because that offense does not carry adverse immigration consequences.” The majority’s approach “may deprive some defendants of the benefits of their negotiated plea deals.”

Niz-Chavez v. Garland (April 29, 2021): 6-3 (**Gorsuch**; Kavanaugh dissenting with Roberts and Alito), reversing 789 Fed. Appx. 523 (6th Cir. 2019).

Headline: A “notice to appear” that is sufficient to trigger the “stop-time rule” under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) must **be a single document containing all of the statutorily required information** about an individual’s removal hearing (as listed in §1229(a)(1)).

Facts: Eight years after Mr. Niz-Chavez unlawfully entered the U.S., the Government ordered his removal. First, it sent him a document containing the charges against him; two months later, it sent a second document providing the time and place of his hearing. He appeared for the hearing and was ordered removed. Niz-Chavez subsequently requested cancellation of the removal orders. To be eligible, a non-citizen must prove that he has been continuously present in the U.S. for at least 10 years (among other things). §1229b(b)(1)(A)). The 10-year clock stops, however, when the noncitizen is served “a notice to appear” for a removal proceeding (“stop-time rule”). §1229b(d)(1). Before the BIA and the Sixth Circuit, Niz-Chavez argued that the stop-time rule had *not* been triggered in his case because neither of the two documents served on him independently contained all of the statutorily required information to constitute a “notice to appear.” Under the Court’s decision in *Pereira v. Sessions* (2017) “a notice that lacks the time and place of the hearing” is *insufficient* to trigger the stop-time rule. But, *Pereira* did not answer whether the stop-time rule is triggered if the government provides notice *via multiple documents*.

Gorsuch (joined by Thomas, Breyer, Sotomayor, Kagan, and Barrett): In deciding *Pereira*, “we explained that in IIRIRA, Congress took pains to describe exactly what the government had to include in a notice to appear, and that the time and place of the hearing were among them.” In light of *Pereira*, the government admits that the first document does not constitute a notice to appear, but argues that the second one “does the trick.” “On its view a ‘notice to appear’ is complete and the stop-time rule kicks in whenever it finishes delivering all the statutorily prescribed information” and the Government “suggests it should be allowed to spread the statutorily mandated information over as many documents and as much time as it wishes.” At issue is the statutory interpretation of two sections in the IIRIRA: §1229(b)(d)(1), which explains when the stop-time rule is triggered [“when the alien is served a notice to appear under section 1229(a)”] and §1229(a), which *defines* “notice to appear” [“written notice. . . specifying the time and place of his hearing”]. **So, “to trigger the stop-time rule, the government must serve ‘a’ notice containing all the information Congress has specified** because the “singular article ‘a’ falls outside the defined term” (notice to appear) “and thus modifies the entire definition.” “Notice” can refer to either a countable object (“a notice,” “three notices”) or a “noncountable abstraction” (“sufficient notice,” “proper notice”). Congress’s decision to use the indefinite article ‘a’ is . . . evidence that it used the term in the *first* of these senses—as a discrete, countable thing.” Thus, **“the government must issue a single statutorily compliant document to trigger the stop-time rule.”**

Kavanaugh dissenting, joined by Roberts and Alito: “Before *Pereira*, the Government could send two documents” and “stop the clock when it served the first, incomplete document.” However, in the wake of *Pereira*, “service of the first document no longer stops the clock” because “the clock does not stop until the Government also provides the time and place of the hearing.” So, after *Pereira*, why would the Government still provide notice in two documents instead of one? Simple. When the Government wants to inform the noncitizen that it is initiating removal proceedings, it may not yet know exactly when the hearing will occur.” “The Government gains no advantage by providing notice in two documents.” “If anyone gains an advantage from two-document notice” it’s noncitizens.”

The Court’s textual interpretation contains two independent flaws. First, “the Court’s analysis disregards the statutory definition of a notice to appear.” Section 1229(a) defines “notice to appear” as simply “written notice.” “The statute nowhere says that written notice must be provided in a single document.” According to the Court, Congress imposed a single-document requirement “not by actually saying” it, but rather by placing quotation marks around the words a “notice to appear” rather than “a notice to appear.” And second, the Court’s “literal meaning” approach is not the “ordinary meaning” we normally seek to apply.

[United States v. Palomar-Santiago](#) (May 24, 2021): 9-0 (**Sotomayor**), reversing and remanding 813 Fed. Appx. 282 (9th Cir. 2020).

Headline: Under the statute that criminalizes unlawful reentry after deportation (§1326 of the Antiterrorism and Effective Death Penalty Act) a non-citizen bringing a collateral challenge to the underlying deportation order is required to demonstrate **all three of the requirements under §1326(d)**. Meaning, **each of the statutory requirements of §1326(d) are mandatory**.

Facts: In 1991 Mr. Palomar-Santiago, a permanent resident of the U.S. and a Mexican national, was convicted of a felony DUI in state court. At the time, lower courts understood a DUI conviction to be an “aggravated felony,” subjecting a noncitizen to removal. 8 U. S. C. §1227(a)(2)(A)(iii). Palomar-Santiago was removed from the country following a hearing before an immigration judge and a waiver of his right to appeal. Six years later, the Court held in *Leocal* (2004), that a DUI offense is not an aggravated felony. In 2017, Palomar-Santiago was again found in the U.S. and indicted for unlawful reentry after removal. See §1326(a). The statute criminalizing unlawful reentry provides that a collateral challenge to the underlying deportation order may proceed only if the noncitizen first demonstrates that (1) “any administrative remedies that may have been available” were exhausted, (2) “the opportunity for judicial review” was lacking, and (3) “the entry of the order was fundamentally unfair.” §1326(d). Palomar-Santiago moved to dismiss the indictment on the ground that his prior removal order was invalid in light of *Leocal*. Following Ninth Circuit precedent, the District Court and Court of Appeals held that Palomar-Santiago was excused from proving the first two requirements of §1326(d) because his felony DUI conviction did not make him removable. The Ninth Circuit affirmed.

