

CHAPTER 2

U.S. SUPREME COURT DECISIONS ON CRIMINAL LAW AND RELATED TOPICS OCTOBER TERM 2012 (OCT. 2012-JUNE 2013)

Rory K. Little and Nancy Schneider

I. INTRODUCTION

This chapter surveys decisions of the U.S. Supreme Court on criminal law and related topics decided during the 2012-13 Term. After briefly introducing the cases that will be discussed, the chapter provides detailed summaries of those decisions, grouped by subject matter. It also provides a brief overview of interesting cases for which certiorari was granted in the Supreme Court's 2013 Term as well as a chart showing which Justices authored which decisions.

A. OVERVIEW OF THE SUPREME COURT TERM

The lead “story” of the 2012-13 U.S. Supreme Court Term has to be the Fourth Amendment. Driven (perhaps surprisingly, perhaps not) by Justice Scalia, the Court is demonstrating fundamental doctrinal shifts in analyzing what is a “search” and when Warrants may be required. Justice Scalia and Justice Sotomayor – not ideological twins by any means – are consistently voting together in Fourth Amendment cases – while Democratic appointee Stephen Breyer is now consistently voting against them. Justice Alito is also carefully adding a third, new and nuanced view. (The interesting “switch” between Justices Scalia and Breyer – Scalia voting for defendants in Fourth Amendment cases while Breyer votes for the government – also suggests the differences between their libertarian versus pro-government philosophies.) The result is that Fourth Amendment doctrine -- in a world that is increasingly different in terms of technology, privacy concepts, and societal threats, from the 1790 world of the Framers – is evolving, and that evolution is far from finished.

Another, less-recognized but major, area of discussion this Term was application of the *ex post facto* Clauses in the Constitution (Art. I, sections 9 (federal) and 10 (states). Although only one opinion (*Peugh*) expressly applied the doctrine – and the defendant “won” – two others (*Metrish* and *Kebedeaux*) plainly involved the concept (and in neither did the defendant prevail). The three opinions should be read together for lawyers interested in development of the legal concepts overall.

The Court also decided other important Constitutional cases. In *Evans*, the Court held fast to its rule that when a judge orders an acquittal on the basis that the government failed to prove its case at trial, double jeopardy forbids a retrial even if the judge was wrong on the law. And in *Salinas* the Court ruled that the prosecution may comment on someone's silence when they are silent in the face of noncustodial, voluntary questioning; the

competing theories of the Fifth Amendment between the majority and the dissent indicate some confusion and more cases to come.

On the statutory side, the Court decided a number of “big” cases. First, in *Alleyne*, the Court finally ruled that *Apprendi* applies to facts that set a mandatory minimum sentence, even though *Apprendi* itself was expressly limited to facts that raise the “statutory maximum.” The doctrinal confusion that underlies *Apprendi* is laid bare here, as Justice Breyer, a longtime critic of *Apprendi*, supplies the fifth vote while Justice Scalia, the original architect of *Apprendi*, dissents.

Meanwhile, in *Descamps* and *Moncreiffe* the Court also reveals doctrinal messiness, and the “modified categorical approach” for evaluating “aggravated felonies” under the Armed Career Criminal Act seems destined for the dustheap – except that no one has a better idea. A legislative solution is needed; but politics makes careful criminal legislation very difficult these days. Still, many will applaud the ruling in *Moncreiffe* that “sharing a small amount of marijuana for no remuneration” is not a federal aggravated felony.

Kebedeaux, *Sekhar*, *Henderson* and *Davila* all answer interesting statutory questions, and *Smith* provides a convenient primer on the law of, and defenses to, conspiracy.

Finally, there were five federal habeas decisions this Term, and another three that were summary reversals. Eight habeas decisions in one Term is really not that unusual, but it certainly shows that the Court is not done patrolling the Circuit court results in this area, and that State Attorneys General are not shy about seeking help from the Supremes. All three summary reversals were Ninth Circuit decisions, and all took that Court to task in blunt terms for, in the view of the Justices, refusing to accept the congressional mandate to defer to state court judgments in criminal cases. Meanwhile, two of the merits habeas decisions (*Trevino* and *McQuiggen*) were actually “wins” for the defense side, although the individual petitioner in *McQuiggen* was actually delivered a virtual mandate to lose on remand, perhaps as a necessary “bargain” to get a fifth vote for the more favorable general ruling for “actual innocence” claims.

