

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

**2012 Annual Meeting
Chicago, Illinois**

**ANNUAL REVIEW
of the
SUPREME COURT'S TERM,
CRIMINAL CASES**

Summaries of all Opinions (including Concurrences and Dissents)
as well as an Overview of the Term,
regarding the
Criminal Law (and related) Opinions of the
United States Supreme Court
October Term 2011 (Oct. 2011-June 2012)

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CRIMINAL LAW (and related) DECISIONS
of the U.S. Supreme Court
October 2011 Term

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**ABA Panel Presenting the Criminal Law (and Related) Opinions
of the
United States Supreme Court
Issued During the October 2011 Term**

**2012 Annual Meeting Panelists
(Chicago, Illinois – August 3, 2012)**

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Brief Overview of the 2011-12 Term, Criminal Cases

This year's Panel is sub-titled "Did Anything Else Happen Besides Health Care?" While the public's attention was tunnel-vision focused on those opinions released on the last day of the Court's Term (June 28, 2012), many significant criminal law opinions were also issued. Indeed, with roughly half the docket dedicated to criminal law-and-related cases, The Court might be said to have spent more time on criminal law issues this year than in recent memory.

What were the "big" cases? Well, *Miller* found that the Eighth Amendment bars mandatory Life Without Parole ("LWOP") for juvenile offenders. The implications of the court's reasoning are intriguing, as it could open up a much larger universe of non-capital sentencing challenges.

The court also opened up many areas of Fourth Amendment doctrine that might previously have been thought to be closed, when it decided in *Jones* that installation of a GPS tracking device on a private vehicle is a Fourth Amendment "search." Indeed, justice Sotomayor's separate concurrence could have been written by Professor Tony Amsterdam (a fellow New Yorker presumably known to the Justice, famous for a pathbreaking 1972 article about the Fourth Amendment). Indeed, all eyes – if not noses – will be on two "dog sniff" cases that will be argued on in the opening days of the upcoming Term, because the Court has previously said that dog sniffs are not a "search." But Justice Scalia in *Kyllo* and now *Jones* is pushing that particular envelope.

The court decided two other Fourth Amendment cases of note, *Florence* and *Messerschmidt*. In addition, the Court decided two important First Amendment cases involving criminal law doctrines, and in *Alvarez* continued the Court's recent statute-striking protection of even borderline speech (in this case, false claims of military decorations -- last Term military funerals, and two Terms ago animal cruelty videos). Thus the Court was quite active in constitutional cases this Term.

Disputes regarding the precise application of *Crawford* (2004) also continued, as the Court rules in *Williams* that a forensic expert may rely on “background” reports not prepared by her, without violating the confrontation Clause, because they are “not offered for the truth.” Also under the sixth Amendment, the Court opened up a major avenue of litigation in *Lafler* and *Frye* by holding that the right to effective assistance of counsel applies to the plea bargaining process, and that “prejudice” may be shown by a demonstration that bad lawyering caused a worse result (i.e., a plea was rejected due to bad lawyering that would have produced a more lenient sentence than what ultimately resulted). Finally, the “*Apprendi* war” between Justices Scalia and Breyer continued, with Justice Ginsburg attempting to straddle the (unbridgeable?) gap between the two, in *Southern Union Co.* (applying *Apprendi* to criminal fines).

Meanwhile, under the Fifth Amendment (in a decision which I personally find indefensible), the Court ruled that Double jeopardy does not prevent the retrial of *Blueford* on capital murder charges, even though the jury announced that it was “unanimously against” that charge, because no “formal verdict” was ever recorded and the jury continued to deliberate for thirty minutes before mistrial was declared. The Court also concluded that a prisoner is not necessarily in *Miranda* custody even when questioned in prison about a crime (*Howes*).

Justice Sotomayor clearly appears to have taken on the role of “liberal defender” in criminal cases, while other Justices are less predictable. Justices Ginsburg, Breyer, and Kagan all declined to join one or more “liberal” opinions of the other three, depending on the context. Justice Kagan generally seems less interested in the criminal docket than Justice Sotomayor, perhaps unsurprising given their respective backgrounds. Meanwhile, Justice Alito is clearly striking his own path on the Court, and while he may be “conservative” in law enforcement matters, he is far less personally attacking that Justice Scalia. He also cannot be counted on to join Justices Thomas and Scalia in all law enforcement cases, and is not shy in developing his own legal theories for decision. Finally, in keeping with his “above the fray” role as Chief Justice, Justice Roberts generally strikes a moderate tone even when vigorously disagreeing (as in *Miller*) with a result; and like Justice Kagan, the Chief Justice’s primary interests appear to lie elsewhere.

The five habeas decisions this year were quite interesting, and in three of five the defendant prevailed, belying the idea that habeas petitioners never win in this Court. Justice Scalia’s dissents here ran the gamut, from the surprisingly agreeable “respectful” dissent in *Maples*, to an over-the-top screech in *Martinez* (decrying a result that “effectively reduces the sentence” in capital cases, “giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume.”).

Finally, with Justice Stevens gone, Justice Ginsburg maintains the mantle of “Senior Dissenting Justice”, writing in 10 cases, far above the number of criminal cases she would write in when Justice Stevens was still there. Meanwhile, Justice Breyer has taken on the role of Justice Scalia’s workhorse nemesis in the criminal law area: Justice Scalia again led all Justices with 13 criminal law opinions (but only 3 majorities), while Justice Breyer wrote 12 (3 majorities). And of their six (total) majorities, Scalia and Breyer wrote the opposing opinions (majority-dissent) in three. They clearly hold opposite world views in the area of criminal law.

Justice Kennedy, demonstrating his central position on the Court, wrote the most majorities – six – and no other opinions in the criminal law area. Meanwhile, Chief Justice Roberts, true to form, stuck mainly to majority opinions, writing four, while concurring and dissenting only once each.

Explanatory Notes for these Materials

The materials below begin with the Editor's brief "Overview" thoughts regarding what the U.S. Supreme Court did in the criminal law are this past Term (OT 2011). In the pages that follow, detailed summaries of all of the U.S. Supreme Court's decisions during the past year are provided, grouped by subject matter. (For a quick assimilation of the Term's work, the Table of Contents above provides a one-sentence description of each decision and the page where it's more detailed summary can be found.) Some decisions address more than one subject, and the author has placed them in the topic group that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which sometime demonstrate how doctrine developed within particular areas as the Term progressed.

The goal of these summaries is to be broadly inclusive for the criminal law practitioner. Thus, civil cases that relate to criminal law topics or facts are also included. We also continue to include immigration law cases that so often relate to criminal issues. This became particularly so after the 2010 decision in *Padilla v. Kentucky*, holding that it can violate the Sixth Amendment's effective assistance of counsel requirement if reasonable advice regarding immigration consequences is not given.

Each summary presents the case name, current citation, and citation to the lower court's opinion. Then follow summaries of the case's facts, majority opinion(s), and any separate opinions. The name of the majority writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. Providing an accurate and somewhat comprehensive representation of each opinion's content is the goal, rather than "sound-bite" brevity. All separate opinions are summarized. But to aid quick "skim" reading, each summary also **bolds the central holding(s)**. In order to provide the most representative flavor of opinions, quotations have been used whenever possible. Comments that appear in [brackets], however, are the Editor's own thoughts, not the Court's.

Following the Summaries of Opinions, interesting dissents or concurrences regarding Orders this Term are summarized, including dissents from denials of certiorari. Then a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term (OT 2012) is presented. Finally, a chart showing what Justices wrote what opinions this Term (including concurring and dissenting opinions), in criminal and related cases, is included. This can sometimes help develop a picture of which Justices do what, and want to be heard, in the field of criminal law.

These materials are the product of Professor Little and his research assistant, Michael Gawley (Hastings Class of 2013). They, and not the ABA or its panelists, bear full responsibility for errors and any opinions expressed. Please be aware that minor changes from the Court's original slip opinions may have been made for ease of reading or understanding -- for example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation or other non-substantive changes may have been made. Remember that these are merely summaries; interested readers should of course review the actual opinions in full and arrive at their own interpretations, rather than rely on the authors'. Please send any comments, suggestions or corrections to Professor Little at his contact points below. The materials are copyrighted and are available for purchase from the ABA. Please do not reproduce without permission.

I continue to produce sporadic “Summaries” during the Term, which you can receive by email simply by joining the Criminal Justice Section. Meanwhile, I look forward to sharing more fascinating and significant rulings with you next summer. Remember to “Do Justice” in whatever you do!

Best wishes until next year,

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DETAILED SUMMARIES of the COURT'S
CRIMINAL LAW (and related) OT 2010 OPINIONS

I. CONSTITUTIONAL DECISIONS

A. FIRST AMENDMENT

Reichle v. Howards, No. 11-262 (June 4, 2012), 8 (6-2) to 0 (**Thomas**; *Ginsburg* concurring in the judgment; Kagan recused), reversing 634 F.3d 1131 (10th Cir. 2011).

Facts: On June 16, 2006, Vice-President Cheney visited a shopping mall in Colorado. Upon noticing Cheney's presence, Steven Howards said (in a conversation over a cellphone but within earshot of Secret Service Agent Doyle), "I'm going to ask [Cheney] how many kids he's killed today." Howards later approached the Vice President, told him his "policies in Iraq are disgusting," and then touched Cheney's shoulder. At that point Agent Reichle asked to speak with Howards, and Howards attempted to walk away. Reichle then stepped in front of Howards and asked if he had touched Cheney, which Howards falsely denied while saying "if you don't want other people sharing their opinions, you should have [Cheney] avoid public places." Reichle then arrested Howards. No charges were ever filed against Howards, and Howards sued under § 1983, alleging that he was "arrested in retaliation for criticizing the Vice President, in violation of the First Amendment." The Tenth Circuit held that qualified immunity for the First Amendment claim did not apply, ruling that Circuit precedent "clearly established" that an arrest that is "retaliatory" for disliked speech violates the First Amendment even if there is other probable cause to arrest.

Thomas (for 6): There is no "clearly established" First Amendment right to be free from a "retaliatory arrest" for speech, when there is otherwise probable cause for arrest. *Hartman* (2006) dealt with retaliatory prosecutions and thus does not answer the question for arrests. This Court has "never" recognized such a right, and Tenth Circuit precedent did not clearly establish such a right when there is otherwise probable cause. A reasonable officer could have believed that *Hartman* did not apply to arrests, so qualified immunity here is appropriate. "*Hartman* injected uncertainty into the law governing retaliatory arrests," which necessarily means that the law was not clearly established.

Ginsburg concurring, joined by Breyer: I believe that "*Hartman's* no-probable-cause requirement is inapplicable" here, but I nevertheless concur. In order to protect public officials, officers "rightly take into account" the speech of individuals. Reichle and Doyle were "duty bound" to assess Howards' statements when "determining whether he posed an immediate threat. Retaliatory animus cannot be inferred from [that] assessment."

United States v. Alvarez, No. 11-210 (June 28, 2012), 6 (4+2) to 3 (**Kennedy** for 4, *Breyer* for 2, and *Alito* dissenting for 3), affirming 617 F.3d 1198 (9th Cir. 2010), further opinions and dissent from denial of rehearing en banc, 638 F.3d 666 (9th Cir. 2011).

"Lying was his habit," begins Justice Kennedy's opinion. In a "pathetic attempt to gain respect that eluded him," Alvarez falsely claimed at a public Water Board meeting to have been awarded a Congressional Medal of Honor. Title 18 U.S.C. § 704(b) makes it a six-month misdemeanor to "falsely represent" oneself to have been awarded "any decoration or medal authorized by Congress for the Armed Forces....," and Subsection (c) elevates the potential penalty to 1 year if the lie is about the Congressional Medal of Honor. Alvarez pled guilty conditionally, but the Ninth Circuit vacated his conviction, finding the statute (the Stolen Valor Act of 2005) invalid under the First Amendment.

Rehearing *en banc* was denied with a number of concurrences and dissents. [Chief Judge Kozinski's concurrence, cited specifically in Justice Breyer's concurrence, is particularly entertaining (638 F.3d at 673-675).]

Kennedy for 4: A criminal statute which makes falsely claiming to have received military decorations a federal crime is invalid under the First Amendment, at least as presently drafted to apply without proof of some gain to the liar or specific harm. The Ninth Circuit, affirmed in a pro-defendant criminal case!] Six Justices rule that the statute is invalid under the First Amendment, but disagree on the standard of review. Justice Kennedy's plurality finds that it fails the "strict scrutiny" required for "content-based" restrictions on speech. Justice Breyer's concurrence applies a more forgiving "intermediate scrutiny" but agrees that the statute is unconstitutionally overbroad for not requiring at least some proof of a "specific harm" and possibly some "less restrictive means" for achieving what the Court unanimously agrees is a strong governmental interest in protecting the intrinsic value of Congressionally- authorized military decorations.

Kennedy, joined by Roberts, Ginsburg and Sotomayor: There are only a "few historic and traditional" exceptions [Justice Kennedy names seven] to the normal rule that the First Amendment prohibits content-based restrictions on speech. There is no "categorical rule,... no general exception ... for false statements." Although we have suggested that false statements have no protection in various contexts, some "legally cognizable harm" must be associated with them. We don't suggest that many statutes that target falsity are vulnerable, but we do "reject the notion that false speech ... is presumptively unprotected." We also reject any "free-floating ... ad-hoc balancing" analysis [this is a jab at Justice Breyer's concurrence.].

Although we can assume the statute would "not apply to, say, a theatrical performance," it is still true that the statute as written applies at "limitless times and settings," even to "personal, whispered conversations within a home." This could "give the government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." There is "no clear limiting principle." **[Ed. Note:** Note the similarity of this "no limiting principle" concern to the same concern expressed in the Heath Care Act decisions that were announced on the same last-day of the Term, regarding the government's Commerce Clause argument there.]

The government does indeed have "compelling interests" in protecting the integrity of the military decorations system, but that does "not end the matter." The government has "no evidence," "no support," and has made "no clear showing" that criminalizing simple falsity, without more, is "necessary" to achieve its objectives. **[Ed. Note:** this expresses an extremely high test for Congress to meet, apparently requiring persuasive "evidence" and a "clear" showing. The plurality's language highlights how high a barrier "strict scrutiny" can be, in some cases.] In a "free society," the "remedy for false speech is speech that is true," not governmental suppression. "Truth needs neither handcuffs nor a badge for its vindication." False claims to military decorations are often exposed to public ridicule (as happened here), which may actually "reawaken and reinforce the public's respect for the Medal." There are databanks where medal of honor winners can be verified **[Ed. Note:** the dissent says this is not true because the government is not allowed to publish identifying info like SSNs or birthdays]. "The First Amendment ... protects the speech we detest as well as the speech we embrace." Without a "clear showing of the necessity of the statute ... required by exacting scrutiny," it is invalid.

Breyer concurring in the judgment, with Kagan: We reject a "strict categorical analysis" and instead apply a four-factor test called "intermediate scrutiny" (and sometimes called "proportionality") that focuses on: (1) the "seriousness of the speech-related harm" caused by the statute; (2) the "nature

and importance” of the government’s objectives; (3) the fit (“tendency to achieve” the objectives); and (4) whether there are “less restrictive ways of doing so.” This statute does indeed harm speech, and it addresses “easily verifiable facts.” [Ed. Note: The dissent contests this as well, since many records have been lost and private identifying data is protected and cannot be published.] Speech about “the arts and the like” would be different. Even when read fairly to apply only to knowingly false and intended-to-be-taken-as-true statements, the statute could chill true speech, and it could also be applied to trivial (non-harmful) false speech that we accept as a society (so-called “white lies,” as outlined in some detail in Judge Kozinski’s concurrence below). Other statutes that target falsity require “materiality” and are “accompanied by harm” or focus on *acts* (such as falsely impersonating a federal agent). Trademark and other such statutes focus on commercial harm or confusion. The statute before us “lacks any such limiting features.” However, the statute does have “substantial justification,” and a “similar but more finely tailored statute” might survive (if also “significantly narrowed in its applications”). Still, the law “as presently drafted” is invalid. [Ed. Note: the two concurring Justices combined with the four dissenters would seem to make it quite likely that a new Stolen Valor Act will be enacted soon (particularly in an election year?).]

Alito dissenting with Scalia and Thomas: [Justice Alito writes a powerful dissent, reminiscent of his dissent in the First Amendment “military funeral protests” case (*Westboro*) of a Term ago.] “The Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interests.” Obviously the statute is limited “in five significant respects.” It reaches only “knowingly false” statements about verifiable facts, and it “does not reach dramatic performances, satire, . . . or the like.” The statute is also “viewpoint neutral,” and not focused on any particular political or ideological message. The primary disagreement with the majority is regarding what “harm” is caused by false claims of Congressional Medals. George Washington invented a careful and restricted military decorations system, and here Congress reacted to a “proliferation of false claims,” most of which could not be easily disproven. Like the trademark protection given by law against “cheap imitations,” this law protects the integrity of this historic system and the objectives of “fostering morale and esprit de corps.” The harm may not be “linked to any financial or other tangible reward,” but it is just as real and important. And Congress had much information suggesting that lesser means would be inadequate.

Meanwhile, the Court has said “time and time again” that false statements “possess no intrinsic First Amendment value” (citing many cases, which even the majority acknowledges). The plurality opinion “represents a dramatic – and entirely unjustified – departure.” Alvarez’s falsity represented none of the types of speech that the majority says it is protecting. His arguments are, instead, a “veritable paean to lying.” Endorsing them is a “radical interpretation of the First Amendment.” It is true that there are many contexts in which “false factual statements enjoy a degree of instrumental constitutional protection.” [Ed. Note: I particularly enjoy Justice Alito’s endorsement of Justice Brennan’s rationale in *New York Times v. Sullivan*, slip op. at 14.] But this is simply not one of them. “The Stolen Valor Act presents no risk at all that valuable speech will be suppressed.” The fact is, “military honors” are “qualitatively different,” and we need not fear that upholding this law would lead to other, more “foolish,” laws (like criminalizing “lies about college degrees or sports awards”). “The safeguard against such laws is democracy.”

B. FOURTH AMENDMENT

United States v. Jones, No. 10-1259 (Jan. 23, 2012), 9 (4-1) to 4, (**Scalia**; *Sotomayor* concurring; *Alito* concurring in judgment for 4) **reversing** 615 F.3d 544 (D.C. Cir.2010).

Stripping away various details, the government obtained a warrant to install a GPS tracking device on the car Jones drove, but then missed the 10-day execution deadline and did the installation in Maryland rather than DC as the warrant specified. Thus the case proceeds as one without a valid warrant. The government tracked the car for 28 days and the GPS produced “over 2,000 pages of data” regarding location of the car (and by inference, Jones). Jones was subsequently indicted for cocaine distribution conspiracy, and moved to suppress the GPS location data and its fruits. Looking back to prior “beeper tracking” decisions (*Karo*, 1984; *Knotts*, 1983), the district court suppressed only data obtained while the car was parked inside a closed garage adjoined to Jones’ residence. The rest of the data was admitted against Jones at trial; he was ultimately convicted and sentenced to life in prison. But on appeal, the D.C. Circuit ruled that obtaining the GPS data without a warrant violated the Fourth Amendment, and it should have been suppressed in its entirety.

Scalia(for 5): The installation and monitoring of a GPS tracking device on Jones’ car is a “search” within the meaning of the Fourth Amendment. Justice Scalia for five Justices writes that “it is beyond dispute that a vehicle is an ‘effect’ as that Term is used in the [Fourth] Amendment,” and **it is a Fourth Amendment “search” to trespass (“physically occup[y] private property”) for the “purpose of obtaining information.” “We must assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted”** (quoting *Kyllo*, 2001). “We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”

It is unnecessary to go further and address the *Katz* (1967) “reasonable expectation of privacy” test. “The *Katz* ... test has been *added to*, not *substituted for*, the common-law trespassory test.” “Situations involving merely the transmission of electronic signals without trespass *remain* subject to the *Katz* analysis.” Moreover, the fact that *Knotts* (1983) held that tracking in public via a beeper installed without trespass is not a ‘search’ because human trackers could theoretically have done the same thing, is not dispositive here, because here there was a clear physical trespass. “[O]ur cases suggest that such visual observation [physically trailing a suspect for days] is constitutionally permissible. **It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.**” “We may have to grapple with these ‘vexing problems’ in some future case where a classic trespassory search is not involved..., but there is no reason for rushing forward to resolve them here.”

The government has alternatively argued that it was “reasonable” under the Fourth Amendment to perform this search without a warrant. But they did not raise this argument below, and “we consider [it] forfeited.” Judgment of suppression affirmed.

Sotomayor, concurring: I join the court’s opinion because “at a minimum” a Fourth Amendment search occurs where “the Government obtains information by physically intruding on a constitutionally protected area” [quoting n.3 of the majority]. But the Fourth Amendment is not concerned “only” with trespasses, and *Katz* “enlarged” the Amendment’s reach -- *Katz*’s reasonable expectation of privacy analysis “augmented, but did not displace or diminish” the prior trespassory analysis. Meanwhile, Justice Alito’s approach (concurrence, below) “discounts altogether the constitutional relevance of the Government’s physical intrusion.”