Sotomayor (for 9): [Section 1326](#) of the Antiterrorism and Effective Death Penalty Act (AEDPA), “establishes three prerequisites that defendants facing unlawful-reentry charges must satisfy before they can challenge their original removal orders.” The Ninth Circuit’s interpretation of the statute, in allowing Palomar-Santiago to be excused from meeting its first two requirements, “is incompatible with the text of §1326(d).” “That section provides that defendants charged with unlawful reentry ‘may not’ challenge their underlying removal orders ‘unless’ they ‘demonstrat[e]’ that [the] three conditions are met.” The section’s requirements are connected by the conjunctive “and,” “meaning defendants must meet all three [requirements].” When Congress uses “mandatory language” in an administrative exhaustion provision, “a court may not excuse a failure to exhaust.” Section 1326(d)’s first two requirements are not satisfied just because a noncitizen was removed for an offense that should not have rendered him removable. “The substantive validity of the removal order is quite distinct from whether the noncitizen exhausted his administrative remedies” or “was deprived of the opportunity for judicial review.”

[Garland v Ming Dai](#) (consolidated with *Garland v. Alcaraz-Enriquez*)(June 1, 2021): 9-0 (**Gorsuch**), vacating and remanding 884 F. 3d 858 and 727 Fed. Appx. 260 (9th Cir. 2018).

Headline: The Ninth Circuit’s judge-made rule—that a reviewing court “must treat a noncitizen’s testimony as credible and true absent an explicit adverse credibility determination”—cannot be reconciled with the Immigration and Nationality Act’s (INA) terms, and is wrong.

Facts: In both of these cases, a foreign national appeared before an Immigration Judge (IJ) and requested cancellation of removal orders. The IJ in Alcaraz-Enriquez’s case had to determine whether

he'd committed a disqualifying crime based on his prior state conviction for "inflicting corporal injury on a spouse or cohabitant." The IJ considered both the probation report (which detailed a serious domestic violence incident) and Mr. Alcaraz-Enriquez's own, conflicting, testimony from a later removal proceeding. Relying on the version of facts detailed in the probation report, the IJ held him ineligible for relief; the BIA affirmed. In Ming Dai's case, the request for removal relief was based on Dai's own testimony that he and his family had suffered persecution by Chinese officials and expected future persecution upon return. But he failed to disclose that his wife and daughter had voluntarily returned to China and when confronted, testified as to the "real story" of why he'd remained in the country unlawfully. Finding that Dai's inconsistent testimony undermined his claim for relief, the IJ denied relief; the BIA affirmed. Both defendants sought judicial review by the Ninth Circuit and in each case the court noted that neither the IJ nor BIA made "explicit adverse credibility determinations" and ruled that, absent such findings, "a reviewing court must treat the noncitizen's testimony as credible and true." Applying this rule, the Ninth Circuit granted relief to both defendants.

Gorsuch (for 9): When it comes to questions of fact of immigration cases, the [INA provides](#) that a reviewing court must accept "administrative findings" as "conclusive unless any reasonable adjudicator would be compelled" to conclude differently. It's long been settled that "a reviewing court is generally not free to impose additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel." So, **as long as the record contains "contrary evidence" of a "kind and quality" that a reasonable factfinder could find sufficient, a reviewing court may not overturn the agency's factual determination.**

While the INA does provide that absent an "explicit" "adverse credibility determination" "the applicant or witness shall have a *rebuttable* presumption of credibility on appeal," the statute cautions that outside the "appeal" there is "*no* presumption of credibility." **In immigration cases under the INA there is only one "appeal"—from the IJ to the BIA. Subsequent judicial review takes place by means of a "petition for review."** Accordingly, "**no such presumption [of credibility] applies in antecedent proceedings before an IJ, or in subsequent collateral review before a federal court.**" Thus, "**the only question for judges reviewing the BIA's factual determinations is whether *any* reasonable adjudicator could have found as the agency did.**"

So long as the BIA's reasons for rejecting an alien's credibility are reasonably discernible, the agency must be understood as having rebutted the presumption of credibility."

[*Sanchez v. Mayorkas*](#) (June 7, 2021): 9-0 (**Kagan**), affirming 967 F. 3d 242 (3rd Cir. 2020).

Headline: A foreign national that enters the U.S. unlawfully, and that later receives Temporary and Permanent Status, is nonetheless *ineligible* for Lawful Permanent Residency because it requires "nonimmigrant status" (which TPS confers to its recipients) *and* an "admission" (which by definition cannot be conferred by TPS).

Facts: Jose Santos Sanchez, a citizen of El Salvador, challenged the denial of his application for Lawful Permanent Residency (LPR). After he'd entered the U.S. unlawfully, the Government granted him Temporary Protected Status (TPS). Years later, he applied to obtain LPR under 8 U. S. C. §1255, which provides a way for "foreign national[s] lawfully present in the country on a temporary basis"—to obtain an "adjustment of status" from TPS to LPR. However, because adjustment to LPR requires an "admission" to the country, which the statute defines as "an entry followed by inspection and authorization by an immigration officer" and because Sanchez's entry was unlawful, the government rejected his application for LPR. He successfully challenged the decision before a District Court, which reasoned that Sanchez's TPS "required treating him as if he had been lawfully admitted to the country for purposes of his LPR application." The Third Circuit reversed, finding Sanchez's unlawful entry into the country precluded his eligibility for LPR status, notwithstanding his TPS.