In terms of workload, the Court heard fewer criminal law cases than last Term, and the Justices wrote fewer criminal law opinions (*see* the last page of this chapter, “Who Wrote What” chart). Whether this is a “trend” or just an anomaly remains to be seen. The chart may also be revealing of the “politics” of the Court in criminal law cases. The largest number of opinions by far were written by Justices Scalia, Thomas, and Alito (31, over half), and only six of these were majority opinions. In addition, the Chief Justice, who certainly prefers to write majorities, wrote three criminal law dissents and no majorities. This suggests a shift to moderation, at least, in the Court’s criminal law opinions. The “conservative” Justices see a need to write more, and often in dissent, while the four “liberal” Justices write less (only 20 criminal law opinions, versus 36 last year). Justice Ginsburg (who took on the role of “liberal dissenter when Justice Stevens retired) wrote only three criminal law opinions, all majorities. And Justice Breyer, who in recent years has matched Justice Scalia in terms of criminal law opinion output (if not in outcome views), wrote only half his “normal” criminal law output.

Thus, while criminal defense supporters might not say so for the record, this Term’s criminal law output, at least, is less hostile to their interests, and often more protective,

than in the past. This may be attributable to the presence of Justice Sotomayor, who clearly has charmed some members of the Court as well as held opposed Justices to precise statements of law and doctrine when they disagree in criminal law cases.

B. COURT DECISIONS ON CONSTITUTIONAL ISSUES

1. Article I, Section 10 (and Fifth Amendment): *Ex Post Facto* Clauses

- a. **Peugh v. United States** – Because federal sentencing Guidelines enacted after Peugh’s offense created a “significant risk” that his sentence would be more harsh, the Guidelines in place when the offense was committed must be used.
- b. **[Discussed in Habeas, below:] Metrish v. Lancaster (CA6)** – State’s decision that elimination of the “diminished capacity” defense after petitioner’s crime (and before his retrial) was no *ex post facto* violation was not an “unreasonable application” of settled Supreme Court authority.
- c. **[Discussed in Federal Statutes, below:] United States v. Kebodeaux** – Because the defendant was subject to sex offender registration requirements as part of his original offense, Congress could later alter the terms of his registration obligations under the Necessary and Proper Clause without *ex post facto* problems

2. Fourth Amendment

- a. **Bailey v. United States** – Officers executing a search warrant may detain only persons “present where the search is being conducted, i.e., within the mediate vicinity
- b. **Florida v. Harris** – A trained dog-sniff can provide probable cause, and no “elaborate and inflexible” evidentiary requirements are appropriate: “a sniff is up to snuff.”
- c. **Florida v. Jardines** – A dog-sniff on the porch of a residential front door is a “search” because it is a physical trespass on property, regardless of expectations of privacy.
- d. **Missouri v. McNeely** – A drunk-driving BAC test may need a warrant; “the natural dissipation of alcohol in the bloodstream does not always constitute a warrantless “exigency.”
- e. **Maryland v. King** – A warrantless DNA cheek-swab of arrestees is okay as part of a “routine booking procedure.”

3. Fifth Amendment

- a. **Salinas v. Texas** – In a voluntary, non-custodial setting, a person must expressly invoke a right not to answer, and the government may later “comment” on silence in the face of questioning.
- b. **Evans v. Michigan** – Even where a court erroneously dismisses a prosecution at the close of the government’s trial case, a retrial for that same offense violates Double Jeopardy

4. Sixth Amendment

- a. **Chaidez v. United States** – The decision in *Padilla* – that it can be ineffective assistance of counsel not to advise of immigration consequences – is not retroactive
- b. **Cert. Dismissed: Boyer v. Louisiana** – A “Speedy Trial” question – whether delay due to government budgetary problems counts “against” the government -- is dismissed as improvidently granted.
- c. **Alleyne v. United States** – The rule of *Apprendi* – treating facts related to sentencing as “elements” that must be found by a jury beyond reasonable doubt - - applies to facts that establish a mandatory minimum sentence