However, Justice Alito does “incisively observe” that nontrespassory investigative techniques exist. [Ed. Note: Justice Sotomayor’s stylistic approach (*cf.* Justice Scalia’s) of complimenting even those Justices with whom she disagrees, is noteworthy]. In fact, I believe that “even short-term monitoring” raises questions under *Katz*. Government surveillance can “chill associational and expressive freedoms” and is “susceptible to abuse.” We should be careful of “entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to abuse.”

“More fundamentally, **it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.**” [Ed. Note: This is a doctrinal bombshell, harking back to Justice Thurgood Marshall’s dissent in *Smith* (1979), and one that would, indeed, fundamentally alter the rationale and result in a number of prior Supreme Court decisions. Rejecting the “third-party-sharing” analysis would truly be “privacy protecting, and this sentence embodies the real core of Justice Sotomayor’s separate writing here.] But we need not resolve these issues to rule on the “narrower basis” of a physical trespass here.

Alito, concurring in the judgment, with Ginsburg, Breyer and Kagan: It is “unwise” and “highly artificial” to restrict Fourth Amendment analysis to “18th century tort law.” [Ed. Note: Note that Justice Scalia, in his footnote 3 (perhaps added after Justice Alito circulated?) denies that his opinion does this.] Aside from the intricacies and state-by-state differences in common law trespass doctrine, “*Katz* ... did away with this old approach,” and allows us to reach the issue of this 28-day electronic monitoring without regard to the relatively “trivial” physical trespass here.

[Lengthy Ed. Note: Justice Alito clearly says that a “property” trespass is insufficient to trigger the Fourth Amendment, a clear break with the majority. He also says it is clear that the simple installation of the GPS was not a “search” because it did not “meaningfully interfere” with Jones’ “possessory interests in the property” (*Jacobson*, 1984). On both these questions (the doctrinal significance of a trespass, and whether physical installation alone is a “search”), what is surprising is that his three “liberal” joining-Justices express no disagreement. Your editor will predict here and now that in the future line of cases sure to result from *Jones*, this façade of agreement will break down, and Justices Kagan, Ginsburg, and perhaps Breyer will reconsider whether Justice Alito’s confident statements are, in fact, doctrinally correct. The liberals’ desire to join Justice Alito on his “extension” of doctrine to nontrespassory searches masks, in my opinion, a number of deeper disagreements that are unnecessary to the resolution of this case.]

The fact is, the “trespass-based rule was repeatedly criticized” in the 20th century, and the Court’s precedents since *Katz* are not consistent with the majority’s result today, creating “disharmony with a substantial body of existing caselaw.” Much electronic surveillance today occurs without physical trespass, and may also be possible under a consent or third-party-sharing theory (cars and phones with GPS built in, toll road payment devices, internet browsers, etc.). The *Katz* approach provides at least some basis for questioning such non-trespass techniques; the majority’s does not. **Indeed, “the best solution to privacy concerns may be legislative “(e.g., the federal wiretapping statute).** However, absent legislation, “the best that we can do” is to **“ask whether the use of GPS tracking ... involved a degree of intrusion that a reasonable person would not have anticipated.”** Thus, “short-term [warrantless] monitoring” may not offend the Constitution, but “the line was surely crossed before the 4-week mark.” Moreover, “prolonged monitoring” might be permissible for “investigations involving extraordinary offenses.” [Further Ed. Note: Wow, this suggestion of a “sliding-scale” based on the type of offense is also unprecedented in past holdings, other than possibly *Welsh v. Wisconsin* (1a). Again, it is unclear to me whether all three Justices joining this concurrence really would agree with it.] I agree that the suppression judgment below must be affirmed, but I concur only in that judgment.

Messerschmidt v. Millender, No. 10-704 (Feb. 22, 2012), 7 (5-1-1) to 2, (**Roberts**; *Breyer* concurring; *Kagan* concurring in part and dissenting in part; *Sotomayor* dissenting with Ginsburg), reversing 620 F.3d 1016 (9th Cir. 2010).

Facts: Jerry Bowen physically attacked his ex-girlfriend (Kelly) and shot five times at Kelly with a sawed-off shotgun as she fled. Detective Messerschmidt investigated and confirmed that Bowen sometimes resided at his foster-mother's house (Ms. Millender) and that he had been "arrested and convicted for numerous violent and firearms-related offenses. Indeed, ... Bowen's rapsheet spanned over 17 pages and indicated he had been arrested at least 31 times." Messerschmidt obtained an arrest warrant for Bowen, and a search warrant for Millender's house. The warrant was reviewed by two supervisory officers and an Assistant DA, as well as the magistrate who signed it. "[N]one of the officials who reviewed the application expressed concern about its validity." Among other things, the search warrant authorized search for and seizure of "all" guns and "articles of evidence showing street gang membership or affiliation." It also contained Messerschmidt's belief that such evidence could be valuable for successful prosecution of not just the shooting crime but also "the curtailment of further crimes being committed."

Upon execution of the warrant, the officers did not find Brown (he was arrested two weeks later "hiding under a bed in a motel room"), but they did confront Ms. Millender ("a woman in her seventies") and her family, and seized her shotgun, some .45 caliber ammunition, and a letter addressed to Bowen. The Millenders filed a § 1983 suit against the police, claiming that the search warrant was overbroad. On summary judgment the district court agreed, because the underlying offense was committed with "a very specific weapon" and there was "no evidence that the crime at issue was gang-related." The district court also denied qualified immunity. On appeal, a panel of the Ninth Circuit reversed as to qualified immunity, finding that the officers "reasonably relied" on the warrant approved by an ADA and judge. But the Ninth Circuit *en banc* reinstated the denial of immunity, finding that the warrant was indeed unconstitutionally overbroad and that "a reasonable officer ... would have been aware of" that. Three judges dissented [and the Court names them and specifies their reasons, in this opinion adopting their dissenting view].

Ruling (7 (5-1-1) to 2, Roberts): We will assume that the warrant here lacked probable cause to justify seizing "all" guns and all "gang-related" materials. But **the question is, was it "so obviously" bad that it is "appropriate to imposed personal liability on a lay officer in the face of judicial approval of his actions." We think such circumstances will be "rare," and this case is not one of them.** This case is "not remotely similar" to *Groh v. Ramirez* (2004) in which we denied immunity despite magistrate approval of a warrant – in that case, the warrant did not specify at all the items to be searched for and seized. Here, a reasonable officer could reasonably believe that additional firearms would be present, would be unlawful if possessed by Bowen (a convicted felon), and that their "seizure ... was necessary to prevent further assaults on Kelly." [Ed. Note: This last statement appears to quietly mark out a truly new and undefined concept in Fourth amendment doctrine: seizing dangerous items that are not, apparently, evidence of the crime at issue, contraband, or fruits of the crime, but simply "necessary" to prevent future unspecified crimes. Really? Undiscussed by any Justice.]

It also would not be unreasonable for a reasonable officer to believe that gang-related materials would be useful in prosecuting Bowen (even if this were a simple domestic violence case, which it is not, contrary to the dissent). Such officer beliefs would not be "entirely unreasonable," which is the standard we find marked out in *Leon* (1984) for rare "no immunity despite a warrant" cases. Even if the facts here would not make out probable cause for the warranted searches, "qualified immunity

gives government officials breathing room.” “On top of all this,” the fact that the warrant application was reviewed by two police supervisors and an Assistant DA, as well as approved by a magistrate, is “pertinent” to assessment of good faith (or the reasonableness of the officer’s decision to rely on it). *Malley v. Briggs* (1986) is not to the contrary – that decision held only that magistrate approval does not “automatically” entitle an officer to immunity. Bottom line: **“even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered ‘plainly incompetent’ (*Malley*) for concluding otherwise.”**

Justice Breyer concurring: The Court relies on two sets of circumstances: (1) Bowen’s illegal possession of a gun, his willingness to use it, his gang membership, and his expressed concern about the police, and (2) Bowen’s threat “I’ll kill you” to his ex as he shot at her, and the officer’s reasonable belief that seizure of firearms was necessary to prevent further assaults. “Given all these circumstances together [**Note:** Justice Breyer does not mention approval by supervisors and the ADA or magistrate], the officers would have reasonably believed that the scope of their search was supported by probable cause.”

Justice Kagan concurring in part and dissenting in part: This case does not have to be “all or nothing” and “I think the right answer lies in between” the majority and the dissent. However, the majority “makes the more far-reaching error.” I agree that a reasonable officer could have believed that the warrant was valid in authorizing seizure of “all firearms.” But I disagree regarding the authorized search for any “gang membership” materials. “Nothing in the application supports a link between Bowen’s gang membership and th[e] shooting” that initiated the search. The warrant “far outstripped the officers’ probable cause” and “a reasonable officer would have recognized that defect.” So immunity is not appropriate.

And “still more fundamentally, the Court errs in scolding the Court of Appeals for failing to give weight” to the approval by supervisors, an ADA, and the magistrate. *Malley* holds to the opposite regarding a magistrate’s approval; and suggesting that supervisory or prosecutorial approval is even “relevant” is wrong – they are not neutral but “part of the prosecution team” (quoting the majority).

Justice Sotomayor dissenting, with Justice Ginsburg: “I could not disagree more” with the Court’s immunity conclusions. The warrant here authorized a “general” search just like the ones that motivated the Framers to propose the Fourth Amendment in the first place. “All 13 federal judges” that have reviewed this case agreed that the warrant violated the Fourth Amendment, and a “substantial majority” viewed officer reliance on it as “objectively unreasonable.” The Court makes up a “post hoc reconstruction of the crime” that the police did not actually ever express; indeed, they denied it. For example, the police denied that they thought this domestic violence crime was “gang related.” The Court should defer to the experienced officer’s assessment, and not “hypothesize” other rationales “of its own invention.” The focus for immunity should be “on whether *petitioners* acted in an objectively reasonable manner,” not on different hypothetical officers drawing different or hypothesized inferences. The fact is, this warrant was based on a “fishing expedition” philosophy that the Fourth Amendment simply does not allow. It was “hopelessly overbroad and invalid,” and the Court’s broad *post hoc* reasoning “reads the probable cause requirement out of the Fourth Amendment.”

***Florence v. Board of Chosen Freeholders of Burlington County*, No. 10-945 (April 2, 2012), 5-4 (Kennedy; Roberts concurring; Alito concurring; Breyer dissenting), affirming 621 F.3d 296 (3d Cir. 2010).**

Florence, who was passenger in his wife’s car stopped for a traffic violation, was arrested when officers discovered an allegedly outstanding warrant for him (that later turned out to have been satisfied). [Ed. Note: Not present in the Court’s facts is the fact that Florence and his wife are African-American and were driving an expensive car, since Florence was an expensive-car salesman.] Through a series of [inexcusable] bureaucratic problems, Florence was held in two different county jails for seven days. At least once in each jail, Florence was “strip-searched,” that is, made to disrobe and to make various moves (including “lift his genitals”) while guards watched (but did not touch). This was part of standard jail procedure before admitting a detainee into the general population. Once released, Florence sued under § 1983 for Fourth Amendment violations. [However, for unexplained reasons], “it is not the arrest or confinement but the search process” that is at issue in this case. The district court granted judgment for Florence, holding that strip-searching non-indictable individuals without at least “reasonable suspicion” violates the Fourth Amendment. The Third Circuit reversed, holding that the general search protocol was a reasonable balance between the need for jail security and detainee privacy.

Kennedy (for 5): “Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry on [or] in their bodies.” “The difficulties of operating a detention center must not be underestimated by the courts,” and “a regulation that impinges on an inmate’s constitutional rights must be upheld if it is reasonably related to legitimate penological interests.” Applying this analysis here, the procedure of subjecting anyone about to be admitted to general jail population to a nude, non-touching examination from a few feet away is not unreasonable under the Fourth Amendment. [Ed. Note: The Court stresses that the term “strip search” is “imprecise” and the Court took pains, at oral argument and in the opinion, to define more precisely what this record showed. It might be argued that when Florence conceded at oral argument that observing a nude de-lousing shower by all inmates is not a Fourth Amendment violation, the case was lost.] The problem of smuggling in contraband is well-known, and “inmates w[ill] adapt to any pattern or loopholes they discover[.]” Detecting lice and other health issues or threats is also a relevant concern. And courts generally should defer to the expertise of prison officials in this regard. Policies like these “protect everyone in the facility.” It does not matter that Florence or others are arrested for minor, even no-jail-time, offenses, so long as they are being admitted into the general population. (Some institutions divide their jail populations into convicted and only charged, but the Fourth Amendment does not require that. And a system requiring discretionary or precise determinations is also “unworkable,” “laborious,” and “less fair.”) *Atwater* (2001) supports our decision today: we held that if state law permits arrest for “minor” offenses, the Fourth Amendment does not prohibit it.

[For a plurality, Thomas does not join:] Finally, there may be limits to strip searches in jails, but we don’t reach them today. For example, inmates not admitted into the general population; Justice Alito’s concurring suggestion (below); touching; or “humiliation or other abusive practices.”

Roberts concurring: “The Court is wise to leave open the possibility of exceptions, to ensure that we ‘not embarrass the future’” (quoting Justice Frankfurter in *Northwest Airlines*, 1944).

Alito concurring: I write to “emphasize the limits of today’s holding.” The practice here is “undoubtedly humiliating and deeply offensive to many” [Ed. Note: particularly to those who are innocent, should never have been arrested, suspect racial bias, and are detained for days without legal justification]. Today’s ruling does not apply to “an arrestee whose detention has not been reviewed by a judicial officer, and who could be held in available facilities apart from the general population.” [This appears to elide the fact that Florence’s detention was not “reviewed by a judicial officer” for six

days – the warrant allegedly issued by a judge was completely invalid.] For example, San Francisco and the federal system treat minor arrestees differently than here. With these limitations in mind, I join the Court’s opinion.

Breyer dissenting with Ginsburg, Sotomayor and Kagan: This sort of “visually invasive search” of “the private areas of a person’s body” is unreasonable where the person is arrested “for a minor offense that does not involve drugs or violence,” unless there is “reasonable suspicion” to believe the person possesses contraband. “Such searches are inherently harmful, humiliating and degrading,” and jail detainees do not forfeit all constitutional rights by virtue of their situation. Ms. Atwater was held for only an hour and was not strip searched; we well might not have upheld her arrest otherwise. Jail detainees can include nuns arrested for antiwar protests; victims of sexual abuse; dog leash violators; and persons who ride a bicycle without an audible bell (citing cases for all). So our rule today reaches all sorts of people we do not view as “deserving” of a strip search.

Meanwhile, the record contains no persuasive evidence that strip searches of minor detainees are “necessary” or effective in keeping out contraband. One review found only one incident out of 23,000 detainee strip searches; another found three (or arguably none) out of 75,000. And a “plethora” of correctional experts recommend separating minor detainees from more serious and strip searching only on reasonable suspicion; and at least 10 states so require. Persons arrested for minor offenses “unexpectedly” are unlikely to hide contraband, even if they wanted to. [Ed. Note: this misses what is probably the real possibility that if minor detainees were known to not be searched, gangs and others could “set up” minor arrests just to get contraband. Although Justice Breyer’s point that there are no real-world examples of such conduct remains valid.] We “share Justice Alito’s intuition that the [Fourth Amendment] calculus may be different” in other circumstances. But even in this case, there is “no justification” for the blanket strip search policy here.

C. FIFTH AMENDMENT

1. *Miranda* Custody:

Howes (Warden) v. Fields, No. 10-680 (Feb. 21, 2012) 6 to 3 (**Alito**; Ginsburg), reversing 617 F.3d 813 (6th Cir. 2010).

Fields, in prison for something else, was escorted by a guard to a prison conference room for questioning about suspected sexual abuse of a 12-year-old boy prior to his imprisonment. He was told that he was free to leave and return to his cell, and he was reminded of this at least once during the five to seven hours of interrogation. Two armed guards conducted the questioning, but Fields was unrestrained and the door was sometimes left ajar. He was offered food and drink. Fields eventually confessed, and was taken back to his cell sometime after midnight after a 20-minute wait for an escort. No *Miranda* warnings were ever given.

In his later prosecution Fields moved to suppress his confession, alleging a *Miranda* violation. The trial court denied, and after jury conviction the Michigan Court of Appeals affirmed, ruling that Fields had not been in *Miranda* “custody” so no warnings were required. The Michigan Supreme Court denied review, but on federal habeas the district court granted relief and the Sixth Circuit affirmed. The Sixth Circuit held that USSCt precedents “clearly established” (this is the statutory federal habeas standard) a rule that *Miranda* warnings must be given when guards remove a prisoner from the general population and interrogate him in prison about criminal conduct that took place outside the prison.

Alito for six: It is “abundantly clear” that no such rule is “clearly established.” In fact, the Sixth Circuit’s rule is “simply wrong.” That court “misread” our precedents and its reasoning “strains credulity.” **“Imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*.”** On this record, Fields was clearly not in “custody” for his interrogation and *Miranda* warnings were not required.

First, *Illinois v. Perkins* (1990) and *Maryland v. Shatzer* (2010) expressly left the question open. Similarly, *Mathis* (1968) did not decide the question, and neither did *Miranda* itself. As has always been the case, ***Miranda* “custody” is a “term of art” that must focus on the totality of the circumstances. The test is “whether, in light of the objective circumstances ..., a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.”** Thus, for example, in *Berkemer* (1984), we held there was no *Miranda* custody even though a person stopped by the roadside for a traffic violation is not “free to leave.” (The Court goes on to list a number of factors that can be relevant to the custody inquiry.)

Questioning conducted during imprisonment does not “necessarily” equal *Miranda* custody. First, it generally does not create the sort of “shock” that “often accompanies arrest” and questioning on the outside. Second, a prisoner cannot reasonably believe that confessing will lead to release. And third, a prisoner generally “has no reason to think that the listeners have official power over him.” [Ed. Note: This third reason seems remarkably unrealistic. The Court considers only whether questioning guards can affect “the duration of” the prisoner’s imprisonment. Of course, a positive or negative word from guard can often influence release decisions. But more importantly, guards have “official power” over prisoners in myriad ways, many of which are quite important to the inmate, even though they are unrelated to the ultimate date of release.]

Similarly, questioning “in private” is insufficient to create custody. And whether the questioning addresses events inside or outside of the prison simply has no bearing on the custody inquiry. Meanwhile, “voluntary confessions ... are an unmitigated good” (repeated from a number of Justice Scalia opinions), and *Miranda*, while it will be “enforced strictly,” should apply only in “those types of situations in which the concerns that powered the decision are implicated.” [Ed. Note: the meaning of this generality is, of course, in the eye of the beholder.]

On this record, Fields was plainly not in *Miranda* custody. “Most important,” he was told he was free to leave and reminded of that again, later. Other factors, examined in their totality, are not sufficient to support custody. The judgment is reversed [Note: and not remanded for application of the Court’s analysis.]

Ginsburg dissenting, joined by Breyer and Sotomayor [Ed Note: not Kagan]: While I agree that there was no “clearly established” rule to support a habeas grant, I disagree with the ruling regarding *Miranda* “custody.” Were the case here on direct review” I would order suppression. *Miranda* held that warnings are required prior to law enforcement questioning “in all settings in which [a person’s] freedom of action is curtailed in any significant way.” I would apply *Miranda*’s original rationale. Fields was involuntarily taken to the interrogation room and interrogated for long hours into the late night by two armed guards. He was told he might leave, but he testified that he did not believe he really could. He was never told he did not have to speak with the guards. He was denied his evening medications. [Until today,] **a statement that a prisoner can return to his cell “is no substitute for” the required *Miranda* warnings.**

2. Double Jeopardy

Blueford v. Arkansas, No. 10-1320 (May 24, 2012), 6-3 (**Roberts**; Sotomayor dissenting), affirming 2011 Ark. 8 (2011).

Blueford was tried in Arkansas state court for capital murder as well as lesser homicide charges for the death of a one-year-old left in his care. After two jury notes and one *Allen* (“dynamite”) charge, the jury said it was “hopelessly deadlocked.” The judge then asked for the jury’s “count on capital murder.” The foreperson responded “That was unanimous against that.” “Okay, on murder in the first degree?” Jury: “That was unanimous against that.” Further dialogue revealed, however, that the jury had not voted on some lesser charges, so the judge gave a second *Allen* charge and sent the jury back for further deliberations. Blueford’s counsel then asked for new verdict forms to be given to the jury so that it could indicate its decision “for those counts that they have reached a verdict on.” (The original verdict forms did not have one for acquittals on some counts but not on others.) The prosecutor objected saying an acquittal had to be “all or nothing” and the trial judge agreed that submitting new verdict forms would be “changing horses in the middle of the stream.” When the jury again reported that it could not reach a verdict, the judge declared a mistrial and discharged the jury.

On an interlocutory appeal, the Arkansas Supreme Court ruled that Blueford could be retried on the capital and first degree murder charges because no “formal announcement of acquittal” had ever been made and “no formal verdict was announced.”