Kagan (for 9): We affirm the denial of relief here. A TPS recipient who entered the U.S. unlawfully is not eligible under §1255 for LPR status merely by dint of his TPS. LPR requires both

“nonimmigrant legal status” and an “admission” into the country. In immigration law, “lawful status and admission are distinct concepts” and “establishing the former does not establish the latter.” While TPS recipients are granted nonimmigrant status, TPS does not also automatically confer its recipients an “admission.” “Admission” means “the alien” lawfully entered after “inspection and authorization by an immigration officer.” **When Congress confers nonimmigrant status [under TPS] for purposes of §1255, but says nothing about admission, the Court has no basis for ruling an unlawful entrant eligible to become a LPR.**

Johnson v. Guzman Chavez (June 29, 2021): 6-3 (Alito for all except for footnote 4 [in which the Court declared it had jurisdiction to review the decision, citing *Jennings v. Rodriguez*]; Thomas concurring except as to footnote 4 and joined by Gorsuch; Breyer dissenting with Sotomayor and Kagan), reversing 940 F. 3d 867 (4th Cir. 2019).

Headline: Noncitizens subjected to reinstated removal orders and who have requested a “withholding-only” hearing, **must be mandatorily detained** under INA §1231 while the withholding-only proceeding is pending.

Facts: A class of noncitizens that were removed from the U.S. and that later reentered without authorization, each had their prior removal orders reinstated under 8 U. S. C. §1231(a)(5). Reinstated removal orders may not be “reopened or reviewed,” but noncitizens who have a reasonable fear of persecution or torture in their home country may request a “withholding of removal.” Each respondent was determined to have a reasonable fear of persecution/torture and was referred to individualized withholding-only proceedings before an Immigration Judge (IJ). But while the proceedings were pending respondents were each detained by DHS. Each sought a temporary release on bond under §1226 (which governs detention following a removal order) but the government opposing their release [under Trump] argued that unlike **detention following a removal order, detention following reinstatement of removal orders is authorized under a different statutory provision, §1231, which makes detention mandatory and does not permit release on bond.** The District Court ruled in favor of the respondents, holding that the statutes’ text made clear that §1226, not §1231, governed respondents’ detention. A divided three-judge panel on the Fourth Circuit affirmed.

Alito (joined in full by Roberts, Kavanaugh, Barrett and “all except footnote 4” by Thomas and Gorsuch): Section 1231 (the INA’s mandatory detention provision), not §1226 (the INA’s discretionary release-on-bond provision) governs the detention of noncitizens subject to reinstated orders of removal, “meaning those [noncitizens] are not entitled to a bond hearing while they pursue withholding of removal.” While §1226 of the INA provides that “an alien *may* be . . . detained pending a decision on whether the alien is to be removed” and that such noncitizens “may apply for release on bond,” §1231 by contrast authorizes *mandatory* detention when a noncitizen is “ordered removed” which is “the date that the removal order becomes administratively final.” **While the INA does not define “administratively final” “its meaning is clear.” It refers to the “the agency’s review proceedings” which are “separate and apart from judicial review proceedings.** Thus, “a prior decision” from an Immigration Judge (IJ) or Board of Immigration Appeals (BIA) to remove a noncitizen remains final, regardless of whether the removal order is ultimately withheld or deferred in the new “withholding only” proceedings. “DHS need not wait for the alien to seek, and a court to complete, judicial review of the removal order before executing it.” “That reinforces why Congress included ‘administratively’ before the word ‘final’ in that provision. The statutory structure confirms this interpretation of “administratively final.” “Every provision applicable to respondents is located in §1231.” **“Section 1226 applies before an alien proceeds through the removal proceedings and obtains a decision; §1231 applies after.”** A contrary reading would undermine Congress’s judgment to treat noncitizens twice ordered removed differently from those once ordered removed. The two groups pose “different levels of flight risk” -- noncitizens who’ve already been ordered remove “have already demonstrated a willingness to violate the terms of a removal order.”

Thomas concurring with Gorsuch (except for footnote 4): The Court should vacate and remand with instructions to dismiss for lack of jurisdiction because under §1252(b)(9) “we can exercise review of questions of law and fact arising from actions taken or proceedings brought to remove an alien in only two circumstances”: when reviewing a final order of removal and when exercising an express grant of jurisdiction elsewhere in §1252.” “[N]either circumstance is present here.

Breyer dissenting (joined by Sotomayor and Kagan): “I agree we have jurisdiction to review the decision.” But I don’t think respondents fall within the scope of §1231; thus, “it does not apply.” Rather, “respondents’ circumstances are governed by the more general section [§1226] that concerns the conditions of detention pending a final determination on removal” and they are “entitled to the bond hearings for which that section provides.” “I can find no good reason why Congress would have wanted categorically to deny bond hearings to those who, like respondents, seek to have removal withheld or deferred due to a reasonable fear of persecution or torture.” And “I do not agree with the majority’s reading of the statute’s language as denying them that opportunity.” “The most natural reading” of the language (§1231(a)(1)) leads to the conclusion that the “removal period does not commence until the administrative proceedings are over,” i.e., until “the order of removal” is “administratively final.” “And the order is not ‘final’ until the immigration judge and the BIA finally determine whether the restriction on removal applies and prohibits removal.”