C. OVERVIEW OF COURT DECISIONS ON FEDERAL STATUTES

1. **Smith v. United States** – A defendant has burden to prove the affirmative defense of withdrawal from a conspiracy
2. **Moncrieffe v. Holder** – Applying the “categorical” approach, the sharing of a small amount of marijuana for no remuneration is not an “aggravated felony” barring immigration removal.
3. **Henderson v. United States** – For “plain error” review under Federal Rule 52(b), the plainness of an error must be evaluated as of the time of appeal, not when it was made in the trial court.
4. **United States v. Davila** – Harmless error review applies to a violation of Federal Rule 11’s “court must not participate in plea discussions” direction.
5. **Descamps v. United States** – A state-law burglary offense that does not categorically include an element of “generic” burglary (such as “unlawful entry”) is not a “violent felony” for purposes of the federal Armed Career Criminal Act.
6. **United States v. Kebodeaux** – Because the defendant was subject to sex offender registration requirements as part of his original offense, Congress could later alter the terms of his registration obligations under the Necessary and Proper Clause without *ex post facto* problems.
7. **Sekhar v. United States** – Federal extortion does not extend to non-transferrable property (in this case, alleged extortion of a government official’s investment recommendation).

D. OVERVIEW OF HABEAS CASES

1. **Ryan v. Gonzales** (CA9 & CA6) – Petitioner has no “right” to an indefinite stay of habeas proceedings even if adjudged incompetent.
2. **Johnson v. Williams** (CA9) – Claims in petition that are unaddressed by state court denying habeas are presumed to be denied on the merits.
3. **Metrish v. Lancaster** (CA6) – State’s decision that elimination of the “diminished capacity” defense after petitioner’s crime (and before his retrial) was no *ex post facto* violation, was not an “unreasonable application” of Supreme Court authority
4. **Trevino v. Thaler** – Where state law makes it “highly unlikely” that an ineffective assistance claim will be recognized on direct appeal, the *Martinez* (2012) exception, which recognizes ineffective assistance claims in first habeas proceedings in such circumstances, applies.

5. **McQuiggen v. Perkins** (CA6) – “Actual innocence” may serve as a “gateway” exception to the federal habeas statute’s “within one-year” limitations period.

E. OVERVIEW OF INTERESTING MISCELLANEOUS CASES

1. Constitutional Article III and Standing: **Clapper v. Amnesty International** (Feb. 26) – No prudential standing to challenge alleged warrantless interception of international communications
2. Federal Securities Law: **Gabelli v. S.E.C.** (Feb. 27) – Five-year limitations period for Investment Advisors Act claims begins to run “when the fraud occurs, not when it is discovered”
3. Federal Securities Law: **Amgen v. Connecticut Retirement Plans** (Feb. 27) – Proof of materiality is not required for class certification of securities fraud class action lawsuit
4. Constitutional Privileges & Immunities, and State FOIA: **McBurney v. Young** (April 29) – State freedom of info law that grants rights to Virginia citizens only does not violate privileges and immunities clause, because not “fundamental.”
5. Treaties, and Mootness: **Chafin v. Chafin** (Feb. 19) – Child abduction treaty

F. OPINIONS WITHOUT ARGUMENT (SUMMARY REVERSALS)

1. **Marshall v. Rodgers** (CA9) (April 1): Habeas: Circuit precedent cannot create “clearly established” Supreme Court law.
2. **Nevada v. Jackson** (CA9) (June 3): Habeas: “no fair-minded jurist” could say what the Ninth Circuit did.
3. **Ryan v. Schad** (CA9) (June 24): Habeas: abuse of discretion not to issue mandate

G. OPINIONS RELATING TO ORDERS

1. **Hayes v. Thaler**: On granting stay of execution (6-3) on *Thaler v. Trevino* claim
2. **Delling v. Idaho**: Four Justices dissent from denying *cert* on abolishment of insanity defense.
3. **Hodge v. Kentucky**: Sotomayor dissents from granting *cert* on capital mitigation issue
4. **Calhoun v. United States**: Sotomayor writes to emphasize that prosecutor’s remark (“you’ve got African-Americans, you’ve got Hispanics ... [Isn’t] this a drug deal?”) is improper.
5. **Gallow v. Cooper**: Breyer and Sotomayor dissent from denial of *cert* on habeas ineffectiveness question.
6. **Marrero v. United States**: Alito and Kennedy dissent from GVR in career offender case.