Roberts for 6: Double jeopardy does not bar this retrial. First, the foreperson’s report “was not a final resolution of anything;” in fact the jury went back into deliberations, and might have “reconsidered” its vote. [Ed. Note: Roberts writes that “juries often do” this; he cites no authority for that proposition.] “That deliberations continued ... deprives that report of finality necessary to constitute an acquittal.” Second, Blueford is wrong that there was no “necessity” for declaring a mistrial on the counts the jury announced it was unanimous on. “We have never required a trial court” to do anything affirmative “before declaring a mistrial because of a hung jury.” [Ed. Note: this of course begs the question whether the Court should now require it – this case is not on habeas so there is no “clearly established law” barrier.] Arkansas law limited the jury’s options to two: convict on one of the offenses or acquit on all. The Arkansas court “did not abuse its discretion” by declining to add a third option of a partial verdict, and “the Double jeopardy Clause does not afford him” that relief. [Ed Note. Why not, is unexplained – that is the last substantive sentence of the majority’s opinion. Of course, “abuse of discretion” is not the constitutional standard. In your Editor’s view, the simplistic, almost *ipse dixit*, quality of this opinion is unusual, surprising and supporting.]

Sotomayor dissenting, with Ginsburg and Kagan [Note: not Breyer]: The Court’s opinion “misapplies” the “longstanding principles” of our precedents. “An acquittal occurs if a jury’s decision ‘whatever its label actually represents a resolution...’” (quoting *Martin Linen* (1977)). And a trial judge “may not defeat a defendant’s entitlement to” a verdict by declaring a mistrial, absent manifest necessity (citing *Jorn* (1971) and *Perez* (1824)). “The jury’s unambiguous decision” here was to acquit on the two most serious charges, and “form is not to be exalted over substance” in the double jeopardy context (quoting *Sanabria*, 1978). Moreover, Arkansas law, and the jury instructions here, clearly requires that the jury unanimously decide that the evidence is insufficient on the more serious charge, before it can even consider the lesser charges. A number of our cases recognize “implicit acquittals,” and here the forewoman [Note that Sotomayor uses this word as opposed to “foreperson”] “unmistakably announced acquittal.” “There is no reason to believe” the jury would reconsider this; there is no “record evidence to support the speculation,” and the substantive evidence against Blueford had many “deficiencies.” (Indeed, (n. 2) even the state trial judge observed that this was “probably ... a lesser included offense case.”) Many lower courts, state and federal, have recognized an acquittal in similar circumstances. “The Double Jeopardy Clause demands that ambiguity be resolved in favor of the defendant” (citing *Downum*, 1963).

Finally, the double jeopardy protection against repeated prosecutions, even where no verdict is reached, should control here. There was no “manifest necessity” to declare a mistrial on the counts the jury was “unanimously against.” The Constitution should, instead, require that a judge take a partial verdict of acquittal in this case. The majority’s “hands-off approach dilutes *Perez* beyond recognition.” (*Perez*, 1824, requires “sound” exercise of “discretion” under the DJ clause.) The failure of the trial judge to accept the acquittal verdict here was an unconstitutional abuse of discretion (particularly where the trial judge expressed confusion, or complete error, regarding the requirements of Arkansas law on this point, saying “they don’t have to get past every charge unanimously before they can move to the next charge.”) “This case demonstrates that the threat to individual freedom from re prosecutions that favor States and unfairly rescue them from weak cases has not waned with time. **Only this Court’s vigilance has.**”

D. SIXTH AMENDMENT

1. Effective Assistance of Counsel in Guilty Pleas:

Missouri v. Frye, No. 10-444 (March 21, 2012), 5-4 (**Kennedy**; Scalia dissenting), reversing 311 S.W.3d 350 (Mo. 2010) (decided together with *Lafler*, below).

Frye was arrested for with driving with a revoked license. Because it was his fourth such offense he was charged with a felony exposing him to four years imprisonment. The prosecutor sent Frye’s attorney a plea letter, offering either a 10-day jail sentence recommendation if Frye pled to the felony, or a 90-day sentence recommendation if Frye would plead to a misdemeanor. But Frye’s lawyer never told Frye about the offer, and it expired. Frye ultimately pled guilty to the felony and received a three-year sentence (it might be relevant here that a few days after the plea offer expired Frye was again arrested for driving with a revoked license). Frye filed for post-conviction relief on the ground that the lawyer’s failure to communicate the plea offer was ineffective assistance and alleging that he would have accepted the misdemeanor bargain if he had known of it. The Missouri court of appeals found ineffective assistance and, as remedy, vacated Frye’s guilty plea and remanded for Frye to either go to trial or consider any further plea offer the prosecution might make.

Kennedy (for 5): This was ineffective assistance of counsel, and some remedy is required. First, the Sixth Amendment right to effective assistance of counsel applies to all “critical stages” of a criminal case, and this includes the plea-bargaining process. The “simple reality” is that plea bargains are “central to the administration of the criminal justice system” and far more common than trials. Thus it is “insufficient simply to point to the guarantee of fair trial” as a “backstop” to remedy errors in the plea-bargaining process.

Second, while we do not “define [all] the duties of defense counsel” in plea bargaining, “**as a general rule defense counsel has a duty to communicate formal offers**” (citing *ABA Criminal Justice Standards* as well as many cases). So this was unconstitutionally deficient lawyer assistance. States may develop procedures to guard against “late, frivolous, or fabricated claims” in this area.

Third, to show *Strickland* “prejudice” in the plea bargaining context, defendants “must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they known of it; and also “a reasonable probability that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it.” This would show “a reasonable probability that the end result ... would have been more favorable....” We believe that “an objective assessment” of normal practices in various jurisdictions is possible. *Hill* (1985) does not require

anything different, as *Hill* involved ineffective assistance that led to acceptance of a plea. We remand for the Missouri courts to apply these newly stated standards.

Scalia dissenting, with Roberts, Thomas and Alito: Frye here admitted his guilt, so this is an easier case than *Lafler* (below) and I will refer the reader to “the constitutional points” I make in my dissent in *Lafler*. I will note here that Frye has no constitutional right to any plea offer, and the court ought not “mistake the possibility of a different result for constitutional injustice.” No one believes the lawyer’s performance here was adequate, but it did not deprive Frye of his “constitutional right to a fair trial” – his guilty plea did that. [Ed. Note: Here, Justice Scalia seems to simply omit the different constitutional right at stake here, that of effective “Assistance of Counsel.”] “Constitutionalizing the plea bargaining process” is a mistake, and the Court provides little guidance beyond the facts of this case – “does a hard-bargaining ‘personal style’ now violate the Sixth Amendment?” Meanwhile, the Court’s prejudice standard here is “**retrospective crystal ball-gazing posing as legal analysis**” and “**retrospective mind-readings.**” [Ed. Note: This wins my annual “creative insult of the year” award.] The Sixth Amendment is “concerned not with the fairness of bargaining but with the fairness of conviction” and the Court “ignores its text.” [Ed. Note: Justice Scalia seems remarkably innocent to the point that his own words (“fairness of conviction”) are also atextual.] We should perhaps “penalize” badly performing lawyers – but the Court instead is “penalizing (almost) everyone else by reversing valid convictions or sentences.”

Lafler v. Cooper, No. 10-209 (March 21, 2012), 5-4 (**Kennedy**; Scalia dissenting; Roberts dissenting), reversing 376 Fed. Appx. 563 (6th Cir. 2010) (decided together with *Frye*, above).

Cooper was convicted by jury trial of assault with intent to murder, for pointing a gun at a woman’s head, firing but mostly, and then pursuing her and shooting her in the buttock, hip and abdomen. He received a mandatory sentence of 185-360 months (15-30 years). In seeking post-conviction relief, Cooper alleged that his lawyer had advised him to reject more favorable plea offers (of 51-85 months) on the (frankly laughable) legal advice that Cooper could not be convicted because he had shot his victim below the waist. The state ultimately conceded ineffective attorney performance here, but the Michigan courts ruled that because he had knowingly rejected the plea offers and had had a fair trial, no relief was appropriate. On federal habeas a district court granted the writ and ordered “specific performance” of the rejected plea offer as a remedy. The Sixth Circuit affirmed in an unpublished disposition.

Kennedy (for 5): “Defendants have a Sixth Amendment right to counsel ... that extends to the plea-bargaining process.” *Frye* (above); *Padilla* (2010). As in *Frye* (above), Cooper “seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome.” Because we have a “concession” that counsel’s advice fell below the Sixth Amendment effective assistance standard, we can move to prejudice and remedy.

The prejudice standard is a “reasonable probability” that [numbering added:] (1) “the plea offer would have been presented to the court (i.e. that (a) the defendant would have accepted the plea and (b) the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the court would have accepted its terms; and (3) that the conviction or sentence, or both, under the offer’s terms would have been less severe than [what] in fact were imposed.” The fact that Cooper had a fair trial after rejecting the plea offer does not mean he was not “prejudiced.” The Sixth Amendment is “not so narrow in its reach” and protects more than “the right to a fair trial.” It protects “the whole course of a criminal proceeding.” “The reality” is that “criminal justice today is for the most part a system of pleas, not a system of trials. A “just result” is more than “reliability of a conviction” – it is

“the fairness and regularity of the process” preceding a conviction that is constitutionality protected. In short, **“if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.”** That a defendant has no right to a plea offer or acceptance is simply “beside the point.”

The question of “appropriate remedy” remains. While a remedy “must neutralize the taint of a constitutional violation,” it must not “grant a windfall ... or needlessly squander” government resources. Courts should have considerable discretion, and “the boundaries ... need not be defined here.” Because of intervening events it may be “difficult to restore the defendant and the prosecution to the precise positions they occupied prior to rejection of the plea offer,” but that “baseline” can be considered so as to not necessarily “require the prosecution to incur the expense of conducting a new trial.” Lower courts have recognized claims like this for over 30 years, and have implemented various remedies, and the system is not “overwhelmed.”

Finally, that this case is on federal habeas is no bar to relief, because the state courts did not apply the “clearly established” law of *Strickland* to Cooper’s claim. We have done so here to find constitutionally ineffective assistance; and we now remand on remedy. The district court ordered “specific performance,” but **“the correct remedy ... is to order the State to reoffer the plea agreement.”** **“The state trial court can then exercise its discretion” regarding how things should then play out.**

Scalia dissenting with Thomas, and with Roberts in significant part: In a misguided “pursuit of perfect justice,” the Court unnecessarily “opens a whole new field of constitutionalized criminal procedure: plea-bargaining law” Moreover, this is at least a “new rule of law” that ought not govern Michigan on federal habeas. This will come at a huge cost and burden to the State, and is a “vast departure from our past cases.” *Padilla* governs effective advice before accepting a plea; it never said that effective assistance “extends to all aspects of plea negotiations.” Unless “unfortunate attorney error” impairs a fair trial, the Constitution does not speak to it. A focus on “mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair” is “defective.” [Ed. Note: Of course, one can easily argue that a “result” of 15 years in jail rather than five is “fundamentally unfair,” if caused by attorney mis-performance.] Our cases reject the idea that a defendant can be unconstitutionally deprived of a right he does not have (here, there is no right to a plea bargain).

Moreover, the Michigan court properly recited the *Strickland* standard; we should defer to its application, on federal habeas, as not “clearly unreasonable.”

Finally, “it is impossible” to not comment on the Court’s remedy, which is “un-heard of in American jurisprudence – and I would be willing to bet in the jurisprudence of any other country.” [Ed. Note: Wait a minute, is Justice Scalia referring to foreign law here?! (<)] If the government must reoffer the plea agreement, why would Cooper’s acceptance of that offer not be “conclusive”? “Astoundingly,” why does the state court have any further discretion to then reject it? One cannot allow “discretion” to block remedy of a constitutional violation. In fact, this bow to discretion is “camouflage” for the incorrectness of the Court’s constitutional analysis. The Court’s “squeamishness” on remedy “is attributable to its realization, deep down, that there is no real constitutional violation here.”

[Note: Chief Justice Roberts does not join this next part, perhaps because it refers again to foreign law, perhaps because of its personalized tone, or perhaps for other reasons:] Many or most other countries don’t allow plea bargaining for serious cases like this. [Again a reference to foreign law?] We may accept it as a “necessary evil,” but today the Court transforms it into a “constitutional entitlement.” I am most “saddened” by the Court’s adoption today of the “sporting chance theory of

criminal law.” “I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.”

Alito dissenting: I agree with Justice Scalia’s Parts I and II, that our precedents, as well as federal habeas restrictions, do not support this result. And “the weakness of the Court’s analysis is highlighted by its opaque discussion of the remedy.” “The only logical remedy is to give the defendant the benefit of the favorable deal,” but that “would cause serious injustice in many instances.” “Time will tell how this works out” but the Court’s constitutional interpretation is “unsound.”

2. Confrontation Clause: *Crawford* follow-up re: expert forensic testimony:

Williams v. Illinois, No. 10-8505, 132 S. Ct. __ (June 18, 2012), 5 (4-1) to 4, (**Alito**, *Breyer* concurring, *Thomas* concurring in the judgment, Kagan dissenting), affirming 385 Ill. App. 3d 359 (Ill. 2008).

Holding: *Crawford* (2004)’s restriction on admissible evidence under **the Confrontation Clause does not bar an expert from testifying (and being subject to cross-examination) while invoking facts that have formed background for the expert’s opinion but about which she has no personal knowledge**, because such background facts are not offered for their truth and the Confrontation Clause therefore has no application to them.

Facts: Williams was convicted of rape after his DNA was found to match the DNA taken from a vaginal swab of the victim. At least five people were involved in the DNA collection and comparison process. A Chicago police detective collected the samples and gave them to ISP, a forensic lab. ISP personnel confirmed the presence of semen on the vaginal swabs, and sent the samples to Cellmark Diagnostics Laboratory for DNA testing. Cellmark personal conducted the DNA analysis and sent back a report. An ISP specialist then conducted a search of the state’s DNA database and discovered a match to a DNA profile previously produced from Williams’ on a prior arrest. Williams was then arrested and the rape victim identified Williams at a lineup; she again identified him at trial. At trial, three forensic scientist witnesses linked Williams to the crime through DNA: an ISP scientist, a state lab scientist, and an expert in forensic DNA analysis. This last expert, Sandra Lambatos, testified that in her opinion the Cellmark DNA sample matched Williams’ prior sample. She said that there was “a computer match of the male DNA profile found in the semen from the vaginal swabs of’ the victim. Lambatos, of course, had no personal knowledge of the underlined phrase, as she admitted on cross-examination. The trial court admitted this testimony over defense objection and the state court’s affirmed.

Alito, joined by Roberts, Kennedy and Breyer: This was a bench trial, and Illinois rules of evidence (as well as federal) allow an expert to introduce background facts that they have assumed in forming their opinions. That is all that happened here; the facts regarding the Cellmark report were offered not for their truth but as expert background. **“Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.”** “It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks firsthand knowledge of those facts.” And because this was a bench trial, we can assume the judge will not be “confused” by reference to such facts. **The Confrontation Clause does not bar testimonial evidence if not offered for the truth of the matter asserted.**

Moreover, “even if” the Cellmark report facts had been offered for their truth, we would not find a Confrontation Clause violation. **We will not extend Crawford beyond (1) formalized statements such as affidavits, that (2) have the “primary purpose of accusing a targeted individual of engaging in criminal conduct.”** (Footnote 13: Perhaps we should even “reconsider” *Crawford* and its progeny, but we accept them for today.) For various reasons, expert reports like this, not targeted at any individual and having many safeguards for reliability, are different than the abuses that originally gave rise to the Confrontation Clause. And as a practical matter, making DNA technicians testify would produce significant “economic pressures” that would encourage prosecutors to rely on evidence that is “less reliable” than DNA (like eyewitness identification). The Constitution does not require that result. **[Ed. Note:** Justice Alito responds in a relatively gentle footnote (n. 3) to the dissents, aggressively critical name-calling. It is interesting to contrast his style here with what one could imagine Justice Scalia writing in a similar context.]

Finally, **the “correctness” of Lambatos’ underlying opinion was tested on cross-examination and “was not in any way dependent on the origin of the samples from which the profiles were derived.”** Other evidence allowed a reliable “chain of custody” for the Cellmark report to be inferred (that it did indeed come from a vaginal swab from the victim). And a defendant remains free, of course, to subpoena any personnel involved in an expert witness process. With sufficient “safeguards” to prevent an expert opinion from acting as a back-door vehicle for admission of otherwise inadmissible hearsay statements, “the use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate’” (quoting Thomas’ concurrence in *Bryant*).

Breyer, concurring: “Neither the plurality nor the dissent . . . adequately” addresses the important question here and from *Bullcoming* and *Melendez-Diaz*: “How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?” We have a duty to provide clearer answers to this constantly recurring question, so **I would set this case for reargument.** “In the absence of doing so, I adhere to my dissenting views” in *Melendez-Diaz* and *Bullcoming* and join fully the plurality’s opinion. The dissent would “abandon [the] well-established rule” that experts can rely on inadmissible evidence, without “produc[ing] a workable alternative.” And preventing admission of out-of-court records like the ones here “could increase the risk of convicting the innocent.”

The “reality” of modern lab reports is that many experts rely on the work of others in reaching their conclusions. Many approaches for setting “some kind of *Crawford* boundary” have been suggested, but our opinions do not provide clear dispositive answers. In the absence of reargument, I agree with the plurality that **“the statements at issue, like those of many laboratory analysts, do not easily fit within the linguistic scope of the term ‘testimonial statement’ as we have used that term in our earlier cases.”** (Justice Breyer attaches an “Appendix” detailing how complex and multi-personnelled modern DNA processes are.)

Thomas, concurring only in the judgment: “I share the dissent’s view of the plurality’s flawed analysis” – these statements were plainly offered “for the truth” as the reliability of the expert’s opinion depends on that idea. I concur in the judgment only because **“Cellmark’s statement lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial’** for the purposes of the Confrontation Clause.” **[Ed Note:** This produces the odd result that 5 Justices agree that the rationale for the Court’s disposition of the case is wrong. Lower courts will have a field day trying to figuring whether, and how, Justice Thomas’s “narrower” “formality and solemnity” rationale controls. In light of this odd lineup, Justice Breyer’s suggestion for reargument appears to carry more force than one might think otherwise.] The dissent incorrectly suggests that a requirement of formality will result

“in a prosecutorial conspiracy to elude confrontation by using only informal extrajudicial statements against an accused.” This is unfounded because informal statements are “less reliable” and a prosecutor is unlikely to substitute less reliable evidence for more reliable evidence. I reject the plurality’s “primary purpose test” because it is not textually based [any more so than “formality and solemnity”?]. The correct solution to the burden of requiring every participating DNA analyst to testify is to “adopt a reading of the Confrontation Clause that respects its historically limited application to a narrow class of statement bearing indicia of solemnity.”

Kagan, dissenting joined by Scalia, Ginsburg, and Sotomayor: This is an “open-and-shut” case because Illinois did not give Williams an opportunity to question the analyst who prepared the Cellmark report, which was vital to linking him to the DNA profile. This deprived Williams of his constitutionally protected right to confront his accuser. Meanwhile, there are five votes in favor of the “fractured” affirmance of his conviction, “but not a single good explanation.” In fact, the “plurality” here is really a dissent, as five Justices “reject every aspect . . . and every paragraph” of that opinion. This case is indistinguishable from *Bullcoming* and *Melendez-Diaz*, and we should stick to them. Also, the plurality’s suggestion that this was okay because it was a bench trial, but perhaps not if it were a jury, is not only unhelpful but also not a constitutionally recognizable distinction – a defendant has a right to confront the witnesses against him whether tried by a judge or jury.

It is true that *Crawford* contained a “not admitted for the truth” limitation. But *Crawford* did not have expert forensic testimony in mind, and plainly the testimony here was admitted for its truth – the reference to the Cellmark report “has no purpose separate from its truth.” The plurality’s artificial distinction gives “the prosecution a ready method to bypass the Constitution” on a “wink and a nod.” “No wonder five Justices reject” the plurality’s “neat trick” which will allow prosecutors to “sneak in” evidence through the back door. Perhaps admission of the Cellmark report was “harmless,” but we should not suggest that it was not constitutional error.

Finally, it is important to note that five Justices reject the view that this DNA expert testimony was not “testimonial” on some new “primary purpose” rationale. Also the suggestion that this report was created to address an “ongoing emergency” of an unidentified rapist on the loose “stretch[es] . . . the facts of this case beyond recognition.” Finally, invoking the supposed “*über alles* reliability” of complex scientific testing merely underscores the need for cross-examination, because it “will often be the most important aspect in the case.”

3. *Apprendi* (Jury) Sentencing:

Southern Union Co. v. United States, No. 11-94 (June 21, 2012), 6-3 (**Sotomayor**; Breyer dissenting), reversing 630 F.3d 17 (1st Cir. 2010).

Natural gas distributor Southern Union Company (“SUC”) was convicted by a jury of criminal violations of the Resource Conservation and Recovery Act (“RCRA”), for unlawfully storing mercury “on or about September 19, 2002 to October 19, 2004.” RCRA says that violations are punishable by, *inter alia*, “a fine of not more than \$50,000 for each day of violation.” 42 U.S.C. § 6928(d). SUC argued that it could be fined no more than \$50,000, since the jury’s verdict failed to specify more than one day’s actual violation, and fining them more would violate the constitutional Due Process and Jury Trial guarantees under *Apprendi* (2000). The government argued that *Apprendi* applies only to imprisonment penalties, not fines. The district judge found that the jury had actually found a 762-day violation, and fined SUC \$6 million. On appeal, the First Circuit found that the jury had not specified any particular number of days, but upheld the fine by concluding that *Apprendi* did not apply. The Second and Seventh Circuits had concluded oppositely regarding *Apprendi* fines.