IV. CIVIL CASES RELATED TO CRIMINAL TOPICS

A. Alien Tort Statute (28 U.S. C. 1350)

Nestle USA v. Doe (June 17, 2021): 8-1 [3+3+2-1 in Part III] (**Thomas**; *Gorsuch* concurring, joined in part by *Kavanaugh* and in part by *Alito*; *Sotomayor* concurring in part joined by *Breyer* and *Kagan*; *Alito* dissenting), reversing and remanding 929 F.3d 623 (9th Cir. 2019).

Headline: An **Alien Tort Statute (ATS)** case – here, alleging child slavery committed in Africa by farms from which U.S. companies buy products and to which U.S. companies provide equipment and technical assistance -- plaintiffs **must allege more conduct in the U.S. than common general corporate activity**.

Facts: The ATS, enacted in 1789, gives federal courts jurisdiction over claims brought “by an alien for a tort only, committed in violation of the law of nations[,] or a [U.S.] treaty.” Here, six persons sought damages from U.S. corporations that allegedly aided and abetted farms in Africa who allegedly pressed the plaintiffs into child slavery. The “injuries occurred entirely overseas,” but plaintiffs alleged that the companies made, in the U.S., “major operational decisions” that aided the farms. The District Court dismissed the suit because we ruled in *Koibel* (2013) that the ATS “does not apply extraterritorially.” But the Ninth Circuit reversed and said the suit could proceed.

Thomas (for 8): We do not resolve whether “aiding and abetting” is even a tort. Even if it is, and even if the ATS allows it, here “nearly all of the conduct ... that abetted forced labor ... occurred in Ivory Coast.” Allegations of “general corporate activity” are insufficient to support domestic application of the ATS.

Part III, joined only by Justices Gorsuch and Kavanaugh: We don’t think the Court can “create a cause of action” here. “That job belongs to Congress.” “The ATS is a jurisdictional statute creating no new causes of action” (*Sosa*, 2004). *Sosa* recognized only “three historical torts;” we cannot create or endorse others without Congressional action.

Gorsuch, concurring: We should answer the question we grated *cert* on: corporations are not immune from suit under the ATS. Also, Justice Thomas is right: no new causes of action. We should reject the suggestion in *Sosa* that perhaps there are exceptions to that rule.

Sotomayor, concurring, with Breyer and Kagan: Opposite to Thomas’s Part III: *Sosa* plainly held that the ATS allows various torts to be recognized by U.S. Courts applying the ATS. To hold

otherwise would be to overrule *Sosa*. [Ed. note: The three opinions (Thomas, Gorsuch, Sotomayor) provide very interesting contrasts in how to approach the history and meaning of the ATS, and the proper role of the federal judiciary.]

Alito dissenting: We should not decide the questions answered today; the cert petitions asked whether corporations are immune, and as Gorsuch says, they are not. We should hold that, and stop. “Too many important assumptions” are necessary, to get to the extraterritoriality question here.

B. Federal Tort Claims and *Bivens* Actions

Brownback. King (Feb 25, 2021): 9-0 (**Thomas**), reversed 917 F. 3d. 409 (6th Cir. 2019).

Headline: A dismissal of a FTCA claim under Federal Rule 12(b)(6) for failure to state a claim or summary judgement constitutes a “judgement on the merits” that is sufficient to trigger the FTCA’s judgement bar on future actions (or pending current claims) against the same defendant and arising from the same set of facts and injuries.

Facts: James King sued officers on a federal task force who “mistook King for a fugitive” and subjected King to “a violent encounter.” King sued under both the FTCA, alleging state law torts, and *Bivens* ((1971) alleging constitutional violations. The district court dismissed the suit, ruling that the FTCA torts were not sufficiently alleged under Michigan state law, and that the officers were entitled to qualified immunity in the *Bivens* action. The Sixth Circuit agreed on the FTCA, but ruled that the FTCA’s “judgment bar” did not preclude the *Bivens* action and granting qualified immunity was wrong.

Thomas (for 9): The FTCA’s “judgment bar” requires a “final judgment on the merits.” Here, the grounds for the district court’s dismissal was “on the merits.” This is true even if it also “deprived the court of subject-matter jurisdiction. “A federal court always has jurisdiction to determine its own jurisdiction.” **Thus the ruling below is sufficient to invoke the “judgment bar.” But whether that would bar the *Bivens* claim is left open on remand.** [Ed. note: this last part is only implicit in the Court’s opinion; Sotomayor’s concurrence, and the briefing in the case, makes clear that this was the “big issue” in the case.]

Sotomayor concurring: “I agree that the District Court dismissed King’s FTCA claims on the merits.” “I write separately to emphasize that, while many lower courts have uncritically held that the FTCA’s judgment bar applies to claims brought in the same action, there are reasons to question that conclusion.” “This issue merits far closer consideration than it has thus far received.” Perhaps courts should avoid “unfair results;” for example, the dismissal here turned on the absence of “subjective” bad faith on the part of the officers, whereas the *Bivens* claims would require only that the officers’ conduct was “objectively unreasonable.”

B. Securities Law Cases

Goldman Sachs Group v. Arkansas Teacher Retirement System (June 21, 2021), 6-3 (although **Sotomayor** would merely affirm and not remand). **Barrett;** *Gorsuch concurring* in part and *dissenting* in part, joined by *Thomas* and *Alito*; *Sotomayor concurring* in part and *dissenting from the judgement*, *vacating and remanding* 955 F. 3d 254 (2d Cir. 2020).