II. UNDERSTANDING HOW MATERIAL IS PRESENTED IN THIS CHAPTER

The following pages have detailed summaries of the U.S. Supreme Court’s criminal law decisions and related cases, grouped by subject matter. Some decisions address more than one subject, so they have been placed in the category that best fits. Within subject categories, cases are presented in chronological order, which sometime demonstrate how doctrine developed as the Term progressed. The goal of these summaries is to be broadly

inclusive for the criminal law practitioner. Thus, some civil cases that relate to criminal law topics or fact areas 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* ruled a criminal defense attorney could violate the Sixth Amendment's effective assistance of counsel requirement if reasonable advice regarding immigration consequences is not given.

Each summary begins with the case name, the Justices' votes and who wrote what, 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, we attempt to **bold the central holding(s)** in each decision. Also, to provide the most representative flavor of opinions, quotations are used when possible. Finally, comments that appear in [brackets] are the Chapter Authors' own thoughts, not the Court's.

Following the Summaries of Opinions, this chapter also provides summaries of interesting dissents or concurrences regarding Orders issued this Term, 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 is presented. Finally, a chart showing what Justices wrote which 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 care the most to write in the field of criminal law.

III. DETAILED SUMMARIES OF THE SUPREME COURT'S CRIMINAL LAW AND RELATED OPINIONS FROM 2012-13

A. Constitutional Decisions

1. Article I, Section 10 (and Fifth Amendment Due Process): *Ex Post Facto* Clause.

Peugh v. United States, 133 S. Ct. 2072 (June 10, 2013) 5-4 (**Sotomayor**; Thomas, dissenting; Alito, dissenting), reversing and remanding 675 F.3d 726 (7th Cir. 2012).

Facts: Peugh ran farm-related businesses with his cousin, and when times got tough they engaged in two bank fraud schemes, in 1999 and 2000. The wheels of justice turned slowly, and Peugh was not tried until the mid-2000s and was not sentenced until 2009. By that time, the Sentencing Guidelines for fraud had been increased, so that Peugh's presumptive sentencing range was more than double than under the 1999 guidelines, from 30-37 months to 70-87 months under the 2009 guidelines. Meanwhile, another significant change had also occurred: in *Booker* (2005), the federal sentencing Guidelines had been declared to be discretionary rather than mandatory. The district court, relying on Seventh Circuit precedent, ruled that the now-discretionary ("advisory") nature of the Guidelines after *Booker* avoided any *ex post facto* problem in applying the later Guidelines, and sentenced Peugh to the bottom of the more severe guideline range (70 months).

Sotomayor (joined by Ginsburg, Breyer, Kagan, and Kennedy): The text of the *ex post facto* clauses in the constitution do not define the term. But ever since the famous 1798 list given by the Court in *Calder v. Bull* (1798), unconstitutional *ex post facto* laws include laws that “change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed.” Still, the category is not self-defining, and “[e]ach of the parties can point to prior decisions of this Court that lend support to its view.” On one hand, the Court has never held that the concept is limited only to laws that increase the maximum sentence, and “the fact that the sentencing authority exercises some measure of discretion will also not defeat an *ex post facto* claim.” *Garner* (2000); *Lindsey* (1937). On the other hand, mere speculation that a change in law might result in increased punishment for a crime is insufficient to establish a violation. Thus, since *Morales* (1995), “[t]he touchstone of this court’s inquiry is whether a given change in law presents a ‘sufficient risk of increasing the measure of punishment.’”