Sotomayor (for 6, including Ginsburg, an *Apprendi* sometimes-swing-vote): The Sixth Amendment right to jury trial and its logic requires that *Apprendi* be applied to criminal fines [**Ed. Question:** and other criminal penalties in general? Probation conditions? Not answered], when facts not found by the jury are relied upon to increase the maximum potential sentence. This is the force of *Blakely* (2006). There is “no principled basis” for treating criminal fines differently.” Fines were “by far the most common form of noncapital punishment in colonial America,” and are common today. We find that historically, statutes that imposed fines generally made the triggering facts a jury question. An opposed 1812 precedent from this Court simply did not involve a Sixth Amendment interpretation.

Apprendi’s “animating principle” – “preservation of the jury’s historic role as bulwark” – requires that it be applied to fines. [**Ed. Note:** 12 years after *Apprendi*, and four new Justices, the collective memory grows dim. The “animating principle” of *Apprendi* when first issued was hardly the “jury’s role;” rather, it was the *Winship* due process “elements” idea. It was Justice Scalia’s twist six years later in *Blakely*, used to strike down mandatory guidelines systems within a statutory maximum range, that altered our memory of this.] This would not apply to “petty” crimes under the Sixth Amendment. But more “substantial” fines “trigger” the jury trial guarantee, for all facts used to set the maximum. [**Ed. Note:** In n. 5, a potential time-bomb for the future, the Court writes that some statements in *Ice* (2009) (written by Ginsburg to hold that *Apprendi* does not apply to consecutive sentencing facts) were “ambiguous” and “not binding” dictum. This continues the battle between Justices Scalia and Breyer on the *Apprendi* doctrine that has gone on for over a decade.] Other arguments here simply “rehearse those made by the dissents in our prior *Apprendi* cases.” *Apprendi* is now more than a decade old” and “reliance interests” have built up around it. Applying *Apprendi* to criminal fines is not an “unexpected extension.”

Breyer dissenting, with Kennedy and Alito: We do adhere to prior *Apprendi* dissents [substituting Justice Alito for O’Connor], but our dissent here does not depend on those. The majority here is “ahistorical” and neither history nor the force of *Apprendi*’s logic, and certainly not “sentencing fairness,” requires its application here. Our decision in *Ice*, which the majority simply discounts, directly supports our dissent. In *Ice* the Court concluded “that *Apprendi* does not encompass every kind of fact-related sentencing decision that increases the statutory maximum” – there, a judge was permitted to make sentences consecutive only if the judge found certain facts, and we upheld that non-jury discretion. In RCRA, Congress plainly did not intend the “each day” statutory requirement for punishment be an “element” of the crime. So the jury need not find it. Courts have always had discretion to impose fines within a statutory range, and this statute is no different. Finally (after a detailed historical account), the majority draws the wrong conclusions from history. “What the Framers would have thought about the scope of the Constitution’s terms” would not have included jury determination of facts related only to the amount of a criminal fine. The 1812 *Tyler* case is instructive, as “a Court that included Chief Justice John Marshall and Justice Joseph Story” would not have decided the case as they did if they thought the Sixth Amendment had anything to do with it. As Justice Story later “authoritatively” wrote on two occasions (sitting as Circuit Justice), in “*Tyler* ... the court held that the fine ... must be assessed and adjudged by the court and not by the jury.” And “mid-19th-century cases should not tell us more about the constitution’s meaning than” *Tyler*, as well as 20th century practice.

Finally, it is important that the consequences of this decision (and *Apprendi*) are “likely to diminish the fairness of the criminal trial process.” It also “nudges our system slightly further” toward resolution by prosecutor-driven plea bargaining, not jury trial. “I see no virtue in doing so.”

E. EIGHTH AMENDMENT

Minneeci v. Pollard, No. 10-1104 (Jan. 10, 2012), 8 [6-2] to 1 (**Breyer**; *Scalia* concurring; Ginsburg dissenting), reversing 629 F.3d 823 (9th Cir. 2010).

Pollard was a federal prisoner held at a facility operated by a private corporation. He filed a federal lawsuit against employees of the corporation, alleging that they had denied him adequate medical care in violation of the Eighth Amendment. The district court dismissed Pollard’s suit, finding that there was no Bivens cause of action under the Eighth Amendment against privately-managed prison personnel. The Ninth Circuit reversed’ the Court now reverses the Ninth Circuit.

Breyer (for 8): Under *Wilkie* (2007), we do not imply a federal cause of action directly under the Constitution where adequate “alternative existing” processes for protection exist. Although the Court did find an Eighth Amendment cause of action against federal officers in *Carlson* (1980), since that time the Court has “decided against the existence” of an implied constitutional action in five different cases (listed), including *Malesko* (2001) which declined to imply an Eighth Amendment action against a private corporation that managed a federal prison. The fact that today’s case involves private employees of such a corporation makes no difference: for “a privately employed defendant, state tort law provides an alternative existing process capable of protecting the constitutional interests at stake.” This is different than the government employees sued in *Carlson*, who ordinarily are protected from state tort lawsuits by the Westfall Act. California state law in particular allows lawsuits against private prison employees. That the state remedies may be “less generous” than federal, or “not perfectly congruent” is “insufficient” to oust state law, and the question is whether state law provides “roughly similar incentives” to deter Eighth Amendment misconduct. So on these facts at least, “we cannot imply a *Bivens* remedy.”

Scalia concurring, with Thomas: “*Bivens* is a relic” of headier days, and I would not extend it beyond its “precise circumstances.”

Ginsburg dissenting: If Pollard were held in a federally-operated or a state-operated prison, he would have a federal lawsuit remedy. We ought not allow “official actors” to engage in “aggravated conduct” simply under the guise of a “private” contract with the government. “Individual deterrent” is the most important interest, and allowing a federal lawsuit serves it best.

Miller v. Alabama, No. 10-9646 (June 25, 2012), 5-4 (**Kagan**; *Breyer* concurring; Roberts dissenting; Thomas dissenting; Alito dissenting), reversing 63 So.3d 676 (Ala. Crim. App. 2010) and 2011 Ark. 49.

In two companion cases, persons who were 14 years old at the time of their offenses were convicted of murders and sentenced to life imprisonment without possibility of parole (“LWOP”). Both were convicted by jury trial, and state statutes made the LWOP sentences mandatory; there was “no discretion to impose a different punishment.” Kuntrell Jackson was convicted on a theory of accomplice murder in a video store robbery; he was not the shooter. Evan Miller more directly bludgeoned his victim into unconsciousness and then set his trailer on fire, which killed him.

Kennedy (for 5): The Eighth Amendment embodies “evolving standards of decency” and we have “two strands of precedent” that lead us to conclude that **the Amendment prohibits mandatory LWOP sentences for juvenile offenders, even murderers**. First, we have found “categorical bans ... based on mismatches between the culpability of a class of offenders and the severity of a penalty.

Graham (2010) (no LWOP for juvenile non-homicide offenders, and a list of other categories); *Roper* (2005) (no death penalty for juvenile offenders). Second, “we have prohibited mandatory imposition of capital punishment, requiring” individualized sentencing consideration. *Woodson* (1976); *Lockett* (1978). As we said in *Roper* and *Graham*, “children are constitutionally different from adults for purposes of sentencing.” “The mitigating qualities of youth” must be considered. “By removing youth from the balance,” mandatory LWOP statutes “contravene” the “foundational principles” above. LWOP for juveniles is “analogous to capital punishment” (*Graham*) and thus “demand[s] individualized sentencing.” Because our ruling on mandatory statutes is “sufficient,” “we do not consider [whether] the Eighth Amendment requires a categorical bar” on LWOP for juveniles. “But” we do think such sentences “will be uncommon” even when individualized. “We do not foreclose” possible individualized LWOP sentences for juveniles, but “we require” the sentence to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (The Court goes on to reject other arguments, like *Harmelin* (1991), which “had nothing to do with children,” and empirical arguments about a “national consensus” on this issue. And the fact that states may allow discretion in deciding whether to charge juveniles with mandatory LWOP crime, is irrelevant to the sentencer’s imposition of that penalty once charged.) “A judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”

Breyer concurring with Sotomayor: I concur in full, but also argue that if the state continues to seek LWOP for Jackson, I believe it must also find (under *Graham*) that he either “killed or intended to kill,” a determination that was lacking below. I don’t think a standard “felony-murder” doctrine can constitutionally be applied to give LWOP to juveniles. “The Eighth Amendment forbids” it.

Roberts dissenting with Scalia, Thomas and Alito: “Our role is to apply the law” and not answer the “grave and challenging questions of morality and social policy” that underlie this debate. Because over 2,000 persons currently have LWOP sentences for crimes committed under the age of 18, it is not “unusual” under the Eighth Amendment, which should “preclude” a finding of unconstitutionality. “Decency is not the same thing as leniency. A decent society protects the innocent from violence,” and “as judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.” Indeed, the states have steadily moved toward LWOP for juveniles, which shows “society’s evolution.” “Members of this Court may disagree with that choice” but the Constitution does not prohibit it and “that is not our decision to make.” Meanwhile, today’s result “does not follow from *Roper* and *Graham*.” And the Court should not make a “gratuitous prediction” that individualized LWOPs for juveniles will be uncommon.

Thomas dissenting with Scalia: Neither of the two lines of precedent on which the Court relies is “consistent with” the Eighth Amendment. “*Woodson* and its progeny were wrongly decided.” Meanwhile, *Harmelin* rejected application of the individualized sentencing requirements for capital cases, to non-capital sentencing. It “compounds error” to extend these precedents. Mandatory death sentences were common at the time of the Framing, as was charging juvenile offenders as adults. 27 jurisdictions have determined that mandatory LWOP for certain homicides is appropriate, “whether juveniles or not.” The Court here goes beyond “divining the societal consensus of today to shaping the societal consensus of tomorrow.” The Court’s “own sense of morality” should not “pre-empt that of the people and their representatives” (quoting his *Graham* dissent).

F. FOURTEENTH AMENDMENT – Due Process

Smith v. Cain, No. 10-8145, 132 S. Ct. 627 (January 10, 2012), 8-1 (**Roberts**; Thomas dissenting), reversing 797 So.2d 193 (La. 2001).

In 2001, Juan Smith was convicted on five counts of first-degree murder as a participant in a grisly home-invasion robbery-murder. At trial the single surviving eyewitness (Boatner) testified that he saw Smith enter the home with two other gunmen, demand money and drugs, and then open fire. Boatner claimed that he was “face to face” with Smith at the scene of the crime. Smith denied being part of the invading group, and no other evidence linked Smith to the robbery or murder. After the trial, Smith obtained handwritten notes from lead detective John Ronquillo indicating that on the night of the murder Boatner “could not . . . supply a description of the perpetrators other than they were black males,” and that five days later Boatner “could not ID anyone because [he] couldn’t see faces” and “would not know them if [he] saw them.” Smith requested a new trial, claiming withholding of material “*Brady*” evidence. But his claim was denied by the Louisiana trial court, court of appeal, and Supreme Court.

Roberts (for 8): It is a undoubtedly a *Brady* violation when the prosecution withholds contradictory statements made by the single eyewitness and the eyewitness was the only evidence implicating the defendant in the crime. [**Ed. Note:** this case comes from the same Louisiana DA’s office that was the subject of a bitter *Brady* dispute last Term in _____, in which that office was shown to have committed many *Brady* violations. Justice Thomas wrote _____, which may explain his vigorous and uncharacteristically long dissent here (19 pages, compared to Robert’s’ 4-page majority).]

“The sole question before us is thus whether Boatner’s statements were material to the determination of Smith’s guilt.” Sometimes withheld impeachment evidence may not be “material” (i.e., have a reasonable probability of changing the outcome) “if the State’s other evidence is strong enough to sustain confidence in the verdict. But [t]hat is not the case here.” Boatner’s identification testimony “was the *only* evidence linking Smith to the crime.” If the undisclosed statements impeaching his identification had been available to Smith at trial, the likelihood of a different result is great enough to implicate *Brady*. “The State and the dissent advance various reasons why the jury might have discounted Boatner’s undisclosed statements. . . . [But] the State’s argument offers reasons the jury *could* have disbelieved Boatner’s undisclosed statements, but gives us no confidence that it *would* have done so.” The case is remanded for further proceedings not inconsistent with this opinion.

Thomas dissenting: “Smith is correct that these undisclosed statements could have been used to impeach Boatner and Ronquillo during cross-examination. But the statements . . . cannot ‘reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” Counterbalancing these contradictory statements are repeated assertions by Boatner that he was, in fact, face-to-face with the perpetrator and that he had “immediately” identified Smith when shown his photo, stating “This is it. I’ll never forget that face.” “The reliability of Boatner’s out-of-court identification was extensively tested during cross-examination at Smith’s trial.” Smith has shown only a “possibility” that the disclosure of Boatner’s statements would have resulted in a different proceeding; that is insufficient under *Brady*. (There are other claims of *Brady* violations here, which the majority does not address; I find them also unpersuasive. [**Ed. Note:** does Justice Thomas go into such detail about these unaddressed points in an effort to affect the result on remand?]) “The question presented here is not whether a prudent prosecutor should have disclosed the information that Smith identifies. Rather, the question is whether the cumulative effect of the

disclosed and undisclosed evidence in Smith’s case ‘put[s] the whole case in such a different light as to undermine confidence in the verdict.’” Smith did not carry his burden.

Perry v. New Hampshire, No. 10-8974 (Jan. 11, 2012), 8 [7-2] to 1 (**Ginsburg**; *Thomas* concurring; *Sotomayor* dissenting), affirming (unpublished Order, N.H. 2010)

At 3 am, a man called New Hampshire police to report that an African-American male was trying to break into cars in a parking lot. A responding officer heard what “sounded like a metal bat hitting the ground” and then found Perry standing between two cars holding two car stereo amplifiers and a metal bat on the ground behind him. The officer detained Perry while another officer went up to the reporting person’s fourth floor apartment. She described that she had seen a man go into her neighbor’s car trunk and remove a box. When asked to describe the man she had seen, the witness pointed out her kitchen window and said the person she had seen was the man now standing next to the police officer in the parking lot below.

Perry was arrested and charged with theft. He moved to suppress the witness’s identification of him on the ground that it was unreliable and violated due process. The state court denied the motion, finding that the allegedly suggestive procedure had not been “manufactured by the police” and had occurred “spontaneously ... without any inducement from the police.” Even though Perry had been the only African-American in the parking lot, and the witness had later been unable to pick Perry out of a line-up, the court ruled the reliability of the ID was for the jury. At trial, the jury convicted Perry, and on appeal the New Hampshire Supreme Court ruled that the Due Process Clause requires a pretrial ruling on reliability only where the police employ suggestive identification techniques.

Ginsburg (for 8): The Constitution protects defendants from unjust convictions with a number of procedures (right to counsel, cross-examination, etc.), but ordinarily leaves the admissibility of evidence to state laws and rules. The Due Process Clause is normally implicated “only when evidence is so extremely unfair that its admission violates fundamental conceptions of justice” (*Dowling* 1990; *Napue* 1959). Although we have said that, for eyewitness identification evidence, “reliability is the linchpin” (*Brathwaite*, 1977), **this principle “comes into play only after the defendant establishes improper police conduct.”** “Prevention of unfair police practices” has been our driving motivation. To drop that limiting factor now would “entail a vast enlargement of the reach of due process” and make virtually all eyewitness identifications subject to constitutional challenge, which up to now have largely been subject only to state rules of evidence.

The fact that eyewitness identification evidence is sometimes viewed as more likely unreliable than some other types of evidence, is not sufficient to create a constitutional rule “without the taint of improper state conduct.” It is “the jury, not the judge, traditionally, [who] determines the reliability of evidence. Specific jury instructions on the dangers of eyewitness testimony, and expert witness testimony about that, also help protect defendants before the jury. **[Ed. Note:** Does Justice Ginsburg’s lengthy discussion of these measures mean that states are now required to allow them? Currently, not all states allow these measures. Will it be ineffective assistance not to demand them, now?]

Thomas concurring: I believe even the Court’s prior due process eyewitness ID cases are “wrongly decided,” because the Due Process Clause is not a “secret repository of substantive guarantees against unfairness.” **[Ed. Note:** Note that Justice Thomas cites a prior Scalia opinion (*BMW*, 1996) – but Justice Scalia does not join Thomas’s concurrence here.]

Sotomayor, dissenting: [In an unusually lengthy 17-page solo dissent, Justice Sotomayor makes a strong case for requiring judicial evaluation of the reliability of all questionable eyewitness

identifications, under the Due Process Clause’s requirement of “reliability” as expressed in *Brathwaite* (among other decisions).] A requirement of “orchestrated by the police” and “inadvertent” circumstances is “a murky distinction” that unnecessarily “grafts a *mens rea* inquiry onto our rule” and will “sow confusion” in lower courts. There plainly was “police action” here, and “our precedents make no distinction between intentional and unintentional suggestion.” And that distinction has no relevance to the ultimate unreliability of any given ID. “Preserving the jury’s role” has always been the dissenting view in our ID precedents; and our constitutional pretrial testing of eyewitness identifications has, in fact, seldom led to actual suppressions – it “sets a high bar” for suppression. Meanwhile, a “Vast body of scientific literature” now reinforces the long-standing concerns about the unreliability of eyewitness identifications [many footnotes cite the authorities]. I would remand this case for application of our normal two-step inquiry, without a new preliminary test of “police-arranged” circumstances.

II. FEDERAL STATUTES

A. Federal Sentencing:

Sester v. United States, No. 10-7387, 132 S. Ct. 1463 (March, 2012), 6-3 (**Scalia**; Breyer dissenting), affirming 607 F.3d 128 (5th Cir. 2010).

Setser was serving a five-year term of probation for a state offense when he was arrested for possessing methamphetamine. He was indicted in Texas state court and also in federal court, for possession with intent to distribute methamphetamine. Setser pleaded guilty to the federal charge, prior to resolution of the state charges. Over Setser’s objection, the district court imposed a 151 month federal sentence and specified that it be served consecutively to any state sentence imposed for the probation violation, but concurrently with any sentence from the new state drug charge. The Texas court subsequently sentenced Setser to 5 years for the probation violation and 10 years for the state drug charge. Setser filed an appeal, arguing that the district court did not have the authority to order that a sentence be served consecutively to a not-yet-imposed state sentence. But the Fifth Circuit affirmed.

Scalia for 6: A federal district court has authority to order that a federal sentence run consecutively to an anticipated, but not yet imposed, state sentence. The issue here is not *whether* Setser’s federal and state sentences will be served concurrently or consecutively, but “*who* has authority to make that decision.” The Sentencing Reform Act of 1984 expressly addresses whether prison terms imposed at the same time, and prison terms imposed on someone already under a state sentence, may be consecutive or concurrent. Setser argues that because his situation is not expressly addressed by the Act, the district court lacks authority to impose consecutive sentences. In short, Setser wants the Court to hold that because the statute “recognizes judicial discretion in scenario A and scenario B, there is no discretion in scenario C.” Federal sentencing, however, is a “matter of discretion traditionally committed to the Judiciary,” and Setser’s argument ignores the “common-law background” of the Sentencing Reform Act. Nothing in the statute’s text requires that Congress foreclosed “the exercise of district courts’ sentencing discretion in these circumstances.” Indeed, it is “likely” that Congress “contemplated” that district courts would have this sentencing discretion, not the Bureau of Prisons. The explicit provisions of the Act on this topic are more naturally read as *limitations* of authority. And as such, the Act “in no way implies a repeal of other pre-existing [discretionary] authority.”

We think that “principles of federalism and good policy ... cut in precisely the opposite direction” than Setser argues. Giving the authority to federal courts “up front” is “always more respectful of the State’s sovereignty.” While it may be “undoubtedly true” that “later is always better” in sentencing, this policy is “overwhelmed by text, by our tradition of judicial sentencing, and by the accompanying desideratum that sentencing not be left to employees of the same Department of Justice that conducts the prosecution.” Finally, there is nothing “unreasonable” about how the district court exercised its discretion in this case.

Breyer dissenting, joined by Kennedy and Ginsburg: “[T]he better legal answer to the question before us is that a federal sentencing judge does *not* have the power to order that a ‘federal sentence be consecutive to an anticipated state sentence that has not yet been imposed.’” The statute “say[s] nothing” about the concurrent-vs.-consecutive decision for a sentence “*not yet imposed*,” and Congress likely understood that the “first federal sentencing judge” simply “does not yet know enough about what will happen in the sentencing-proceeding-yet-to-come” to construct a fair sentence. The Bureau of Prisons can better make this determination later in the process, when more information is available. And sentencing has long involved all three branches, so there is no problem with giving this decision to the better-placed Bureau of Prisons. Where the statute does not require it, allowing the district court to make this determination is a “mistake” that can “increase the risk of sentencing disparity.” Moreover, “I can find no significant tradition (pre-Guideline or post-Guideline) of federal judges imposing a sentence that runs consecutively with a sentence not yet imposed.”