Headline: In a securities fraud class action, the “**generic**” nature of a misrepresentation can be **relevant evidence** of ‘price impact’ that courts should consider at class certification; and **defendants bear the burden of persuasion to prove a lack of price impact** by a preponderance of the evidence.

Facts: Goldman Sachs made generic statements about its management of conflicts, such as “We have extensive procedures” in place to “identify and control” them. Plaintiffs alleged that these were “false and misleading” in light of several undisclosed conflicts. Goldman sought to demonstrate that the statements had no impact on its stock price. The district court certified the class, after ruling that

Goldman had failed to carry its burden to overcome the *Basic* (1988) presumption that investors rely on the market price, which is also presumed to incorporate all public statements. CA2 affirmed (2-1).

Barrett (joined by Roberts, Breyer, Kagan, and Kavanaugh in full; and by Thomas, Alito, Gorsuch in part): First, the parties, and we now, agree “**that the generic nature of a misrepresentation is often important evidence of price impact that courts should consider at class certification.**” This is true “even though the same evidence may [also] be relevant to materiality,” even if materiality is an inquiry reserved for the merits phase of a securities-fraud class action. So we remand “for the Second Circuit to consider all record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue.”

Next, “**Defendants bear the burden of persuasion in proving lack of price impact by a preponderance of the evidence at class certification.**” Although F.R.Evid. 301 suggests that a burden of persuasion may rest on a party against whom a presumption is not directed, courts may change this. *Transportation Management* (1983). We think our decisions in *Basic* and *Hilliburton* (2014) did this: by requiring a “showing,” “the *Basic* framework” for securities actions places the burden of persuasion on the defendants, to “show” (prove) that there was “in fact” no price impact, which the *Basic* presumption presumes. This is more than just a “burden of production” of “some evidence.” “The defendant must in fact sever the link between a misrepresentation and the price paid” by securities buyers. Still, we think this is “unlikely to make much difference, and rarely” (**ed. note: ??? why?**).

Sotomayor (*concurring in part and dissenting in part*): I agree with the Court’s answers; but I would just affirm completely, because I don’t think Goldman made or preserved the “generic evidence” argument.

Gorsuch (*concurring in part and dissenting in part*, joined by Thomas and Alito): I join much of the Court’s opinion, but I don’t agree that the defendant should “bear the burden of persuasion on price impact.” When *Basic* and *Halliburton* said defendants must make a “showing,” based on presumptions, I think the Court meant they had a burden to produce some evidence; the plaintiffs would still bear the overall burden to persuade that a misrepresentation in fact impacted price. I think this flows from our precedents addressing “presumptions” in the law generally (see *St. Mary’s Honor Center v. Hicks* (1993)). “In the 30-plus years since *Basic*, this Court has never (before) suggested that plaintiffs are relieved from carrying the burden ... on ... their own causes of action.” The Court “splices together” stray phrases from *Basic* and *Halliburton*. And saying that this will “rarely make a difference is a “curious disavowal.”

[**Ed. Note:** This case is the first to show direct, authored, disagreement between Gorsuch and the Court’s newest Justice, Barrett.]

SUMMARY REVERSALS OPINIONS

Taylor v. Riojas (November 2, 2020): 7-1 (**Per Curium**; *Alito* concurring; *Thomas* dissent; Barrett not participating), granted, vacated, and remanded 946 F.3d 211 (5th Cir. 2019): Fifth Circuit erred in granting qualified immunity to prison officials that confined a defendant in prison cells covered in feces and overflowing raw sewage.

McKesson v. Doe (November 2, 2020): 7-1 (**Per Curium**; *Thomas* dissent; Barrett not participating), granted, vacated, and remanded 945 F.3d 818 (5th Cir. 2019): Fifth Circuit erred in permitting a police officer’s personal injury claim against a Black Lives Matter leader.

Shinn v. Kayer (December 14, 2020): 6-3 (**Per Curium**; *Breyer* dissent; *Sotomayor* dissent; *Kagan* dissent), vacated and remanded 923 F.3d 692 (9th Cir. 2019): Ninth Circuit erred in granting post-conviction relief to a man on Arizona death row.

[Mays v. Hines](#) (March 29, 2021): 8-1 (**Per Curium**; Sotomayor dissent), reversed *Hines v. Mays*, No. 15-5384 (6th Cir. 2020): Sixth Circuit erred in revisiting and reversing a Tennessee jury finding of guilt for murder 35 years later.

[Alaska v. Wright](#) (April 26, 2021): 9-0 (**Per Curium**), vacated and remanded *Wright v. Alaska*, No. 19-35543 (9th Cir. 2020): Ninth Circuit wrongly interpreted §2254(a)'s "in custody" requirement when it declined sex offender's writ of habeas corpus.

[Lombardo v. St. Louis](#) (June 28, 2021): 6-3 (**Per Curium**; Alito dissent joined by Thomas and Gorsuch), vacated and remanded *Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th Cir. 2020): A "careful, context-specific analysis" of the "facts and circumstances" of each case is required to determine whether "excessive force" has been used.

[Dunn v. Reeves](#) (July 2, 2021): 6-3 (**Per Curium**; Breyer dissent; Sotomayor dissent joined by Kagan), reversed and remanded *Reeves v. Comm'r, Ala. Dep't of Corr.*, No. 19-11779 (11th Cir. Nov. 10, 2020): Eleventh Circuit erred in characterizing the Alabama court's case-specific analysis as a "categorical rule" that a prisoner will always lose an ineffective-assistance-of-trial-counsel claim.

WRITINGS RELATED TO ORDERS

VII. Denials of Stay Applications

[Valentine v. Collier](#) (November 16, 2020): Application to vacate stay presented to **Alito** was **denied**; Sotomayor joined by Kagan dissenting from denial of application to vacate stay.