Miller v. Florida (1987) is “[t]he most relevant of our prior decisions for assessing whether the requisite degree of risk is present.” In *Miller*, the Court found (under a since-abandoned test) that an increase in sentencing guidelines could **constitute an *ex post facto* violation. The same is true here – even though the federal guidelines are now discretionary**, “[c]ommon sense indicates that in general, this system will steer district courts to more within-Guidelines sentences.” [Ed. Note: This is a realistic and knowledgeable statement coming from the only Justice who has ever sentenced defendants under the guidelines.] Even after *Booker*, the huge majority of sentences are with guidelines; and this is true even after a guidelines range is increased by amendment.

Thus Peugh’s case is remanded for resentencing under the 1999 Guidelines – but with the important proviso that “[o]f course ... sentencing courts will be free to give careful consideration to the current version of the Guidelines as representing the most recent views of the agency charged by Congress with developing sentencing policy.”

In a section that Justice Kennedy does not join – thereby rendering it a plurality – Justice Sotomayor goes on to say that the Court’s holding is consistent with “animating principles” of “fairness” and “fundamental justice” that underlie the *ex post facto* prohibition. The *ex post facto* clause gives people fair warning of the gravity of their crimes, guards against vindictive legislative action, and makes sure the government follows its own rules before it deprives a person of their liberty. Although the “principle of unfairness” is “not a doctrine unto itself” [this footnote statement was perhaps a belated (and unsuccessful) attempt to regain Justice Kennedy’s vote], it “helps explain the clause’s scope.”

Thomas, dissenting (joined in part by Roberts, Scalia, and Alito): Justice Thomas agrees that the discretionary guidelines “do influence” sentences, but believes that, under the Court’s precedents, they do not create a “sufficient risk” of increasing a defendant’s punishment. Changes in the law that create risk, but not assurance, of a higher sentence, do not deprive citizens of notice or fair warning. Thus, even applying *Morales*’s test, there is no *ex post facto* violation here.

Then, **in a discussion not joined by any other Justice**, Justice Thomas argues [as is often his wont] that the entire *ex post facto* doctrine should be re-examined. Current doctrine “has devolved into little more than an exercise in judicial intuition.” Under the *Calder* formulation (as Justice Thomas reads it), the *ex post facto* clause applies only to

“laws” that “change the punishment annexed to the crime.” Sentencing guidelines that affect a sentence within a statutory range do not do that.

Alito, dissenting (joined by Scalia): “I agree with Justice Thomas” that the federal guidelines do not meet even the *Morales* test; but “I do not have occasion in this case to reconsider that test’s merits or its relation to the original understanding of the Clause.” [Ed. Note: Chief Justice Roberts does not join this separate opinion, but simply declines to join the portion of Justice Thomas’s dissent that suggests reexamining the entire doctrine. The effect is the same, and thus one may wonder whether Justice Alito’s separate statement (joined by Justice Scalia) is a somewhat stronger signal to Justice Thomas not to write to reexamine entire doctrinal areas when unnecessary.]

B. Fourth Amendment

Bailey v. United States, 133 S. Ct. 1031 (Feb. 19, 2013), 6-3 (**Kennedy**; *Scalia* concurring; *Breyer* dissenting), reversing 652 F.3d 197 (2d. Cir. 2012).

Facts: A confidential informant told police that a “heavy set black male with short hair known as Polo” was selling drugs at a basement apartment and had a gun. Officers obtained a search warrant for the apartment. As officers were preparing to execute the warrant, they saw two men, “both matching the general description of ‘Polo,’” leave the apartment and drive away. Officers followed the car for about five minutes (one mile) and then stopped it and searched the occupants (one of whom was Bailey), yielding evidence later used against Bailey. The District Court upheld the stop as “incident to the execution of a search warrant” under *Michigan v. Summers* (1981). (The Court alternatively upheld the stop as based on reasonable suspicion under *Terry* (1968) – the Court explicitly declines to opine on this alternative ground, and it may be open on remand.) The Second Circuit agreed, ruling that *Summers* permits the detention of persons “seen leaving the premises” of a search warrant execution, when they are stopped “as soon as reasonably practicable.” Cert was granted to resolve differing interpretations of *Summers*.