Dorsey v. United States, No. 11-5683 (June 21, 2012), 5-4 (Breyer; Scalia dissenting), reversing 635 F.3d 336 (7th Cir. 2011).

In the Fair Sentencing Act of August 3, 2010, Congress finally reduced the infamous 100-to-1 ratio for sentencing severity of crack versus powder cocaine, to 18-to-1. Dorsey (and a companion case of *Hill*) committed a crack cocaine offense before the Act (in 2008) but was not sentenced until after the Act took effect. Under the law in effect at the time of his offense, Dorsey was subject to a 10-year mandatory minimum sentence (for 5.5 grams of crack). Under the new Act, no mandatory minimum at all would apply. But Dorsey’s judge decided that the old law applied and sentenced Dorsey to 10 years. The Circuits have split as to whether the new Act or the old law applies to offenders who commit their crimes before the Act but are sentenced after.

Breyer (for 5): The 1871 “savings statute” (18 U.S.C. §109) directs that new (“repealing”) criminal laws do not change the penalties for crimes committed before their date, unless the statute “expressly” provides (although caselaw allows such “repealing” effect also by “necessary implication” because “one Congress cannot bind a later Congress”). We find that “different statutes argue in opposite directions here,” but “**six considerations, taken together, convince us that Congress intended the Fair Sentencing Act’s more lenient penalties to apply.**” [Ed. Note: this has become Justice Breyer’s signature methodology: to list a number of factors that “taken together” lead to a result, without specifying more precisely how they apply. The lack of generalizability and imprecision of this method drives Justice Scalia (among others) nuts; his dissent here is one example.]

Most significantly, the Sentencing Reform Act (which Justice Breyer helped write as counsel to Senator Kennedy, and then apply as a Sentencing Commissioner) directs sentencing judges to apply the “sentencing range” that is “in effect on the date the defendant is sentenced.” We think some language in the Act supports this; and applying old law would “create disparities” that Congress wanted to prevent, and indeed “would make matters worse.” (Justice Breyer attaches some complex Appendices to demonstrate this.) Seeing no strong “countervailing considerations,” we hold that the

Act applies to “all of those sentenced after August 3, 2010,” even though new Guidelines implementing the Act were not in place until November. [Note that former Deputy SG (and failed D.C. Circuit nominee) Miguel Estrada was appointed to argue for the contrary position, since the Department of Justice declined to defend it, and “ably” did so.]

Scalia dissenting, with Roberts, Thomas and Alito: The 1871 statute “dictates” that the more lenient penalties apply only prospectively, because the 2010 Act says nothing to indicate otherwise. “The Court starts off on the right foot” **Note**: “Thanks,” says Justice Breyer (Ed. By (just kidding).) by noting the presumption against repeals, but then “understates the burden” that must be carried. “The considerations relied upon by the Court do not come close to satisfying the demanding standard for repeal by implication.” (A number of arguments hypothecating a non-retroactive Congressional intent are presented.) Moreover, “the mischief of the Court’s opinion is not the result in this particular case, but rather the unpredictability it injects into the law for the future.” Congress enacted § 109 “to provide a stable set of background principles that will promote effective communication between Congress and the courts.” The Court’s approach “cannot be reconciled” with this concept.

B. Qualified Immunity (§ 1983):

Rehberg v. Paulk, No. 10-788, 132 S. Ct. 1497 (April 2, 2012), 9-0 (**Alito**), affirming 611 F. 3d 828 (11th Cir. 2010).

Charles Rehberg sent anonymous faxes criticizing a hospital’s management and activities. The response of the district attorney’s office in Albany, Georgia (and its chief investigator James Paulk) was to launch a criminal investigation into Rehberg. Paulk testified before three grand juries, which then charged Rehberg with a number of offenses including aggravated assault, burglary, and making harassing telephone calls. But all these charges were eventually dismissed. Rehberg sued Paulk under 42 U.S.C. § 1983, claiming that Paulk presented (and conspired to present) false testimony to the grand jury. Paulk moved to dismiss, claiming absolute immunity. The District Court denied the motion to dismiss but the Eleventh Circuit reversed, holding that Paulk was entitled to absolute immunity.

Alito (9-0): A complaining witness who testifies in a grand jury proceeding is entitled to absolute immunity from § 1983 claims of false testimony. Section 1983 “was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits.” Although this Court does not create immunities out of thin air, and § 1983 is not “simply a federalized amalgamation of pre-existing common-law claims,” we must still look to “history and reason” and take a “functional approach” when identifying immunities. This approach has long recognized absolute immunity for legislators, judges, and prosecutors within the scope of their respective jobs, as well as for witnesses testifying at trial. While the “precise contours” of absolute immunity are different in each setting, the general goal is to “accommodate the special needs of the public.” Historically, the justification for trial witness immunity has been so as to not “impair” the truth-seeking process. This justification “appl[ies] with equal force to grand jury witnesses.” The threat of “retaliatory litigation may deprive the tribunal of critical evidence.” Meanwhile the threat of a perjury prosecution provides enough of a deterrent to protect against false grand jury testimony.

Paulk’s attempt to distinguish law enforcement witnesses from lay witnesses is not persuasive; the Court rejected such a distinction in the past in *Briscoe*. And reliance on *Malley* and *Kalina* to argue that a “complaining witness” is not entitled to absolute immunity is “based on a fundamental misunderstanding.” Not all “complaining witnesses” actually testify, but those who *testify* are

absolutely immune. In addition, to allow § 1983 claims against grand jury witnesses “would compromise [the proceeding’s] vital secrecy.”

Filarsky v. Delia, No. 10-1018 (April 17, 2012), 9 (7-1-1) to 0, (**Roberts**; *Ginsburg* concur; *Sotomayor* concur), reversing 621 F.3d 1069 (9th Cir.2010).

The California city of Rialto retained a private employment law expert, Filarsky, to conduct an investigative interview of a firefighter (Delia) that the City suspected of malingering while on medical leave. The City was informed that Delia had purchased certain building materials, and wanted him to produce them to prove he had not actually been working on his house while on leave. Delia objected that an order to produce the materials from inside his home would violate his Fourth Amendment rights. Despite Delia’s threat to sue, Filarsky drafted an order for Delia to produce the materials, and the Fire Department Chief signed it. They then went to Delia’s home and Delia brought the building materials out to his front lawn. Seeing that Delia still had the materials, the officials thanked him, drove away, and apparently dropped further investigation. True to his word, Delia sued everyone involved. (As Delia’s lawyer put it, “Everyone is going to get named and they are going to sweat it out as to whether they have individual liability.”)

The district court granted summary judgment to all defendants, ruling that they were entitled to qualified immunity. The Ninth Circuit affirmed as to all defendants but Filarsky, whom they distinguished because he was not a government official. **[Ed. Note:** In a merits ruling that does little to dampen the Ninth Circuit’s occasionally “loopy” reputation, the panel also ruled that the order to produce the materials had violated the Fourth Amendment on a theory that forcing Delia to reveal the contents in his home on pain of being fired was an unconstitutional choice, and ruled the fact that this was not “clearly established” did not immunize a private individual [in some tension with the finding that this was state action under § 1983]).

Roberts: To determine the contours of § 1983 qualified immunity, we look to the “general principles of tort immunities and defenses applicable at common law and the reasons we have afforded protection from suit under § 1983” (quoting in part from *Imbler*, 1976). These factors support a ruling that **a private individual retained by government in a part-time or temporary role to carry out government work is entitled to qualified immunity to the same extent as a government official.** In fact, in 1871 (when § 1893 was first enacted) many government officials acted on a part-time basis (*e.g.*, prosecutors, customs collectors, judges, even the Attorney General of the United States) and were clearly granted immunity at common law for their government work. Thus, for example, sheriffs often enlisted private individuals as deputies as needed, and all members of such a “posse comitatus” received immunity.

No policies under § 1983 require a different role. The fiscal reality is that government needs to be able to attract, part-time or temporarily, “talented individuals” with “specialized knowledge or expertise.” Such private actors should not be left “holding the bag” when government officials they work with (like the Fire Department Chief here) are immune. And suing private individuals will often affect the time and resources of the government officials, who will have to be deposed, testify, and the like. Two precedents (*Wyatt* and *Richardson*) are easily distinguishable. In *Wyatt* (1992) private individuals who used available government process (replevin) for their own private ends were not immune. And in *Richardson* (1997), guards in privately- run for-profit prisons were not immune. “Nothing of the sort is involved here.” “A straightforward application” of the foregoing rules requires that Filarsky and similar part-time or temporary government workers receive immunity to the same extent that a government official would.

Ginsburg, concurring: The substantive portion of the Ninth Circuit’s analysis leaves many questions unsettled, and “the Circuit’s law will remain muddled absent the Court of Appeals’ focused attention to the questions” on remand. [In other words, revisit the merits and clean up your law on remand, don’t leave it confused as the panel’s initial Fourth Amendment analysis does.]

Sotomayor concurring: Immunity cases “should be decided as they arise,” and “not ... every private individual who works for the government in some capacity necessarily may claim qualified immunity.” At the same time, “close coordination” with full-time government officials is not always necessary for immunity; for example, “special prosecutors and comparable individuals hired for their independence” would seem also to deserve qualified [at least?] immunity.

C. Statutory Right to Counsel:

Martel (Warden) v. Clair, No. 10-1265 (March 5, 2012), 9-0 (**Kagan**), reversing 403 Fed. Appx. 276 (9th Cir. 2010).

Unsurprisingly for a 28 year-old capital case, the facts are a bit involved. Clair was convicted for the 1984 murder of a neighbor. “No forensic evidence linked Clair to the crime” and he was convicted mainly on the testimony of his ex-girlfriend, including a surreptitiously-recorded conversation with her. He received the death penalty, which was affirmed through the California Supreme Court. On federal habeas, Clair was appointed counsel as entitled under the federal statute, 18 U.S.C. § 3599. The district court handled the habeas litigation for over 10 years. In 2005, the DJ told the parties that briefing was “complete” and he “did not wish to receive any additional material.”

Soon after that, Clair asked for new (substitute) counsel, claiming that his lawyers were not seeking to “prove his innocence.” Indeed, Clair claimed to have hired private investigators who had uncovered important and potentially exculpatory evidence, but his current lawyers weren’t pursuing it. Clair’s lawyers initially said they had worked it out, but then Clair asked again to proceed *pro se*. The State, while saying that an “interests of justice” standard applied, said it wasn’t met because of the delay a substitution could cause. Two weeks after Clair’s final request for substitution of counsel, the DJ denied it and, on the same day, issued an opinion denying habeas on the merits.

The Ninth Circuit allowed a substitution of counsel for Clair’s appeal, after the then-lawyers admitted to a “broken down” relationship with Clair. The State did not object. Clair’s new counsel then moved in the district court under Fed.R.Civ.P. 60(b) for vacation of the denial of habeas, so that he could pursue the significance of the new evidence. The district court denied that motion, Clair appealed, and his appeals were consolidated. The Ninth Circuit then reversed, finding it an “abuse of discretion” not to inquire into Clair’s complaints about his counsel ignoring exculpatory evidence. The panel vacated denial of Clair’s habeas, saying that the appropriate “remedy” was to vacate and allow Clair’s new lawyer to file whatever pleadings he might have filed had he been substituted in before the DJ’s habeas ruling on the merits.

Kagan: First, the “interests of justice” standard, applied by a number of Circuits, is the correct one. Prior to 1988 when Congress divided the federal appointment of counsel statutes into capital and non-capital cases, an “interests of justice” standard clearly applied to all federal substitution of counsel motions. Although there is a “statutory hole” on this question in the 1988 capital appointment-of-counsel statute, we think it is best filled by applying the same “interests of justice” standard as before. Congress clearly intended to “improve the quality of lawyering in capital litigation” by the 1988 statutory changes, and it would be odd to say that a more difficult standard for prisoners was implicitly imposed on this one issue. There is a “dearth of authority” for the more

restrictive standard (now) proposed by the State. Meanwhile, Sixth Amendment standards simply don't apply when Congress legislates more expansively. "Inventiveness is often an admirable quality," but "we prefer to copy something familiar than concoct something novel."

The Court is quick to add, however, that the "interests of justice" include "protecting against abusive delay." Thus, although the Circuit got the standard right, we do not think the district court abused its discretion in denying the substitution of counsel motion here, even if it probably should have made some inquiry into the "new evidence" allegations. Our ruling is "fact-specific" -- "we doubt that any attempt to provide a general definition of the [interests of justice] standard would prove helpful." "As all Circuits agree, **courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer.**" However, in this unique case, with the district court (after 10 years of litigation) just "putting the finishing touches on its denial" of habeas, new counsel "could do nothing more" and it "no longer mattered." [Ed. Note: Might it also be relevant that two of the three CA9 judges nolo reversed were Pregerson and Reinhardt?] This is especially true where the new evidence allegations "did not relate to any of the claims" in Clair's long-pending habeas petition. Here, even with new counsel, a motion to amend at this late date would have been "a futile motion." [Ed. Note: "Futile" seems like a bit of a reach, as the Court bases that conclusion on the idea that the district court "could have properly denied" such a motion, not that it necessarily would have.]

In a final footnote (n. 4), the Court states that even if denial of substitution had been an abuse of discretion, the court of appeals "ordered the wrong remedy." The proper remedy would be to remand for the district court "to decide whether substitution was appropriate." [Ed. Note: What? Wasn't that what the district court already decided, that it was not?] Thus (final sentence in the opinion), the Circuit "had no basis for vacating the denial of Clair's habeas petition." [Ed. Note-**within-a-Note**: this seems to create a bit of vagueness for the Ninth Circuit panel on remand "for further proceedings consistent with this opinion." Now that denial of substitution of counsel has been affirmed, may the Circuit go on to examine the merits of Clair's habeas appeal? It would seem that the "no basis" *dictum* here really means just "no basis due to denial of substitution." The Court does not appear to be foreclosing any further examination of Clair's habeas appeal merits. Although the opinion is less than crystal on the point.]

[**Final Ed. Note**: this opinion is full of Justice Kagan's different-sounding, somewhat colloquial, writing style. For example: "here lies the rub;" "A trip back in time begins to show why;" "in those days" (referring to 1988); "still worse;" and others. Also, aside from the refreshingly different phraseology, it is a bit surprising that all the Justices joined in this rather harsh rejection of the State's less-prisoner-friendly alternative standard. Perhaps the more pro-government Justices felt they were gaining more than they lost in joining a "capital defendant loses" opinion written by one of the perceivedly-more-liberal Justices....]

D. Sex Offender Registration & Notification (SONRA)

Reynolds v. United States, No. 10-6549 (January 23, 2012), 7-2 (**Breyer**; Scalia dissenting), reversing 380 Fed. Appx. 125 (3rd Cir. 2010).

On July 27, 2006, Congress enacted SORNA, which requires that all state and federal sex offenders register with local authorities within 3 business days of moving to a new jurisdiction. The Act expressly gave the Attorney General "authority to specify the applicability" of the Act to pre-Act offenders. On February 28, 2007, the Attorney General issued an Interim Rule which applied the Act to all offenders convicted "prior to the enactment of the Act." The Circuits have split regarding whether the Act's registration requirements apply to pre-Act offenders between the July 2006 date of the Act itself, and the February 2007 date of the Attorney General's rule issuance.

Billie Joe Reynolds was convicted of a sex offense in October 2001, and he registered as sex offender in Missouri in 2005. In September 2007 (after enactment of SONRA), Reynolds moved to Pennsylvania but did not register as a sex offender there. He was federally indicted for violating SONRA, and moved to dismiss the charge, arguing that Act's registration requirement was not yet applicable to him because the Interim Rule was unconstitutional. The District Court denied his motion but on appeal, the Third Circuit ruled that the Interim Rule was irrelevant because SONRA applies to pre-Act offenders regardless of any Interim Rule.

Breyer (for 7): “A natural reading of [SONRA’s] textual language” supports the conclusion that SONRA applies to pre-Act offenders only after the “Attorney General validly specifies that the Act’s registration provisions apply to them.” In particular, the language “the Attorney General shall have authority to specify applicability” suggests that **the Act does not apply unless the Attorney General “so specifies.”** This reading also “efficiently resolves” any problems Congress may have foreseen regarding the complexities of “mak[ing] more uniform a patchwork of pre-existing state [registration] systems.” Furthermore, our reading clarifies the “lacunae” of the law for pre-Act offenders, helping to “diminish or eliminate . . . uncertainties” regarding whether the law applies to them; if the Attorney General *has* to proclaim applicability, then that sufficient clears up any ambiguity. [**Ed note:** this seems far-fetched – surely Congress intended, by its plain language that SONRA would apply to pre-Act offenders]

The Government puts forth three arguments: our reading (1) “conflicts” with the Act’s goal of registering *all* sex offenders, (2) “leads to an absurd result,” and (3) misreads “authority.” First, nothing in our reading prevents the statute’s applicability to all sex offenders; it merely “involves implementation delay.” Second, there is nothing absurd in requiring “the Attorney General to promulgate a rule applicable to all pre-implementation offenders.” Finally, the Government’s reading of the term “authority” to confer on the Attorney General “the power *not* to specify anything” and thus, apply all requirements on pre-Act offenders, “bases too much on too little.”

Scalia dissenting, joined by Ginsburg: SONRA plainly applies to all offenders “without action by the Attorney General,” and the Court’s ruling permits unwarranted implementation delay and a windfall to some offenders. The provision at issue “is best understood” as giving the Attorney General the authority “to make exceptions” regarding applicability. I do not believe that “‘specify the applicability’ more naturally means . . . ‘to make applicable’ rather than to ‘make inapplicable.’” In this context, a better reading of the language is that “the Attorney General may excuse the unqualified requirement for pre-Act offenders.” The statute obviously sought to achieve registration of all offenders, so it “is implausible” to “leav[e] it up to the Attorney General whether the requirement would *ever* apply to pre-Act offenders.” The Court’s reading “sails close to the wind” of unconstitutionality in suggesting that Congress can ever constitutionally give the Attorney General discretion to apply a general criminal statute only to certain individuals. The majority’s “extraordinary interpretation” is unjustified.

E. Torture Victim Protection Act

Mohammad v. Palestinian Authority, No. 11-88 (April 18, 2012), 9 [8-1] to 0 (**Sotomayor**; *Breyer* concurring), affirming 634 F.3d 604 (D.C.Cir. 2011).

The plaintiffs filed a federal lawsuit against the Palestinian Authority and the Palestine Liberation Organization, alleging that their relative had been a victim of defendants’ torture and “extrajudicial killing.” The Torture Victim Protection Act of 1991 allows lawsuits against “an

individual” for such foreign acts. The district court and Circuit dismissed the lawsuit, finding the statute applicable only against “natural persons.”

Sotomayor (for 9): “Individual” in the state means “natural persons” and does not authorize suits against foreign states or organizations. Simple “ordinary meaning,” and there is no indication that Congress intended otherwise. While “person” might include “non-natural persons,” “individual” does not. [As usual, Justice Scalia does not join the part of Sotomayor’s opinion that discusses legislative history.] Whether or not it might make sense to authorize such lawsuits against organizations, Congress has not done that here.

Breyer concurring: I think “individual” is “linguistically” broad enough to include “other entities.” But the legislative history here makes clear that it does not in this statute.

HABEAS CASES

Greene v. Fisher, No. 10-637 (Nov. 8, 2011), 9-0, (**Scalia**), affirming 606 F.3d 85 (3d Cir. 2010).

Eric Greene was charged in a grocery store robbery perpetrated by five men. Some statements by co-conspirators implicated Greene by name, so he sought a severance. But the Philadelphia trial court denied severance, ruling instead that redaction of the incriminating statements would avoid the *Bruton* (1968) problem. The statements were admitted against Greene, after being redacted to eliminate identifying names by, in some cases, merely inserting the word “blank” or a blank space. Greene was convicted. On appeal the state court ruled that the redactions satisfied *Bruton* in light of Pennsylvania precedent, which was a not-unreasonable application of the caselaw at the time of that adjudication. However, while Greene’s petition for review by the Pennsylvania Supreme Court (“PaSCt”) was pending, the U.S. Supreme Court issued its decision in *Gray v. Maryland* (1998). *Gray* held that redactions consisting merely of blanks or symbols do not cure a *Bruton* problem. Perhaps unsurprisingly, the PaSCt then granted Greene’s petition for review on that question. However, after the parties filed merits briefs in which the state argued waiver and invited error, the PaSCt dismissed its review as “improvidently granted,” thus never issuing an opinion on the merits. Greene (whose counsel had then withdrawn) did not file a petition for *certiorari* with the U.S. Supreme Court, nor did he return to the Pennsylvania state courts with a collateral review petition. Instead, he filed a federal habeas corpus petition. Thus the last state-court “merits adjudication” of Greene’s *Bruton* claim occurred at the intermediate appellate level in Pennsylvania, prior to the issuance of *Gray*. The district court denied Greene’s petition and the Third circuit affirmed, 2-1.