Headline: Sotomayor and Kagan dissenting from the denial of application to vacate a stay stemming from Fifth Circuit's decision to suspend an injunction that required a Texas geriatric prison to take appropriate health and safety measures to protect inmates from COVID-19

[Francois v. Wilkinson](#) (January 22, 2021): Application for stay of removal presented to **Alito** was **denied**; Sotomayor dissent).

Headline: Sotomayor, dissenting from the Court's denial of an application for stay of removal orders against a 61-year old Haitian national with severe mental illness: "This is exactly the kind of [case] that calls for a temporary stay of removal."

Facts: Alex Francois, a 61-year-old Haitian national who came to the United States unlawfully and who suffers from severe mental illness, presented compelling evidence that, if removed, he would be targeted for cruel and dehumanizing mistreatment in Haiti because of his mental illness. An Immigration Judge (IJ) granted his withholding of removal in 2019, guaranteeing that he would not be sent to Haiti. However, the BIA "ignored the factual findings of the IJ" (*says* Sotomayor) and remanded the case back to the IJ for further factfinding. On remand the IJ reviewed the same evidentiary record on which it had previously relied but this time the IJ denied Francois withholding of removal. The BIA dismissed Francois' appeal and the Fifth Circuit, without explanation, denied his stay. The Court denied Francois's application for stay of removal orders.

Sotomayor (dissenting from denial of application to stay removal): This is exactly the kind of circumstance that calls for a temporary stay of removal. "The Government plans to remove [him] before he can even submit his opening brief" in the Fifth Circuit but, under the four factor test (see *Nken v. Holder*, (2009)) to help determine whether to issue a stay, Francois is plainly entitled to one: "he is likely to prevail on appeal; he will suffer irreparable harm absent a stay; and the public interest strongly favors protecting Francois from wrongful removal and the suffering awaiting him in Haiti.

“It takes time to decide a case on appeal,” and “if a court takes the time it needs, the court’s decision may in some cases come too late for the party seeking review.” Courts have an important tool for addressing such a situation: the power to issue a temporary stay. A stay “allows an appellate court to act responsibly,” preventing the need for “justice on the fly” or, worse, the denial of justice altogether.

B. Denials of *Certiorari*

Death Penalty Cases

Heness v. DeWine (October 5, 2020): Petition for a writ of certiorari was **denied** (Sotomayor “respecting” the denial of certiorari).

Headline: Sotomayor “respecting” the denial of certiorari in case where a death row inmate complained that the three-drug cocktail that Ohio plans to use to kill him is unconstitutional because it will cause a feeling of drowning and suffocation. The Sixth Circuit’s decision not to conduct an inquiry is at odds with the Court’s decision in *Bucklew*, which ruled that “a risk of pain raises constitutional problems if it is ‘substantial when compared to a known and available alternative’ that is ‘feasible and readily implemented;’” If an alternative exists and a State nonetheless refuses to adopt it without reason, “then the State’s chosen method ‘cruelly’ (and unconstitutionally) “superadds pain to a death sentence.”

Bernard v. United States (December 10, 2020): Application for stay of execution presented to **Alito** was **denied**. Petition for writ of certiorari was **denied**. Breyer and Kagan would grant the application and the petition for a writ of certiorari; Sotomayor dissents from the denial of certiorari and application for stay: the defendant alleged that the Government secured his death sentence by withholding exculpatory evidence and knowingly eliciting false testimony against him.

Bourgeois v. Watson (December 11, 2020): Application for stay of execution presented to **Barrett** was **denied**. Petitioner for a writ of certiorari was **denied**. Sotomayor joined by Kagan dissents from the denial of certiorari and application for stay. The case involved the execution of a man with an IQ between 70 and 75 and who argued that he is intellectually disabled under current clinical standards. Sotomayor would grant the petition to address whether the Federal Death Penalty Act prohibits his execution.

United States v. Higgs (January 15, 2021): Fourth Circuit Court of Appeals order granting a stay in death penalty case was **vacated**. (Kagan would deny the petition for writ of certiorari before judgment and the application; Breyer dissents). Case involved a federal inmate infected with COVID-19 at an Indiana prison, who claimed that as a result of COVID-related lung damage, the state’s method of execution by injection of pentobarbital will “subject him to a sensation akin to waterboarding.”

Dunn v. Willie B. Smith (February 11, 2021): Application to vacate injunction presented to **Thomas** was **denied**. (Thomas would grant the application; Kagan joined by Breyer, Sotomayor, and Barrett concurring in the denial; Kavanaugh joined by Roberts dissenting from denial). The Court denies an application to vacate an injunction granted by the Eleventh Circuit in which the court held that Alabama is required to permit the inmate’s wish to have his pastor with him as he dies.

Johnson v. Precythe (May 24, 2021): Petition for a writ of certiorari was **denied** Breyer and Sotomayor dissenting from the denial of certiorari. The Eighth Circuit concluded that petitioner plausibly claims that because of a brain tumor operation, the State’s ordinary execution method, lethal injection of pentobarbital, is cruel and where petitioner has requested execution by firing squad.