Kennedy with Roberts, Scalia, Ginsburg, Sotomayor, and Kagan: When executing a search warrant, **officers may detain, absent probable cause, only those persons “present ... where the search is being conducted,” that is, within “the immediate vicinity,”** and not persons who have recently left the scene.

The Fourth Amendment generally requires probable cause as “the minimum justification necessary to make the kind of intrusion involved in an arrest.” *Summers* recognized a “categorical” exception, “to detain the occupants of the premises when a proper search is conducted” – thus in *Summers*, a person was lawfully detained “on a walk leading down from the front steps.” But “an exception to the Fourth Amendment ... must not diverge from its purpose and rationale.” *Summers* rested on “three important law enforcement interests ... taken together.” They are not present here.

The stop here was not necessary for officer safety. But although in *Muehler* (2005) we allowed officers to handcuff occupants for 2-3 hours, such “far reaching authority” at the scene of a search warrant execution “counsels caution” in extending the authority. Occupants who have left the scene unaware of the search “pose little risk to the officers at the scene,” and “unexpected arrivals” by anyone can be dealt with by other measures.

Otherwise, “the rationale would justify detaining anyone in the neighborhood” and thus exceed the normal probable cause limitation and the rationale of *Summers*.

Preventing “interference with the execution” was also not in play here, once Bailey had left the scene. And the idea that detained occupants might actually assist the search, while recognized in *Summers*, “would have no limiting principle” if extended further.

Finally, “preventing flight” has no application to persons who are unaware of the search and have left the scene. The danger of flight” is always present for criminally-involved persons; but this *Summers* rationale applies only if potential flight could “damage . . . the integrity of the search” itself.

Allowing *Summers* to extend “beyond the immediate vicinity of the premises” “would give officers too much discretion.” Moreover, detentions “away from the premises . . . often will be more intrusive than detentions at the scene.” Just as an authorized search has a “spatial constraint,” so too must the authority to detain pursuant to that search. While a “number of factors” [Justice Kennedy gives a non-exclusive list] may help determine the limits of “immediate vicinity,” here Bailey was detained “at a point beyond any reasonable understanding of” the term. A rule of “as soon as reasonably practicable” “departs from the spatial limit that is necessary to confine the [*Summers*] rule.” We leave open for remand the possibility of a separate *Terry*-stop rationale.

Scalia concurring with Ginsburg and Kagan [Ed. Note: interestingly, not Sotomayor]: “I write separately to emphasize why [an] interest-balancing approach – is incompatible with [*Summers*] categorical rule.” *Summers* was categorically limited to “occupants,” and Bailey was not one – he “was seized a mile away.” “It really is that simple” – *Summers* cannot apply. The “pragmatic appeal” of an “open-ended balancing” for reasonableness would “swallow the general rule” that requires probable cause for Fourth Amendment seizures. The “expansive” list of law enforcement interests discussed in *Summers* was “regrettable.” “The ordinary interest in investigation crime and apprehending suspects” is insufficient to support an exception [**Ed. Note:** quoting Justice Stewart’s dissent in *Summers*, a bit surprising, albeit quite satisfying, to find coming from Justice Scalia]. *Summers* “simplifies the task” of search warrant execution, but “the Government must take the bitter with the sweet” and not go beyond “*Summers*’ spatial bounds.”

Breyer dissenting with Thomas and Alito: The police here acted “reasonably” (as the Second Circuit found) and that is all that the Fourth Amendment requires. Bailey was stopped “at the earliest practicable location that was consistent with the safety and security of the officers and the public.” I agree that this case requires “drawing a line of demarcation.” The majority’s line is only “semi-bright” and “invites case-by-case litigation.” I think “as soon as reasonably practicable,” or “had just left the home,” would better serve the interests recognized in *Summers*, and “almost every” Circuit has adopted a similar approach. The majority’s line is “based on indeterminate geography” rather than “realistic concerns.”

Florida v. Harris, 133 S. Ct. 1050 (Feb. 19, 2013), 9-0 (**Kagan**), reversing 71 So.3d 756 (Fla. 2011).