Scalia (9-0): In the first merits opinion of the Term, and an unusually short seven-page unanimous opinion, the Court ruled that **28 U.S.C. § 2254(d)(1), as amended in 1996 by AEDPA, bars federal habeas consideration of a new Supreme Court decision, if issued after the last merits adjudication of a prisoner’s claim in state court**, even though the new decision comes out before the prisoner’s conviction is “final” by denial or time-barring of *certiorari*. This result is dictated by both “text and precedent.” Section 2254(d)(1) directs that a federal court may not grant habeas relief “with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law...” (emphases added). Applying this statutory provision, the lower federal courts ruled that the only “clearly established law” that can be considered by a federal habeas court is the law that is in place at the time of the last state court adjudication on the merits. Because the last state court adjudication of the merits of Greene’s claim

was prior to the issuance of *Gray*, *Gray* could not be considered; and under *Bruton* alone, the state court's adjudication of Greene's redaction claim was not "contrary to" or "unreasonable."

First, the text of 2254(d)(1) is clear: the second "adjudication" in the statute refers back to the first "adjudication on the merits," and the "decision" in the unless-clause "obviously refers back to the decision produced *by that same adjudication on the merits*" (italics in the original; underlining added). [Ed. Note: This reading did not seem "obvious" to Greene or to the dissenting Third Circuit judge. They argued that the "decision" to be reviewed under 2254(d) is the ultimate disposition that "results" from whatever state merits adjudication is done. In other words, they argued that if a U.S. Supreme Court decision came out after the intermediate adjudication, but before the final state "decision" produced by the earlier merits adjudication, then the new decision could be applied to the federal habeas petitioner's case, as retroactivity rules would in fact require. But Justice Scalia, for the Court, dismissed this reading in one sentence as "implausible."]

Second, the Court ruled last Term in *Cullen v. Pinholster* (2011) that with regard to the factual record on federal habeas, the state court's decision must be measured against the record "as of 'the time the state court renders its decision.'" Despite a potential distinction that might be made between evidentiary determinations of fact versus applicable law – a difference argued by Greene and noted at oral argument of the case, but not mentioned in today's opinion – the Court found *Cullen* dispositive: "The reasoning of *Cullen* determines the result here."

Third, Greene had argued that the court's reading of 2254(d)(1) would conflict with the *Griffin-Teague* rule of retroactivity, which say that new decisions of the Supreme Court apply to all cases that are not yet final on appeal, and "final" means either that a petition for *certiorari* to the U.S. Supreme Court has been denied, or the time to file for *certiorari* has expired. Under that rule, *Gray* would have applied to Greene's case. But under today's reading of 2254(d)(1), it does not. No matter, says the court here. It has previously noted that "the AEDPA and *Teague* inquiries are distinct;" "AEDPA did not codify *Teague*," and "we see no reason why *Teague* should alter AEDPA's plain meaning." [Ed. Note: it is worth noting that just because *Gray* might apply to Greene's case, that does not mean he would have gotten relief under it. The state offered strong arguments that Greene had actually waived the claim or even invited the redactions he got, which might well explain why the PaSCt ultimately dismissed its review without commenting on the merits. But the fact that the claim might be waived should be distinct from the question whether it can be considered at all.]

At this point the Court dropped its only footnote, n.* [Ed. Speculation: a footnote added at the behest of one of the non-dissenting Justices? In exchange for unanimity?]. *Teague* recognized two "exceptions" to its rule of finality-retroactivity, both premised on particularly strong equitable claims of injustice – such decisions can be applied even to cases that are "final." In footnote *, the Court noted that it "need not address" whether a *Teague*-exception precedent might be applied on federal habeas, even if issued "after the last state-court adjudication on the merits," presumably because Greene's case does not involve a *Teague*-exception decision. [Ed. Note: How or why the Court might find a different "plain reading" of the 2254(d)(1) statute in such a circumstance, was not further discussed. Although such cases will undoubtedly be rare, the theory that might underlie a different answer is murky at best.]

[An intermixed and overlong Ed. Note: Given that just a few months ago, the Court's decision in *Cullen* generated a lengthy and vigorous dissent from Justices Sotomayor, Ginsburg and Kagan, as well as a partial dissent from Justice Breyer, one might wonder why the Court's opinion today, finding *Cullen* dispositive, did not garner even a single dissenting vote. Indeed, the Court's opinion exhibits an unusual impatience as well as brevity with the petitioner's arguments. The explanation for this may be found in the opinion's final paragraph:] "We must observe that Greene's predicament is an unusual one of his own creation," for two reasons. First, Greene did not seek *certiorari* [possibly understandable in light of his having no lawyer at the time], and the Court today

says that if Greene had filed for *cert*, the Court “would almost certainly have” ordered a GVR (“grant, vacate, and remand”) for his judgment to be reconsidered in light of *Gray*. Second, Greene never went back to state court in an available state post-conviction proceeding, to ask that Pennsylvania apply *Gray*. “Having foregone two obvious means of asserting his claim,” “we decline” to “interpret AEDPA in a manner contrary to both its text and our precedents.” [Ed. Note: However, while these foregone opportunities may make the result for Greene “feel” more equitable, there is no suggestion that the Court would actually have read the statute differently had Greene done both these things and still been denied *Gray*’s application – nor would there appear to be a principled reason for so reading it, if its meaning is “plain.” The same difficulty exists as with regard to footnote * -- how can a statute’s “plain reading” change based simply on the equities of an individual case? All we can say about this now is, as Pogo liked to say, “the future lies ahead of us.” Presumably a habeas case stronger on the equities will arise in the future, unless the Court attends to its GVR reviews quite carefully.]

Gonzalez v. Thaler, No. 10-895 (Jan. 10, 2012), 8-1 (**Sotomayor**; Scalia dissenting), affirming 623 F.3d 222 (5th Cir. 2010).

Gonzalez was convicted of murder in Texas state court, and has a typically byzantine procedural history leading to this decision regarding procedural federal habeas corpus limits under the 1996 AEDPA amendments. First, the required Certificate of Appealability here failed to “indicate which specific issue” in Gonzalez’s petition satisfied the “substantial showing of the denial of a constitutional right,” under 28 U.S.C. 2253(c)(3) – the question is, is that a “jurisdictional” requirement?

Second, AEDPA imposes a one-year limit on the filing of a federal petition, running from “the date on which the [state] judgment becomes final by conclusion of direct review or the expiration of the time for seeking such review. Here, Gonzalez filed within a year from the date on which the Texas State Court of Appeals issued its mandate, but outside a year after the time in which he could have sought that court’s review expired (he did not in fact seek such review). The second question is, from when does the one-year limit begin to run? The Circuit ruled that Gonzalez’s petition was prohibited under the one-year limit.

Sotomayor (for 8): First, the requirement that a federal habeas COA “indicate” the specific constitutional issue, is “nonjurisdictional” under our recent “stricter” application of that term. WE apply a “clear statement” rule: if Congress did not “clearly state” that a requirement bars subject-matter jurisdiction, then we assume it does not. While the issuance of a COA is clearly jurisdictional, the fact that it may be “defective” is not. Here the Circuit considered Gonzalez’s petition under the COA it issued, and the state did not raise the “indicate” objection until *certiorari*. A further remand would simply increase delay, which AEDPA is clearly against. While the court of appeals must consider a timely objection on this basis, an untimely objection cannot raise it as a jurisdictional bar.

Second, however, the one-year AEDPA limit clearly runs from “the expiration of the time” in which the petitioner could have sought highest state court review. This rule is consistent with our precedents (*Clay*, 2003, and *Jimenez*, 2009). WE will not adopt various state rules for “finality” (in Texas, issuance of a mandate). There is no “textual anchor” for this reading, and a uniform federal rule, for federal petitions, is in line with what Congress intended as well as easier and more fair to administer.

Scalia dissenting: The Court’s reading of the “indicate” provision “makes a hash out of the statute. First, the text clearly shows Congress’s intention to bar federal petitions where the COA does

not “indicate” a specific, substantial, constitutional issue. Second, many similar precedents [discussed by Justice Scalia but not here] point to the COA requirements as being jurisdictional. Indeed, we have held (Torres, 1988) that a notice of appeal is jurisdictionally defective if it does not contain required elements. “The parallel is perfect.” The Court’s “mounting disfavor” of jurisdictional rules, transforming them into “claims processing rules,” “exposes us to ridicule.” “WE are obliged to enforce” Congress’s commands, even if harsh. (And (n. 9) “I confess error” in joining a portion of *Kontrick* (2004) that helped move us down this misguided path.)

Maples v. Thomas, No. 10-63 (Jan. 18, 2012), 7 [6-1] to 2 (**Ginsburg**; *Alito* concurring; Scalia dissenting), reversing 586 F.3d 879 (11th Cir. 2009).

Maples was convicted of murder and sentenced to death in Alabama. He filed for post-conviction relief in state court, represented by two lawyers at a large New York law firm *pro bono*. While the petition was pending, the two lawyers both left the law firm and took new jobs in which they could no longer represent Maples. But they did not inform Maples nor did they inform the Alabama court, nor did they find anyone else to substitute in to represent Maples.

When the Alabama trial court denied Maples’ petition, it mailed the notice to the New York law firm. When the notices were returned to the Alabama court unopened (and marked “return to sender, attempted, unknown”), no further mailing or contact was attempted by the court. Maples’ time for appeal thus ran out. His federal habeas petition was then dismissed because of his procedural default in state court, citing *Coleman v. Thompson* (1991) for the proposition that ineffective assistance of postconviction counsel cannot qualify as “cause” for excusing the default. “The sole question this Court has taken up for review is whether, on the extraordinary facts of Maples’s case, there is ‘cause’ to excuse the default.”

Ginsburg (for 7): [Justice Ginsburg begins her opinion with an unusually strong and general indictment of Alabama’s system for capital representation when Maples was charged]: \$20 per hour for out-of-court work capped at \$1,000 (50 hours, when one average might be over 1,400 hours), \$40/hour for in-court work; “low eligibility requirements” for appointed capital counsel; and no guaranteed representation for postconviction proceedings in capital cases, “nearly alone among the States.” [Alabama has improved its system since 1999.] Maples’ jury voted 10-2 to sentence him to death. Based on other facts, his post-conviction claim of ineffective assistance of trial counsel was not frivolous.

An “independent and adequate” state procedural ground for denying postconviction claims blocks federal habeas review unless there is “cause” for the default and “prejudice” therefrom. *Wainwright* (1977). “Cause” must be something “external to the petitioner,” and *Coleman* did indeed hold that negligence of postconviction counsel cannot constitute cause because the attorney is the defendant’s agent. “We do not disturb that general rule.” However, here the defendant was “abandoned” by his counsel, without any notice to Maples. The attorney who abandons his client without notice “sever[s] the principal-agent relationship.” Justice Alito’s concurring opinion in *Holland v. Florida* (2010) made this point clear.

We reject the argument that the firm of Sullivan & Cromwell continued to represent Maples. The record on this is “murky” but it is clear that no other lawyers were admitted to practice in Alabama and they had “no authority to act” for Maples. Similarly, the record is clear that “local counsel” flatly did not represent Maples “in any meaningful sense” (regardless of his formal obligations under Alabama rules). Neither did Maples have any idea that he was unrepresented. He was “disarmed by extraordinary circumstances quite beyond his control.” Reversed and remanded for

CA11 to consider “prejudice” [Ed. Note: although the majority’s opinion would seem to leave little doubt on that score.]

Alito, concurring: “Under these unique circumstances,” Maples’ attorneys effectively abandoned him and that should constitute “cause.” But I don’t “think that Alabama’s [capital representation] system had much if anything to do with petitioner’s misfortune.”

Scalia dissenting (with Thomas): Federal review of state court judgments where there has been a procedural default exacts “significant costs.” When there is no right to appointed counsel – as there is not in habeas – “the client bears the risk of all attorney errors ..., regardless of the egregiousness of the mistake.” But I agree that “abandonment” is more than error – it severs the agency relationship. And there was indeed abandonment here, by the first two lawyers. However, both local counsel and other Sullivan & Cromwell lawyers continued to represent Maples. So on this record, I would affirm. “Today’s holding will serve as a template for future habeas petitioners seeking to evade” *Coleman* and our cause and prejudice doctrine.

I also reject Maples’ alternative argument (not reached by the majority) that he was denied due process when the Alabama court clerk did nothing upon return of the notice unopened. “Indeed I think it doubtful whether due process entitles a litigant to *any* notice of a court’s order in a pending case” [Ed. Note: !!!], although “there is no need to grapple with this question” here.

The Court’s “lengthy indictment” of Alabama’s system must grow out of frustration with the perceived unfairness of Alabama not granting its own relief here – it “is so disconnected from the rest of its analysis as to be otherwise inexplicable.” But fairness cannot permit “evisceration of the principle that defendants are responsible for the mistakes of their attorneys.”

Martinez v. Ryan, No. 10-1001 (March 20, 2012), 7-2 (**Kennedy**; Scalia dissenting), reversing 623 F.3d 731 (9th Cir. 2010).

Arizona law does not permit a defendant to raise a claim of ineffective assistance in a direct appeal; rather the defendant must present it in a postconviction collateral proceeding. Martinez was convicted of sexual abuse, and his lawyer did not raise ineffective assistance in the direct appeal, as she could not. But then, Martinez’s lawyer in his collateral attack proceeding also failed to present an ineffectiveness claim. On federal habeas, Martinez argued that his lawyer’s ineffectiveness in the postconviction proceeding should excuse his failure to timely present the claim in state court. The federal courts, relying on *Coleman* (1991), rejected this claim, as Martinez had no right to counsel in his postconviction proceeding.

Kennedy (for 7): *Coleman* actually left open the question we now answer: does a defendant have a right to effective counsel in a collateral proceeding “which provides the first occasion to raise a claim of ineffective assistance at trial”? We now answer “yes” but to a slightly more limited question: does it at least provide “cause” for excusing a procedural default on habeas. When a collateral proceeding is the first opportunity to raise an issue, it is “in many ways the equivalent of a prisoner’s direct appeal” as to that claim, where he normally would have a right to effective counsel under *Douglas* (1959). We can conclude this is “cause,” which is “an exercise of the Court’s discretion “reflect[ing] an equitable judgment.” (“The prisoner must also demonstrate that the underlying ineffective-assistance ... claim is a substantial one” *i.e.*, that is “has some merit” – we remand on this question.) We stress that our ruling today is “equitable” and not a constitutional ruling, so that it “permits States a variety of” responses.

Scalia dissenting (with Thomas): “Let me get this straight,” Justice Scalia begins. This is an equitable ruling, not a constitutional one? That distinction is “a sham.” And the Court’s “soothing assertions” of limitation “insults the reader’s intelligence.” This will soon be expanded from claims of ineffective assistance to other claims that can usually be presented only in a collateral attack, such as prosecutorial misconduct and newly-discovered evidence. And “ineffective assistance of trial counsel is a monotonously standard claim on federal habeas (has a duly convicted defendant ever been effectively represented?).” Moreover, “the Court does not explain where [its] substantiality standard comes from.” This will not only “squander state taxpayers’ money,” but also provide an “escape hatch” for all capital defendants, “effectively reduce the sentence and give the defendant as many more years to live, beyond the lives of innocent victims whose life he has snuffed out, as the process of federal habeas may consume.” This “repudiates” longstanding principles of procedural default. A constitutional ruling would be more honest: “equity is not lawlessness, and discretion is not license to cast aside established jurisprudence.” However, the constitutional rule Martinez seeks is “quite clearly foreclosed by our precedents,” which is why the Court avoids it. Today’s “decision is a radical alteration of our habeas jurisprudence that will impose considerable economic costs.” “The Court creates a monstrosity.”

Wood v. Milyard, No. 10-9995, 132 S. Ct. 1826 (April 24, 2012), 9 [7-2] to 0 (**Ginsburg**; *Thomas* concurring in the judgment), reversing 403 Fed. Appx. 335 (10th Cir. 2010).

Wood was convicted of murder, robbery, and menacing for the shooting and killing of an assistant pizza shop manager in 1986. In 1989, the Colorado Court of Appeals affirmed his conviction and sentence of life imprisonment, and the Colorado Supreme Court denied further review. In 1995, proceeding *pro se*, Wood filed a motion in state court to vacate his conviction, but the record is unclear regarding any further action on that 1995 state motion. In 2004, Wood filed another *pro se* motion for postconviction relief in state court, which the state court denied four days after receiving it. In 2008, Wood finally filed a federal habeas petition, well after the one-year limitations period established by AEDPA. The district court initially dismissed his petition as untimely but then asked the state to address the issue; in response, the State twice noted that it “w[ould] not challenge, but [is] not conceding, the timeliness of Wood’s [federal] habeas petition.” The state explained that this decision was based on the murky state of the record regarding the 1995 motion. The district court eventually dismissed the petition on the merits. On appeal, the Tenth Circuit raised the timeliness issue on its own motion and affirmed dismissal solely on the ground of untimeliness.

Ginsburg (7): *Granberry* (1987) and *Day* (2006) both support the proposition that federal appellate courts have “the discretion to address, *sua sponte*, the timeliness of a habeas appeal, but that that discretionary authority should be used only in “exceptional cases.” Accordingly, “we decline to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense.” However, this case presents a situation where the Tenth Circuit abused its discretion. “A court is not at liberty . . . to bypass, override or excuse a State’s deliberate waiver of a limitations defense,” because “the principle of party presentation [is] basic to our adversary system.” When a district court has ruled on the merits at the State’s invitation, but a court of appeals rules on timeliness *sua sponte*, “the district court’s labor is discounted and the appellate court acts not as a court of review but as one of first view.” The State in this case clearly stated it would not challenge Wood’s petition for untimeliness; that represents a “strategic . . . choice.” Thus the State knowingly and intentionally *waived*—as opposed to forfeited—the timeliness argument, and the Tenth Circuit should not have “resurrected” the issue on its own accord. The distinction between forfeited and waived is “key to our

decision.” Normally “an affirmative defense, once forfeited, is excluded from the case” (quoting *Wright & Miller* treatise). So it is here.

Thomas concurring with Scalia: I believe that “the *Day* Court was wrong to hold that district courts may raise *sua sponte* forfeited statute of limitations defenses in habeas cases,” and I would not extend that holding here. I also believe that *Granberry’s* distinction between waived and forfeited defenses is not principled. Thus I cannot join either of the Court’s holdings. But because I agree that the Court of Appeals should not have considered the timeliness ground, I concur in the judgment.

IMMIGRATION LAW

Judulang v. Holder (Attorney General), No. 10-694 (Dec. 12, 2011) **9 to 0, (Kagan)**, reversing 249 Fed. Appx. 499 (9th Cir. 2007, unpub.).

Judulang (“J”) was born in the Philippines and entered the U.S. in 1974 when he was 8. In 1988 (when he was 22), he “took part in a fight in which another person shot and killed someone,” and pled guilty to voluntary manslaughter, receiving a six-year suspended sentence.

In 2005 (age 39), J pled guilty to a criminal theft offense, and the Department of Homeland Security (DHS) moved to deport him, claiming that his prior conviction was an “aggravated felony” involving a “crime of violence.” Although there is statutorily no “discretionary relief” from such deportation grounds, the BIA (Bureau of Immigration Appeals) has for many years applied a “comparable grounds” approach to allowing discretionary relief in some deportation proceedings. If the deportation offense is “comparable” to statutory grounds that allow discretionary relief in an “exclusion” case, then BIA will allow the petitioner to apply for discretionary relief in his deportation proceeding. Here, however, the BIA concluded that there was no “comparable ground” in the exclusion statute to the “crime or violence” deportation ground. This was despite the exclusion ground of “crime of moral turpitude” – the BIA has previously rejected the argument that that broad exclusion category is “comparable” to [most of] the more specific grounds in the deportation statute. So J was not permitted to argue for discretionary relief (available to persons who have been in the U.S. for seven or more years and whose conviction was before 1996). He was ordered deported, and the Ninth Circuit affirmed based on a prior decision upholding the “comparable grounds” approach.

Kagan (for 9): The BIA’s “comparable grounds” policy, for determining when a deportable alien may seek discretionary relief, is “arbitrary and capricious” because it is “unmoored from the purposes and concerns of the immigration laws.” This is a surprisingly unanimous rejection of the government’s position (and of Justice Kagan’s previous SG office’s arguments) – and an unusual “win” for an alien.] Although the BIA must be given deference due to its expertise and experience, “[t]he BIA has flunked” the “reasoned explanation” test that we apply to review agency actions. (Thus the Court need not decide a constitutional equal protection challenge raised here.) “Agency action must be based on non-arbitrary, relevant factors.” Here, the comparable grounds policy “neither focuses on nor relates to an alien’s fitness to remain in the country.” That is, even if the exclusion and deportation grounds do (or do not) match up, “so what...?,” Justice Kagan asks in a refreshingly colloquial twist. Such matching up “has nothing to do with” whether a deportable alien “merits a waiver.” The BIA policy instead produces “head-scratching oddit[ies]” [which I am not going to detail here]. Results can also “rest on the happenstance of an immigration official’s charging decision,” another non-relevant factor. [Ed. Note: I wonder if this discussion of the arbitrariness of charging decisions can have implications for other statutes, including criminal statutes, that might turn on the “happenstance” of a prior prosecutor’s charging decision?] We have

long recognized the “high stakes for an alien who has long resided in this country.” *Delgadillo*, (1947). As “Judge Learned Hand wrote in another early immigration case, deportation decisions cannot be made a ‘sport of chance’” *Di Pasquale*, (CA2 1947). That is what the comparable grounds policy does, and that is what the arbitrary and capricious standard “is designed to thwart.”