Other Denials of *Certiorari*

Kaur v. Maryland (October 5, 2020): **Sotomayor** “respecting” the denial of certiorari: A criminal defendant, twice convicted of first-degree murder in Maryland, subsequently raised Sixth Amendment issues alleging ineffective assistance of counsel after each trial. After the first trial, a judge granted a new trial on the condition that the defendant turn over certain privileged defense documents to the prosecution. In the defendant’s retrial, the same state attorneys prosecuting the defendant in the first trial served as the prosecution in the defendant’s retrial. The defendant appealed the retrial on the theory that her Sixth Amendment rights were prejudiced once again by the state’s knowledge of her entire defense strategy. While Sotomayor agreed to deny certiorari, she stressed that the defendant’s case “could benefit from further consideration by the lower courts.”

MalwareBytes Inc. v. Enigma Software Group USA, LLC. (October 13, 2020): **Thomas** “respecting” the denial of certiorari: Liability Immunity for Online Platforms (“Section 230”). Thomas argues that courts have interpreted Section 230 of the Communications Decency Act to confer far more immunity to online platforms than the law requires, and therefore that the Court should reexamine the issue when a better case presents itself.

Bovatt v. Vermont (October 19, 2020): **Gorsuch**, joined by **Sotomayor** and **Kagan**, “respecting” the denial of certiorari: The Vermont Supreme Court determined that police officers peering through a suspect’s garage window without a warrant acted within the bounds of the “plain view doctrine” exception to the general warrant requirement. Gorsuch claimed that the Vermont Supreme Court wrongly applied the reasoning of *Florida v. Jardines* when it concluded that driveways are only “semiprivate areas,” not the kind of “curtilage” to a home that receives greater protection.

Silver v. United States (January 21, 2021): **Gorsuch**, joined by **Thomas**, dissenting from denial of certiorari, regarding whether extortion and bribery are treated as distinct crimes under the Hobbs Act when a public official is the defendant.

Thompson v. Lumpkin (March 22, 2021): **Kagan**, joined by **Breyer** and **Sotomayor** concurring in the denial of certiorari, regarding a prisoner seeking an evidentiary hearing in his habeas proceeding under the Antiterrorism and Effective Death Penalty Act.

Smith v. Titus (March 22, 2021): **Sotomayor** dissenting from the denial of certiorari: Eighth Circuit denied defendant’s application for writ of habeas corpus stemming from a murder conviction that the defendant alleges was an act of self-defense.

Longoria v. United States (March 22, 2021): (**Sotomayor**, joined by **Gorsuch**, “respecting” the denial of certiorari, regarding Fifth Circuit’s interpretation of §3E1.1(b) of the Federal Sentencing Guidelines rules for permitting a one-level sentence reduction.

Brown v. Polk County (April 19, 2021): **Sotomayor** “respecting” the denial of certiorari, regarding what degree of suspicion the Fourth Amendment requires to justify the physically penetrative cavity search of a pretrial detainee.

Whatley v. Warden (April 19, 2021): (**Sotomayor** dissenting from the denial of certiorari), arguing that the Defendant was prejudicially and unnecessarily shackled.

[Doe v. United States](#) (May 3, 2021): (**Thomas** dissenting from the denial of certiorari). Second Circuit held that sovereign immunity under the Federal Tort Claims Act barred petitioner’s claims alleging that she was raped by a fellow cadet while she was a student at the U.S. Military Academy at West Point.

[Calvert v. Texas](#) (May 17, 2021): (**Sotomayor** “respecting” the denial of certiorari). Petitioner argued that admission of unrelated evidence about an inmate’s unprompted attack on him during petitioner’s trial violated his right to individualized sentencing under the Eighth Amendment.

[Hernandez v. Peery](#) (June 28, 2021): **Sotomayor** dissenting from the denial of certiorari, Sotomayor dissenting from the denial of certiorari in a case where the Ninth Circuit refused to issue a certificate of appealability (COA) where “the state” (California) interfered with a defendant’s right to consult with his counsel.”

[Standing Akimbo, LLC v. United States](#) (June 28, 2021): **Thomas** “respecting” the denial of certiorari, case involving Congressional authority to regulate commerce related to a Colorado medical-marijuana dispensary.

[Hoggard v. Rhodes](#) (July 2, 2021): **Thomas** “respecting” the denial of certiorari, qualified immunity for university officers that prohibited a student from placing a table in the student plaza to promote her student org, speech protected by the First Amendment.

C. Opinions accompanying the Grant of *certiorari* followed by “Vacate and Remand” Orders (“GVRs”)

[Sanders v. United States](#) (June 1, 2021), *Kavanaugh* concurring in the decision to grant certiorari, vacate, and remand *United States v. Sanders*, 956 F.3d 534 (8th Cir. 2020) in light of [Caniglia v. Strom](#).

Headline: Remanded to the U.S. Court of Appeals for the 8th Circuit to determine whether police officers' warrantless entry into defendant’s house to check on a potential victim of domestic violence violates the Fourth Amendment under the community caretaking exception as interpreted by [Cady v. Dombrowski](#) and in light of the Court’s 2021 decision in [Caniglia v. Strom](#).

[Mast v. Fillmore County](#) (July 2, 2021): *Alito* concurring in the judgment; *Gorsuch* concurring in the decision to grant, vacate, and remand for further consideration in light of [Fulton v. Philadelphia](#). Remanded to the Minnesota Court of Appeals to determine whether, when applying strict scrutiny under RLUIPA, (1) lower courts may rely on an admission that an interest is compelling generally, or must they require the government to demonstrate that the interest is compelling as applied to the particular claimant, as the Supreme Court has previously held; and (2) evidence that twenty other jurisdictions permit a particular less restrictive alternative is sufficient to defeat a government’s claim that it used the least restrictive alternative.