The Court goes on to reject arguments of the government based on “text, ...history, ... [and] cost.” Even though the existence of discretionary relief in the deportation context is itself non-textual, the policy applying this longstanding doctrine must not be arbitrary and capricious. And even if the policy is easy (and thereby less expensive) to administer, **“cheapness alone cannot save an arbitrary agency policy.”** “The BIA’s comparable grounds rule is **unmoored from the purposes and concerns of the immigration laws,**” and thus “cannot pass muster under ordinary principles of administrative law.”

Kawashima v. Holder (Attorney General), No. 10-577 (Feb. 21, 2012), 6-3 (**Thomas**; Ginsburg dissenting), affirming 615 F.3d 1043 (9th Cir. 2010).

Husband and wife petitioners became lawful permanent residents of the US in 1984. In 1997 they pled guilty under 26 U.S.C. § 7206 to filing a false tax return (husband), and aiding the preparation of a false return (wife). Because the loss to the government was allegedly over \$10,000, the INS sought deportation for conviction of an “aggravated felony” under 8 U.S.C. § 1227(a)(2)(A)(iii). Subparagraph M of 8 U.S.C. § 1101(a)(43) lists as one type of aggravated felony an offense that either “(i) involves fraud or deceit in which the loss to the victim ... exceeds \$10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion in which the revenue loss to the Government exceeds \$10,000.” The INS proceeded under clause (i), and the Ninth Circuit affirmed the order of deportation. The Kawashimas argue that, at best, only clause (ii) should apply -- and that either clause (i) does not apply to tax offenses at all, or if it does, a false tax return conviction does not necessarily involve “fraud or deceit.”

Thomas (for 6): Filing a false tax return is an “aggravated felony” permitting the government to seek removal of alien. First, a § 7206 false statement conviction certainly involves “fraud or deceit,” and an express use of those words is not required for the offense to “involve” it, which is all the statute requires. Second, the fact that clause (ii) refers to a different tax offense (evasion) does not mean that Congress did not intend to include false returns in the more general clause (i). We think the language of clause (i) plainly includes the Kawashimas’ offenses, so that no “lenity” principle need be applied. And we reject any argument that the Sentencing Guidelines’ separate treatment of tax crimes has any bearing on the meaning of this statute. [**Ed. Note:** Frankly, the Court’s conclusions here would seem relatively straightforward, were it not for the fact that three Justices dissent. Perhaps this indicates the power that a perception of relatively draconian deportation policies can have on statutory interpretation in the immigration context.]

Ginsburg dissenting, with Breyer and Kagan [**Ed Note:** not Sotomayor; and Note that Justice Ginsburg’s late husband was a prominent tax attorney -- and her vigorous and knowledgeable dissent here may be informed by that background]: If clause (i) includes tax offenses, then there is no reason to have clause (ii) – but we generally won’t read a statute to render some portion of it “superfluous.” This is the interpretive principle of “superfluity.” The government’s suggestion of a hypothetical tax evasion offense that would not involve “fraud or deceit” is a “fantasy,” and the government concedes that it has no record of such a case actually occurring. The Court’s reliance on a “long-obsolete case” from 1932 -- a “cryptic, thinly-reasoned opinion” (*Scharton*) -- is “hardly credible” as relevant to interpreting this statute. Moreover, the Court’s broad view will sweep into the

“aggravated felony” category even tax misdemeanors, state as well as federal, while far more serious crimes are not ground for deportation. In addition, the Court’s ruling will make it harder to resolve tax prosecutions where deportation is a possibility. Congress could not have intended this, and in light of the plausible ambiguity, I would apply the rule of lenity in petitioners’ favor.

Vartelas v. Holder, No. 10-1211, 132 S. Ct. 1479 (March 28, 2012), 6-3 (**Ginsburg**; Scalia dissenting), reversing 620 F.3d 108 (2nd Cir. 2010).

In 1996 Congress changed a provision of immigration law, and made it unlawful for lawful permanent residents who have certain prior convictions to leave the United States and then reenter (unless they seek and are granted re-admission). In effect, the change in the law “precluded foreign travel by lawful permanent residents” who have “moral turpitude” convictions. Previously such aliens could leave the U.S. for brief foreign trips without jeopardizing their status. Vartelas became a lawful permanent resident in 1989 and in 1994 – before the 1996 change in the law – he pled guilty to felony “conspiracy to make a counterfeit security” and served a four-month sentence. After 1996, Vartelas traveled to Greece a few times to visit his aging parents. But upon his return from one such trip in 2003, he was “treated as an inadmissible alien and placed in removal proceedings.” He was ultimately (after some pretty terrible lawyering errors) ordered to be removed to Greece. The Second Circuit affirmed, ruling that the 1996 law (the “IIRIR Act”) applied “retroactively.” This created a split with the Fourth and Ninth Circuits which had held that IIRIR Act does not apply to pre-Act convictions.

Ginsburg (for 6): Applying our normal presumption that a federal law does not apply retroactively unless Congress unambiguously so states (*Landgraf*, 1994), **the 1996 Act does not apply to those with pre-Act convictions – instead, the “immigration law in effect when he was convicted” governs his removability in this context.** (In *St. Cyr* (2001) we ruled that the IIRIR Act is not retroactive in its entirety.). We have always relied on Justice Story’s 1814 “classic formulation” against retroactivity where, for example, a new law attaches a “new disability” to “past wrongful conduct.” “Loss of the ability to travel abroad is itself a harsh penalty” and should not be retroactively imposed (at least not without a clear statement). And Congress did not expressly state the “temporal reach” of its 1996 law.

We reject the argument that “no retroactive effect” is involved here because the law applies only to prospective conduct, i.e. leaving the US after 1996 and then trying to reenter. “We find this argument disingenuous.” Vartelas’s “past misconduct,” that is, his felony conviction” and “not [his] present travel,” is the wrongful activity Congress targeted” in the 1996 law. Nothing about Vartelas’s brief trips to Greece was unlawful. [**Ed. Note:** Justice Scalia disagrees, noting that leaving the US and then reentering without seeking re-admission was in fact unlawful under the 1996 Act.] And we reject (in n.7) analogies to other statutes; those statutes “address dangers that arise post-enactment” or have a “prospective thrust” [**Note:** Justice Scalia seems correct that this last concept is undefined and less than clear.] Finally, while reliance on prior law is not required to invoke the presumption against retroactivity, Vartelas “likely relied” on the prior law that permitted his brief trips, which “strengthens [his] case.” Vartelas’ case is “at least as clear as” other non-retroactivity precedents, so the pre-1996 law “continues to govern Vartelas’ short-term travel.”

Scalia dissenting, joined by Thomas and Alito: This case does not present a case of retroactivity, so the presumption against retroactivity has no application. “In my view, ... the ‘retroactivity event’ is the moment at which the party does what the statute forbids.” Here, the activity Congress targeted (as a “straightforward question of statutory interpretation”) is leaving the country and then returning. Because Vartelas did that after 1996, the 1996 law making him removable is

properly applied to him. “We should concern ourselves with the statute’s actual operation on regulated parties, not with retroactivity as an abstract concept or as a substitute for fairness concerns.” Vartelas could have “avoided” removal by staying either in the United States, or in Greece once he travelled there. It also is not unfair to apply this statute to Vartelas, who flouted the 1996 law, was a “serious tax evader,” offered “incredible” testimony below, and showed no particular hardship of his removal on others. Also, that Vartelas relied on old law can have no bearing on the question -- “ignorance, of course, is no excuse (*ignorantia legis neminem excusat*); and his return was entirely lawful only if the statute before us did not render it unlawful.” (The Court’s description of Vartelas’s conduct as “innocent” is simply “circular.”) The Court avoids the text of this statute simply because the Court “believes that reentry after a brief trip abroad *should* be lawful.” This case raises a plain-vanilla question of statutory interpretation, not broader questions about “frustrated expectations or fairness,” or constitutional considerations. We simply do not have “a license to rewrite the statute in a way the Court considers more desirable.”

Holder v. Gutierrez, No. 10-1542 (May 21, 2012), 9-0 (**Kagan**), reversing 411 Fed. Appx. 121 (9th Cir. 2011).

It is not an unreasonable decision for the Board of Immigration Appeals to require, in cancellation of removal proceedings, that an alien living in this country as a child must meet length of residency requirements “on his own, without considering a parent’s years of residence.” The Board’s position is not inconsistent with the governing statutes, and *Chevron* (1984) deference requires that we uphold it. The Board *could* adopt a different “imputation” rule, but it is not required to do so.

Arizona v. United States, No. 11-182 (June 25, 2012) 5 to 3 (**Kennedy**; *Alito* concurring and dissenting; *Scalia* dissenting; *Thomas* dissenting), affirming in large part 641 F.3d 339 (9th Cir. 2011).

Holding: **Arizona cannot impose additional state law criminal penalties and warrantless arrest authority regarding federal immigration matters, because its law is preempted by Congress’s decision to “occupy the field;”** but the enjoinder of the state law requirement to “verify” immigration status of arrestees is reversed because premature.

Facts: In 2010, Arizona enacted a law “to address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country.” “The problems posed to the State by illegal immigration must not be underestimated.” Four state law provisions were immediately challenged “on their face” by the U.S. government, and were enjoined by the district court in Arizona (the Ninth Circuit affirmed 2-1):

(1) Section 3 created a state-law misdemeanor for an alien to fail to “complete or carry” a federally- required “alien registration document.”

(2) Section 5(C) created a state law misdemeanor for an alien to “apply for work, solicit work..., or perform work” in Arizona.

(3) Section 6 authorized state officers to warrantlessly arrest persons if the officer has “probable cause to believe that the person has committed” an offense that would make him removable under federal law.

(4) Finally, Section 2(B) required state officers to “make a reasonable attempt ... to determine the immigration status” of any person they detain for some other legitimate reason if the officer has “reasonable suspicion” that the person is “unlawfully present in the U.S.,” and directed that any arrested person’s immigration status be determined “before the person is released.”

The Federal government took the position that federal authority in the immigration area is virtually exclusive and so these provisions were all invalid because preempted. Arizona contended that none of its provisions conflicted with federal immigration law, and in fact they complimented it; and that Congress has not otherwise indicated that States are powerless in this area, which heavily impacts State resources (particularly if the federal government, as Arizona argued, is failing to vigorously enforce federal law in this area).

Kennedy, joined by Roberts, Ginsburg, Breyer, and Sotomayor (Kagan the former SG was recused): **The first three provisions are preempted by “field preemption” doctrine; they also appear to “conflict” with federal immigration law and enforcement efforts.** The fourth provision, however, might be read in ways which might not be preempted (although in application the fourth provisions might pose significant problems), so enjoining it before the state courts have interpreted them was error because premature.

“Both the National and State Governments have elements of sovereignty.” But the Constitution’s Supremacy Clause gives Congress to preempt state law. Congress can do this by express statement or “in at least two other circumstances”: when state laws “conflict” with federal law (known as conflict preemption) and when Congressional “intent to displace state law altogether can be inferred” by pervasive or dominant federal regulation in a particular “field” of law (field preemption). Because federal preemption carries significant “federalism” concerns, the Court has stated a presumption against finding preemption unless Congress’s intent to do so is “clear and manifest.”

Nevertheless, in the field of immigration law, Congress has “broad” and “undoubted” power, under the Constitution’s “establish an uniform Rule of Naturalization” clause (Art. I §8, cl. 4) as well as “its inherent power as sovereign to control and conduct relations with foreign nations. “Congress has specified what aliens may be admitted, which may be removed (formerly, deported), and the procedures for all of this; and “a principal feature of the removal system is broad discretion exercised by [federal] immigration officials.” The Executive Branch of the federal government is entitled to exercise its discretion based on “policy choices” and “the equities of an individual case.” With this background in mind:

(1) Creating a new state misdemeanor for conduct that already violates federal immigration law (not carrying registration documents) “intrudes on the field of alien registration.” We held long ago (*Hines* 1941) that Pennsylvania could not enforce its own alien-registration program. “The Federal Government has occupied the field of alien registration.” So Section 3 is invalid.

(2) Regarding the employment of aliens, Congress has chosen to enact penalties on employers, but not on the aliens themselves (other than possible removal). Although prior to enactment of this aspect of federal immigration law, we upheld state regulation of the employment of aliens (*De Canas*, 1976), “current federal law is substantially different.” Although there is no express preemption here, we think there is clear conflict preemption here.

(3) Similarly, authorizing state officials to arrest upon probable cause of federal immigration violations “would be an obstacle to the removal system Congress has created.” It is broader than existing federal immigration arrest authority, and it would be done by state officers untrained in special immigration methods and concerns. Its “unilateral” authority “goes far beyond” the federal authority for state officer “cooperation” in immigration matters. So it is preempted.

(4) Finally, we appreciate that “detaining individuals solely to verify their immigration status would raise constitutional [as well as conflict preemption] concerns.” “But Section 2(B) could be read to avoid these concerns.” The federal government has set up a “verification” system for aliens, and has encouraged States to use it. If the state law were read merely to require verification during the course of detentions or arrests made for other legitimate reasons, without prolonging them, “it is not clear at this stage and on this record” that the provision would be invalid. “The nature and timing of

this case counsel caution” in light of the State’s important sovereignty concerns, and while we do not “foreclose other ... challenges” to the law, it was premature error to enjoin it without first allowing the Arizona courts to interpret and apply it.

The national government has “responsibility” for the “sound exercise” of its power over immigration law. But although “Arizona may have understandable frustrations” regarding what it views as lax enforcement of federal immigration law,” it “may not pursue policies that undermine federal law” even as it engages in political discourse to change it.

Scalia dissenting (concurring only as to the reversal on (4): I dispute the fundamental premises of the majority’s opinion. “As a sovereign, Arizona has the inherent power to exclude persons from its territory.” “The Constitution did not strip the States of that authority” (citing, *inter alia*, *Mayor of New York v. Miln* (1837) and the debates over the Alien and Sedition Acts of 1790)). Although in 1882 Congress enacted “the first general immigration statute,” which “I accept [as] “an inherent attribute of the (United States’) sovereignty,” I doubt that “field preemption” can even be applied to “the *core* of state sovereignty” – the power to exclude illegal persons. Even if it “may upset foreign powers” I think States can act in this area, absent clear and express federal preemption. I find no conflict between the Arizona provisions and federal law, so they should all stand. The Executive – not Congress – has made a “policy choice of lax enforcement.” Arizona’s laws “merely enforce [federal immigration] restrictions more effectively.” If this is not within the State’s power, then “we should cease referring to it as a sovereign state.” (And it “boggles the mind” to say that Arizona may not enforce federal law “that the President declines to enforce.”) [Ed. Note: why this “boggles the mind” is not precisely explained, and while I am not sure what “boggles the mind” means, Justice Scalia has a brilliant mind and it is difficult to imagine it “boggled.” Nor does Justice Scalia address at any point the problem that might result if all 50 states were to set up their own, differing, immigration enforcement laws, which seems like an obvious objection to his conception of State sovereignty in the area.] “I dissent” [note: no “respectfully”].

Thomas dissenting (concurring only as to the reversal on (4): “I agree with Justice Scalia” on the proper result, but for the “simple reason that there is no conflict” between federal immigration law and the state laws here. I previously have explained that I don’t accept the “freewheeling speculation” approach of “implied preemption.” So “tensions” between Arizona’s approach and the “purposes and objectives” of Congress is, for me, no basis on which to preempt.

Alito concurring in part and dissenting in part: I agree with the Court that the state crime of “failure to complete or carry alien registration” documents is preempted under *Hines*. I also agree that the fourth provision discussed should not be enjoined at this point. I would uphold the other two provisions because “I do not believe that Congress has spoken with the requisite clarity” to preempt. Conflict merely with “a federal agency’s current enforcement priorities” should not be a basis for preemption.

INTERESTING MISCELLANEOUS

Federal Securities Law:

Credit Suisse Securities v. Simmonds, No. 10-1261 (March 26, 2012), 8-0 (**Scalia**; Roberts recused), reversing 638 F.3d 1072 (9th Cir. 2011).

Section 16(b) of the Securities Exchange Act of 1934 allows security holders of a corporation to sue “insiders” who realize profits from sale of the corporation’s stock within any six month period.

This is a “strict liability” disgorgement-of-profits statute, designed to discourage “short-swing speculation by corporate insiders. 16(a) also requires such insiders to file a report of their profits. Meanwhile, 16(b) has a two-year statute of limitations: suits must be filed within “two years after the date such profit was realized. Simmonds filed well beyond the two year point at which profits were realized; but she filed against “underwriters” of IPOs, who because they claim they are not subject to Section 16 at all (i.e., not “insiders”), did not file any 16(a) reports. Simmonds argued that the two-year limitations period should be “tolled” until the required report is filed. The Ninth Circuit agreed based on its own 1981 precedent (*Whittaker*) that tolled the period as a form of “equitable tolling.

Scalia (for 8, Roberts not participating): The two-year period is not tolled because the statute “does not say so.” The text of §16(b) simply does not support the *Whittaker* rule.” Moreover, the claim is “completely divorced from long-settled equitable tolling principles” because equitable tolling normally requires due diligence by the plaintiff. The “oddity” of Simmonds’ claim is “especially apparent” here, where application of 16(b) to underwriters is “novel” and disputed – since the defendants do not believe that §16 applies to them, the statute would always be tolled regardless of plaintiffs’ conduct. This is “inequity”, not equity.

The Court is divided 4-4 regarding whether equitable tolling should ever apply to §16(b). But we hold unanimously that whether it applies or not, there is no general rule that §16(b) is tolled until a §16(a) report is filed.

Dismissal of Certiorari as Improvidently Granted:

Vasquez v. United States, No. 11-199 (April 2, 2012), writ dismissed as improvidently granted from 635 F.3d 889 (7th Cir. 2010): After full briefing and oral argument, the Court dismissed the writ because it appeared that the “harmless error” standards proposed by either side were not very different. Perhaps the dispute is whether a harmless error analysis should focus on the overall guilt of the defendant, versus the effect the error may have had on the jury’s deliberations. But it became apparent that this case did not present the distinction very well or clearly.

-- E N D of 2011-12 Supreme Court Decisions After Argument --

SUMMARY REVERSALS (Merits Opinions without Briefing or Argument)

Cavazos v. Smith, No. 10-1115 (Oct. 31, 2011), 6-3 (*per curiam*; Ginsburg dissenting), summarily reversing 437 F.3d 884 (9th Cir. 2006) (after two prior GVR’s in the case (grant, vacate and remand) in light of USSCt decisions stressing the high burden for reversal on federal habeas).

Holding: Where testimony is highly conflicting, *Jackson v. Virginia* (1979) requires that the jury’s resolution not be overridden unless “irrational,” and it must be presumed that the jury believed the prosecution’s evidence and not the defendants. When the “objectively unreasonable” standard for federal habeas is added to the mix, the Ninth Circuit’s habeas grant below cannot stand.

Facts: Shirley Ree Smith was sleeping next to her 7-week old grandson Etzel, with other grandchildren and the mother nearby, when Etzel died. The jury heard evidence (disputed) that Smith said she “jostled” Etzel to wake him, and said “Oh my God, did I do it?” when Etzel was dead. Five medical experts testified over seven days as to the cause of death, and they could not agree (even among experts on the same side). The jury convicted Smith of assaulting a child so as to cause death and granddaughter Smith was sentenced to 15 years to life. The California state courts affirmed, finding that under *Jackson v. Virginia*, sufficient evidence supported the verdict. On habeas the

Magistrate and District Judges recognized that “many questions” were present regarding Smith’s guilt, but concluded the state courts’ resolutions were not “objectively unreasonable” given *Jackson’s* high standard. But a Ninth Circuit panel reversed, finding “no evidence” to support “death by violent shaking.”

Per Curiam: “The decision below cannot be allowed to stand.” Indeed, we already vacated it twice and remanded for reconsideration in light of habeas decisions; “each time the panel persisted in its course ... without seriously confronting the significance of the cases called to its attention.” [Ed. Note: this would seem to be a matter of opinion, if you read the panel’s decisions after remand.] First, the “no evidence” conclusion “was plainly wrong.” There was evidence, even if it was disputed, unconvincing in some post hoc view, and subject to scientific critique today. “When the deference to state court decisions required by § 2254(d) is applied..., there can be no doubt of the Ninth Circuit’s error. “Doubts” about Smith’s guilt “are understandable,” and other factors might support Executive clemency. [Ed. Note: California’s Governor in fact granted clemency after this decision.] But that “is not for the Judicial Branch to determine.”

Ginsburg, dissenting with Breyer and Sotomayor [Note: not Kagan]: The is “a misuse of discretion.” We do not normally grant cert for “error correction” where the lower court has stated the correct legal principles, even if we view them as misapplied (citing Justice Scalia to that effect in *Kyles v. Whitley* (1996)). The science behind “shaken baby syndrome” has changed significantly since this 1997 trial, throwing even more doubt on the prosecution’s questionable expert testimony. Meanwhile, this grandmother has served many years in prison, has been on release for years since the Ninth Circuit first granted the writ, and is plainly no danger to society. “What does the Court achieve” by exercising its discretion to grant cert and summarily reverse, “other than to prolong Smith’s suffering” and “teach the Ninth Circuit a lesson?” I would deny cert, or at the very least allow the Respondent to brief the merits from the 1500-page record of trial. “Justice is not served” here.