VIII. CRIMINAL LAW *CERTIORARI* GRANTS FOR UPCOMING (Oct. ’21) TERM

As of August 2021, the Court has granted review in 29 cases for the upcoming Term. By my broad definition, 12 of these are criminal or quasi-criminal (such as immigration cases). This is normal – roughly one-third of cases decided by the Court every year have some relationship to criminal law. Here are brief descriptions (either the parties’ or my own) of the questions presented in the criminal-and-related cases that have been granted:

A. Cases Already Scheduled for Argument

[Wooden v. U.S.](#) (argument scheduled for Oct. 4, 2021): Whether, for purposes of a sentencing enhancement under the Armed Career Criminal Act, offenses that were committed as part of a single criminal spree, but sequentially in time, were “committed on occasions different from one another.”

[Brown v. Davenport](#) (argument scheduled for Oct. 5, 2021): Whether the appropriate standard of review for the federal habeas court in this case is based solely the Brecht v. Abrahamson test or additionally, a finding that the state court unreasonably applied Chapman v. California.

[U.S. v. Zubaydah](#) (argument scheduled for Oct. 6, 2021): Whether the Ninth Circuit erred when it rejected the U.S. Government’s assertion of “state-secrets privilege” based on the courts own assessment of potential harms to national security that would result from disclosure of information concerning secret CIA activities.

[Hemphill v. New York](#) (argument scheduled for Oct. 12, 2021): Whether, or under what circumstances, a criminal defendant who “opens the door” to evidence that would otherwise be barred by the rules of evidence, also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.

[U.S. v. Tsarnaev](#) (argument scheduled for Oct. 13, 2021): Whether the 1st Circuit erred in concluding that Dzhokhar Tsarnaev’s capital sentences must be vacated on the ground that the district court did not ask each prospective juror for a specific accounting of all of the pretrial media coverage they’d consumed about the case during the 21-day voir dire; and (2) whether the district court committed reversible error at the penalty phase of Tsarnaev’s trial by excluding evidence that Tsarnaev’s older brother was allegedly involved in different crimes two years before the offenses for which Tsarnaev was convicted.

B. Cases Not Yet Scheduled for Argument (as of August 10, 2021)

[Thompson v. Clark](#): Whether people may sue a police officer for instigating baseless criminal charges against them once those charges are dropped—or whether, instead, victims may sue only if the charges are dismissed in a manner that somehow demonstrates their innocence.

[FBI v. Fazaga](#): In a case involving allegations by three Muslim men claiming illegal government spying on a Muslim community in Orange County, California, whether §1806(f) of the Foreign Intelligence Surveillance Act displaces the “state-secrets privilege” and authorizes a district court to resolve the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

[New York State Rifle & Pistol Association Inc. v. Corlett](#): Whether New York’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment.

[Patel v. Garland](#): Whether the statutory provision governing judicial review of removal orders (8 U. S. C. § 1252(a)(2)(B)(i)) preserves the jurisdiction of federal courts to review a nondiscretionary determination that a citizen is ineligible for certain types of discretionary relief.

[Shinn v. Ramirez](#): Whether the Court’s decision in *Martinez v. Ryan* renders the Antiterrorism and Effective Death Penalty Act inapplicable to a federal court’s merits review of a claim for habeas relief.

[U.S. v. Taylor](#): Whether a “crime of violence” (as defined in 18 U.S.C. § 924(c)(3)(A)) excludes attempted Hobbs Act robbery.

[Pivotal Software v. Tran](#): Whether the Private Securities Litigation Reform Act’s discovery-stay provision applies to a private action under the Securities Act in state or federal court, or solely to a private action in federal court.

“WHO WROTE WHAT*”

in CRIMINAL-and-related Cases in the 2020-19 Term

(*all writings, not just majorities, in argued cases)

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

ROBERTS

Torres
Caniglia
Lange

THOMAS

Caniglia
Terry
Nestle
Brownback
Lange
Vannoy
Jones
Borden
Guzman-Chavez
Van Buren

BREYER

Cooley
Pereida
Guzman-Chavez

ALITO

Briggs
Guzman-Chavez
Caniglia
Cooley
Nestle

SOTOMAYOR

Palomar-Santiago
Terry
Nestle
Brownback
Goldman-Sachs
Jones
Greer
Goldman-Sachs

KAGAN

Lange
Borden
Sanchez
Vannoy

KAVANAUGH

Vannoy
Jones
Greer
Caniglia
Lange
Borden
Niz-Chavez

GORSUCH

Pereida
Niz-Chavez
Ming-Dai
Vannoy
Briggs
Nestle
Torres

BARRETT

Van Buren
Goldman-Sachs

Per curium summary reversals (no individual author): Seven cases

Total Criminal-and-Related Decisions in argued and unargued cases: 26 (19 unargued plus 7 SRs)

Total WRITINGS in argued Criminal Law-and-Related cases: 49

Criminal Law “Workhorses” and comments: Thomas, by far. Ten writings. Five were concurrences, which some might say indicates a particular interest in a topic

Justices Sotomayor, Kavanaugh and Gorsuch penned about the same number (7 or 8). Interestingly, Gorsuch was assigned (by the Chief) the majority opinion in three of the six Immigration cases. Hard to know if this indicates a special interest of his, or a general assignment category for the future.

The Chief Justice and Justice Barrett wrote no dissents in criminal cases. That may reflect Roberts’ general distaste for dissents unless he thinks it essential. As for Barrett, new Justices often stay “quiet” until they get the hang on the job. So far, her “style” seems markedly different from the Justice she clerked for (Scalia).

Finally, none of the “truly criminal” cases were unanimous one-opinion decisions. Only three Immigration cases were decided 9-0 with no separate writings.