Bobby [Warden] v. Dixon, No. 10-1540 (Nov. 7, 2011), 9-0, (**Per Curiam**), summarily reversing 627 F.3d 553 (6th Cir. 2010).

In brief, Dixon was convicted of a grisly murder, after admission of a confession. He was questioned by the police on three occasions. In the first he was not in custody, and when the police read him *Miranda* warnings anyway, he declined to speak with them. In the second, the police clearly erred when they declined to give Dixon *Miranda* warnings “for fear that Dixon would again refuse to speak with them.” The Ohio courts suppressed statements resulting from that interrogation. But four hours, later, “things had changed dramatically:” Dixon said he had spoken to his lawyer, Dixon learned the police had found the body and were talking to his accomplice, and Dixon volunteered that he wanted to talk with police. After *Miranda* warnings and waiver, he confessed. All courts denied relief until the Sixth Circuit granted habeas, 2-1.

Per Curiam: On federal habeas, “it is not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court’s decision,” which is the standard (quoting *Harrington v. Richter*, 2011). “No precedent of this Court required Ohio to do more” than suppress the statements resulting from the second, unwarned, interrogation. This case is not like *Seibert* (2004), which involved an intentional two-stage denial of *Miranda* warnings in order to coerce a confession. “The Sixth Circuit was without authority to overturn the reasoned judgment of the State’s highest court.” [Ed. Note: Note that *Bobby* was issued the day before the merits habeas opinion in *Greene v. Fisher, supra*. Under *Greene*, *Seibert* was probably not even available to Dixon, since it was after the last state court merits adjudication. That may explain why the Court issued *Bobby* a day before *Greene*.]

Hardy [Warden] v. Cross, No. 11-74 (Dec. 12, 2011), **Per Curiam** (9-0), summarily reversing 632 F.3d 356 (7th Cir. 2009).

Cross was tried for kidnapping and sexually assaulting victim A.S. At an initial trial, A.S. was fearful of testifying and testified “haltingly,” but she did testify and was cross-examined. Cross was acquitted of kidnapping and the jury hung on sexual assault. At retrial, A.S. could not be located. The state averred that it had made strong efforts to find A.S., and asked to have her prior testimony read into the record. A law clerk did so, allegedly less haltingly than A.S. and with a “slight inflection.” Cross was convicted. The state court’s affirmed, finding that the State had made a “good-faith, diligent search” for A.S., so admission of her prior cross-examined testimony was not error. On federal habeas, the district court denied relief but the Seventh Circuit reversed.

Per Curiam: Federal habeas law requires that “state court decisions be given the benefit of the doubt (*Felkner v. Jackson*, 2011). The Seventh Circuit “departed from” this standard. “The state court identified the correct Sixth Amendment standard and applied it in a reasonable manner.” Therefore “it cannot be disturbed” on federal habeas.

Ryburn v. Huff, No. 11-208 (January 23, 2012), **Per curiam** (9-0), summarily reversing 632 F. 3d 539 (9th Cir. 2011).

Facts: The Huff family sued Burbank police officers Ryburn and Zepeda alleging a Fourth Amendment violation for entering the family home without consent. The officers had responded to an alleged threat made by student Vincent Huff to “shoot up” his high school. After some investigation suggesting there could be merit to the threat, the officers went to Huff’s home to interview Huff. No one answered their knocks, but when the officers called Mrs. Huff’s cellphone she said they were inside. Mrs. Huff “hung up” and a few minutes later she and Vincent came onto the front porch. But they declined the officers’ request to continue questioning inside, an “extremely unusual” refusal. Then, when Ryburn asked if there were any guns inside the house, Mrs. Huff “immediately turned around and ran into the house.”

“Scared,” Officer Ryburn ran in after her, Vincent then went in, and a second officer followed, fearing for Officer Ryburn’s safety. The officers remained in the living room for 5-10 minutes, had some discussion, and “did not conduct any search.” They then left, concluding that the rumored threat was false. The district court, sitting as factfinder, resolved disputes and found the facts above, and then granted judgment for the officers after a two-day trial. The court found that reasonable officers could have believed there was danger and no “clearly established law” prohibited a warrantless entry on such suspicion. Thus qualified immunity was available. The Ninth Circuit reversed 2-1, finding a belief of danger to be “objectively unreasonable.” Judge Rawlinson dissented.

Per curiam (9-0): “Judge Rawlinson’s analysis of the qualified immunity issue was correct.” “No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.” It was an error for the Ninth Circuit panel, “far removed from the scene and with the opportunity to dissect the elements of the situation,” to conclude that the officer’s fear of imminent harm was unreasonable. The Ninth Circuit opinion is “flawed for numerous reasons.” First, it “changed [the District Court’s] findings in several key respects.” Second, **the panel majority mistakenly believed “that conduct cannot be regarded as a matter of concern so long as it is lawful.”** Third, the Ninth Circuit viewed each separate event in isolation rather than in context, which is “entirely unrealistic.” Fourth, it **“second-guess[ed] a police officer’s assessment, made on the scene, of the danger presented by a particular situation.”** In short, a reasonable police officer could have reasonably concluded that the Fourth Amendment permitted warrantless entry into the

Huff home “if the officer has a reasonable basis for concluding that there is an imminent threat of violence.” The judgment of the Ninth Circuit is reversed.

Wetzel (Pa. Dept. of Corrections) v. Lambert, No. 11-38 (Feb. 21, 2012), 6-3 (*per curiam*; Breyer dissenting), summarily vacating and remanding 633 F.3d 126 (3rd Cir. 2011).

Lambert was sentenced to death in 1984 after his conviction for the murder of two patrons of Prince’s Lounge in Philadelphia. Twenty years later he filed a state claim for post-conviction relief, alleging that a newly discovered “police activity log” contained undisclosed *Brady* information -- it allegedly showed that the main co-participant/witness (named Jackson) against Lambert at trial had identified someone else as a participant in the robbery. Lambert claimed that this new evidence was both directly exculpatory and impeaching of Jackson.

The Pennsylvania state courts denied relief, finding the “activity log” to be ambiguous and “speculative at best” and also finding that any impeachment would have been cumulative of already-extensive impeachment and thus not have made a difference at Lambert’s trial. Thus it was not “material” under *Bagley*. On federal habeas, the district court also denied relief, finding the Pennsylvania court’s resolution “not unreasonable” and the new evidence, again, “ambiguous” and “speculat[ive].” The Third Circuit reversed, ruling simply that the cumulative impeachment ruling was “patently unreasonable.” Pennsylvania petitioned for *certiorari*.

***Per Curiam* (6-3): On federal habeas, even if one state court ground for decision is “unreasonable,” the writ may not be granted unless all presented grounds are examined and found to be unreasonable.** “Any retrial here would take place three decades after the crime, posing the most daunting difficulties for the prosecution. [Ed. Note: Might the author of this *per curiam* be former Third Circuit Judge (and former federal prosecutor) Alito, who might be sympathetic to the Philadelphia authorities’ plea?] That burden should not be imposed unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA.” The failure of the Third Circuit to rule on the other, primary, rationale (that the new evidence was ambiguous and speculative “at best”) requires *vacatur* and remand.

Breyer dissenting, joined by Ginsburg and Kagan [Note: not Sotomayor]: First, I “cannot agree” that the police activity log is ambiguous; and I think the Pennsylvania trial court also found it not ambiguous. Moreover, the suggestion is strong here that Lambert might actually be innocent; only Jackson’s testimony identified him as the shooter. The Third Circuit applied the proper legal principles, and “we do not normally consider ... fact specific questions about whether a lower court properly applied” legal principles. See *Kyles v. Whitley* (1995) (Scalia dissenting). Thus we should simply deny this writ of *certiorari*.

Coleman v. Johnson, No. 11-1053 (May 29, 2012), *Per curiam* (9-0), summarily reversing 446 Fed. Appx. 531 (3rd Cir. 2011).

This is another federal habeas sufficiency of the evidence case under *Jackson v. Virginia* (1979, see *Cavazos v. Smith, supra*. The evidence showed that Jackson, together with Williams, escorted the victim (Walker) to an alley and stood at the alley entrance while Williams shot the victim. Johnson had been presented earlier in the day when the victim had humiliated Williams by giving him a “public thrashing with a broomstick,” and Johnson had heard Williams repeatedly say he would kill Walker. Witnesses testified that they saw Johnson and Williams “force” the victim into the alley. Johnson was convicted as an accomplice to the murder, and the jury necessarily found that he

possessed the knowledge and intention that Williams be killed. The state courts all affirmed, rejecting a sufficiency of the evidence claim, as did the district court. But the Third Circuit reversed.

Per Curiam (9-0): **The Third Circuit “failed to afford due respect to the role of the jury and the state courts of Pennsylvania” and “unduly impinged on the jury’s role as factfinder.”** The standard under *Jackson* is “bare rationality,” and on federal habeas the state court must have been “objectively unreasonable” to find that standard met. Juries may draw reasonable “inferences,” and these must be viewed “in the light most favorable to the prosecution [Note: actually, most favorable to the jury’s verdict, which necessarily is the prosecution’s in a criminal case.] The type of “fine-grained factual parsing in which the Court of Appeals engaged,” such as ruling that without physical coercion the jury could not rationally find that Johnson “forced” Williams into the alley, is “not permit[ted].” “We conclude that the evidence at Johnson’s trial was not nearly sparse enough to sustain a due process challenge under *Jackson*.”

Parker v. Matthews, No. 11-845 (June 11, 2012), ***Per Curiam*** (9-0), summarily reversing 651 F.3d 489 (6th Cir. 2011).

Matthews killed his estranged wife and mother-in-law and was convicted of capital homicide (and sentenced to death). The Kentucky courts rejected his argument that the burden to prove “extreme emotional distress” was unconstitutionally imposed on him, and that the evidence was insufficient on this point; and that the prosecutor’s closing argument violated due process. On federal habeas, the district court denied Matthews’s petition but the Sixth Circuit (2-1) reversed.

Per Curiam (9-0): The Sixth Circuit “set aside two 29-year-old murder convictions based on the flimsiest of rationales.” [Ed. Note: the Court’s impatience with this result is apparent in the summary reversal as well as unanimous tone of this opinion.] It “had no authority to do so” under the deferential standard of 2254(d). First, although “certain aspects of the Kentucky Supreme Court’s opinion” support the Sixth Circuit’s view, the opinion as a whole does not, especially where the jury instructions clearly placed the burden to disprove emotional distress on the government. And under the “twice deferential standard” for sufficiency of the evidence claims on habeas (see *Cavazos, supra*), the Kentucky courts “made no objectively unreasonable error.” Second, even though the Kentucky courts rejected the prosecutorial misconduct claim “without analysis,” it is subject to deferential review under *Harrington v. Richter* (2011). Again, viewed as a whole the prosecutor’s closing argument did not “infect the trial with unfairness” (*Darden*, 1986) so as to clearly violate due process. We have never held that a prosecutor may not “emphasize a defendant’s motive to exaggerate” exculpatory symptoms of his mental state. Moreover (“as we explained in correcting an identical error by the Sixth Circuit two Terms ago,” *Renico* (2010)), “it was plain and repetitive error for the Sixth Circuit to rely on its own precedents” rather than ours to find “clearly established law.” [Ed. Note: *Parker* seems to “clearly establish” the Sixth Circuit as the successor to the Ninth as the “whipping boy” of federal habeas reversals.]

ORDERS (and Dissents from, and concurrences in)

Buck v. Thaler, No. 11-6391 (Nov. 7, 2011), denying certiorari 7-2 (*Alito* joined by *Scalia* and *Breyer* concurring; *Sotomayor* joined by *Kagan* dissenting), leaving in place 2011 WL 4067164 (5th Cir. Sept. 14, 2011).

Alito, concurring with Scalia and Breyer: *Buck* was one of six Texas defendants convicted of murder and sentenced to death, in separate cases in Texas, where an expert testified that race (black)

statistically increased the chances of future dangerousness. This was “bizarre and objectionable testimony,” and in five of the six cases the State conceded error (the Texas AG at the time saying that “it is inappropriate to allow race to be considered as a factor in our criminal justice system.” However, in Buck’s case, the testimony was elicited by the defense, and the prosecution did not exploit it (although it did re-mention it on cross). Moreover, the state on various appeals stated conflicting and even erroneous explanations of the reason for asserting a procedural bar in Buck’s case. Nevertheless, the district court here was aware of all the circumstances, and denied a Certificate of Appealability for the issue (and the Fifth Circuit affirmed). Because the testimony was elicited by the defense, we concur in the denial of cert. **[Ed. Note:** this hardly seems like Buck’s last chance, as this basis for denial seems to scream for an ineffective assistance challenge, although the walls hedging in habeas are remarkably high.]

Sotomayor dissenting with Kagan: It is wrong for us to “den[y] review of a death sentence marred by racial overtones [on] a record compromised by misleading remarks made by the State.” “Especially in light of the capital nature” of the case, and the fact that the prosecutor did intend to suggest that race made Buck a better death candidate, we should grant review.

Cash v. Maxwell, No. 10-1548 (January 8, 2012), denying certiorari 7 to 2 (*Sotomayor* concurring, *Scalia* dissenting with Alito), leaving in place 628 F. 3d 486 (9th Cir. 2010).

In the late 1970s the “Skid Row Stabber” killed at least 10 homeless victims in Los Angeles. Bobby Joe Maxwell was convicted in 1984 by a California jury of two counts of first-degree murder for these crimes and sentenced to life without parole. One witness against Maxwell was Storch, who later was recognized as “one of the most notorious jailhouse informants in the history of Los Angeles County” for repeatedly crafting false stories of confessions by his cellmates from newspaper accounts of the crimes. California state courts repeatedly rejected Maxwell’s claims that Storch had testified falsely regarding Maxwell’s own confession, ultimately concluding that Maxwell had not established that Storch has lied as his trial and that prosecutors had not violated *Brady* in failing to disclose certain facts about Storch. On federal habeas, the district court denied but the Ninth Circuit reversed, finding the factual findings of the California Supreme Court “unreasonable.”

Sotomayor respecting denial of certiorari: The Ninth Circuit recognized the extremely high standard for granting federal habeas, and then “meticulously set forth an avalanche of evidence demonstrating that the state court’s factual finding was unreasonable.” Denial of certiorari is appropriate in such fact-bound circumstances. The record demonstrated that Storch was a “habitual liar who even the State [of California] concedes told . . . material lies at Maxwell’s trial,” and many law enforcement officials refused to use him as unreliable. The evidence is far more than “circumstantial” as the dissent suggests, and in the end, there is “overwhelming evidence” that Storch “attempt[ed] to manipulate the integrity of the judicial system” in Maxwell’s case. “Mere disagreement with [the Ninth Circuit] is, in my opinion, insufficient basis for granting certiorari.”

Scalia, dissenting from denial of certiorari, joined by Alito: “‘It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can assure observance of Congress’s” commands about federal habeas “is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no issues of law. . . . Today we . . . let[] stand a judgment that once again deprives California courts of that control over the State’s administration of criminal justice which federal law assures.” I believe the Ninth Circuit unquestionably ignored [the] commands” of this Court’s precedent. [Justice Scalia’s detailed

review of the record is omitted here.] “We should grant the petition for certiorari and summarily reverse the Ninth Circuit.”

Maryland v. King, No. 12A 48 (July 30, 2012), granting stay of judgment pending certiorari.

Roberts (as Circuit Justice): Like many jurisdictions, Maryland has a statute authorizing law enforcement to collect DNA samples from persons charged with, but not (yet) convicted for, certain crimes. King was convicted of rape after DNA collected from him on an assault arrested produced a match. The Maryland Court of Appeals vacated the conviction, holding the rape collection statute violates the Fourth Amendment. The State now seeks a stay of that judgment so that it may continue to collect DNA samples, pending disposition of a petition for a writ *certiorari* in this Court.

The stay is granted. There is a “reasonable probability” that we will grant cert. There is a conflict among at least four jurisdictions, and this “implicates an important feature of day-to-day law enforcement practice in approximately half the States.” And there is a “fair prospect that this Court will reverse” in light of the “considered analysis of courts on the other side” [!]. Meanwhile, there is “irreparable harm” to Maryland in not being able to implement its state law and employ a “valuable tool.” Respondent makes some “fair points” in opposition but on balance the stay must be issued.

[The Court ultimately did grant *certiorari* and the case was argued for the 2012 Term.]

Criminal Law Certiorari Grants for the Upcoming Oct. '12 Term

1. *Johnson v. Williams*, No. 11-465, from 646 F.3d 626 (9th Cir. 2011), oral argument scheduled for October 3: Has a habeas petitioner's claim been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim? Also, under § 2254, may a federal habeas court grant relief based on rejection of a state court's finding that a potential juror could be stricken for cause?
- 2 & 3. *Tibbals v. Carter*, No. 11-218, from 644 F.3d 329 (6th Cir. 2011), and *Ryan v. Gonzales*, No. 10-930, from 623 F.3d 1242 (9th Cir. 2010), oral arguments scheduled for October 9: Is there a "right to be mentally competent" under *Rees v. Peyton*, 384 U.S. 312 (1966) and the federal statute that requires appointment of counsel for federal habeas proceedings in capital cases? May a federal court order an indefinite stay of federal habeas proceeding under *Rees* if the defendant is not competent, even if the court finds that the habeas claims are purely record-based?
4. *Moncrieffe v. Holder*, No. 11-702, from 662 F.3d 387 (5th Cir. 2011), oral argument scheduled for October 10: Is a conviction under a provision of state law that might be a misdemeanor because it encompasses distribution of a "small amount of marijuana for no remuneration," but also might be a state law felony, an "aggravated felony" for immigration removal purposes?
- 5 & 6. *Florida v. Harris*, No. 11-817, from 71 So. 3d 756 (Fla. 2011) and *Florida v. Jardines*, No. 11-564, from 73 So. 3d 34 (Fla. 2011), oral arguments scheduled for October 31: Are dog-sniffs a Fourth Amendment "search" requiring a warrant, and even if not, are dog sniff alerts sufficient to constitute "probable cause" to search a home?
7. *Bailey v. United States*, No. 11-770, from 652 F.3d 197 (2d Cir. 2011), oral argument scheduled for October 30: Following *Michigan v. Summers*, 452 U.S. 692 (1981), may police officers detain an individual "incident to" the execution of a search warrant, when the individual has already driven away from the premises to be searched before the search begins?
8. *Chaidez v. United States*, No. 11-820, from 655 F.3d 684 (7th Cir. 2011), oral argument scheduled for October 30: *Teague* and retroactivity: Does *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation, apply to persons whose convictions became final before its announcement?
9. *Evans v. Michigan*, No. 11-1327, from 491 Mich. 1 (Mich. 2012), oral argument scheduled for November 6: Does the Double Jeopardy Clause bar retrial after the trial judge has granted a midtrial directed verdict of acquittal because the prosecution failed to prove a fact that the judge has erroneously ruled is an element of the offense?
10. *Smith v. United States*, No. 11-8976, from 651 F.3d 30 (D.C. Cir. 2011), oral argument scheduled for November 6: When a defendant offers evidence that he withdrew from a conspiracy prior to expiration of the statute of limitations period, does that shift the burden of persuasion to the government to prove beyond a reasonable doubt that the defendant was in fact a member of the conspiracy during the relevant period?

11. *Henderson v. United States*, No. 11-9307, from 646 F.3d 223 (5th Cir. 2011), oral argument not yet scheduled: For Federal Rule of Criminal Procedure 52(b) review, is an error “plain error” when the governing law is unsettled at the time of trial but becomes settled in the defendant's favor by the time of appeal? Five Circuits have chosen a time-of-appeal standard, the Ninth Circuit has chosen a time-of-trial standard.

-- E N D as of August 2012 --

WHO WROTE WHAT in the 2011-12 Term

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

ROBERTS

Messerschmidt
Blueford
Smith
Filarsky
Florence
Miller

SCALIA

Jones
Sester
Greene
Minnecci
Frye
Lafler
Frye
Dorsey
Reynolds
Gonzalez
Maples
Martinez
Vartelas
Arizona

KENNEDY

Alvarez
Florence
Frye
Lafler
Martinez
Arizona

THOMAS

Reichle
Kawashima
Williams
Perry
Wood
Miller
Smith
Arizona

GINSBURG

Perry
Maples
Wood
Vartelas
Reichle
Filarsky
Howes
Minnecci
Kawashima
Cavazos

BREYER

Minnecci
Dorsey
Reynolds
Alvarez
Messerschmidt
Williams
Miller
Mohammad
Florence
Southern Union
Sester
Wetzel

ALITO

Howes
Williams
Rehberg
Jones
Florence
Maples
Arizona
Lafler
Alvarez

SOTOMAYOR

Southern Union
Mohammad
Gonzalez
Jones
Filarsky
Messerschmidt
Blueford
Perry

KAGAN

Miller
Martel
Judulang
Gutierrez
Messerschmidt
Williams

Per Curiam Opinions (Summary Reversals)

Cavazos
Bobby
Hardy
Ryburn
Wetzel
Coleman
Parker