Facts: Aldo was a trained narcotics detection dog. One day in 2006, Aldo’s law enforcement handler (officer Wheeler) used Aldo to conduct a “free air sniff” around Harris’s car during a lawful stop (expired license plate). Aldo alerted for drugs at the

driver's-side door handle, but a search did not turn up any drugs Aldo was trained to detect (including methamphetamine). Precursors for methamphetamine were found, and Harris later admitted that he routinely cooked methamphetamine at his home. Harris was arrested. Then, while out on bail, Aldo again alerted for Wheeler on Harris's driver's-side door handle, during another lawful stop (broken tail light), but a search yielded "nothing of interest."

Harris moved to suppress the fruits of the search of his car. The state proved that both Wheeler and Aldo had completed training courses (one with each other), and that Aldo had been certified in 2004 (but it was not renewed for 2006). Testing results were produced which showed Aldo to be "really good" at finding drugs. However, officers did not keep records of any "false alerts" by Aldo. Wheeler explained that Aldo's alerts on Harris's car were not errors, but rather "probably" responses to "residual odor" from Harris's cooking meth at home. The Florida trial court found that Aldo's alert had provided probable cause to search, but the Florida Supreme Court reversed, stating various requirements to show adequate narcotics-dog training, including records of false alerts. Because Wheeler did not keep such records for Aldo, the state could never show "that the dog is a reliable indicator of drugs."

Kagan (unanimous): "A sniff is up to snuff" if "all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent persons think that a search would reveal contraband or evidence of crime." **[Ed. Note:** reversal of Florida's "elaborate and inflexible evidentiary requirements" (quoted from the Florida S.Ct. dissent) seemed foreordained from the moment cert was granted.] The state's evidence of Aldo's training was sufficient for "probable cause" and no precise requirements are required by the Fourth Amendment. "The test for probable cause is not reducible to 'precise definition or quantification'" (*Pringle*, 2003). "All that is required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act" (*id.*). "The Florida Supreme Court flouted **[Ed. Note:** wow, that is rather strong language] this established approach." A "mandatory checklist," and an absolute requirement of "hits" and "misses" records, "is the antithesis of a totality-of-the-circumstances analysis." We criticized such an approach in *Gates* (1983) and our ruling is no less "for dogs than for human informants." It does not matter that no drugs were found: first, a dog is trained to detect odors, not drugs; and second, only a "fair probability" – not perfect accuracy – is constitutionally required. While we agree that a defendant "must have an opportunity to challenge ... a dog's reliability," we also recognize that law enforcement has its own efficiency incentives to effectively train sniffing dogs.

Florida v. Jardines, `133 S. Ct. 1409 (Mar. 26, 2013), 5-4 (**Scalia**; *Kagan* concurring; *Alito* dissenting), affirming 73 So.3d 34 (Fla. 2011).

Facts: Based on a tip (but without, it is assumed, probable cause or exigency), Detectives approached the front door of Jardines' front door with a marijuana-sniffing dog ("Franky"). The dog ran back and forth on the front porch, finally alerting at the base of the front door. This positive drug alert served as the basis for a search warrant. Marijuana plants were discovered inside and Jardines was charged with drug trafficking. However, the trial court, and ultimately the Florida Supreme Court, granted suppression on the ground that the dog-sniffing was a "search" unsupported by probable cause or other exception.

Scalia with Thomas, Ginsburg, Sotomayor and Kagan: The Fourth Amendment “establishes a simple baseline:” **“When ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects, ‘a ‘search’ within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred’”** (quoting *Jones* (2012), last term’s GPS case). “For much of our history” this “physical intrusion” rule formed the exclusive basis” for the Fourth Amendment’s protections. And “though *Katz* (1967) may add to the baseline, it does not subtract” from the prior test. “That principle renders this case a straightforward one.” Because the officers were “gathering information in an area belonging to Jardines and immediately surrounding his house” – “the curtilage” – and they “physically enter[ed] and occup[ied]” the area “to engage in conduct not explicitly or implicitly permitted by the homeowner,” it was a Fourth Amendment search requiring probable cause or an exception. **[Ed. Note:** Hmmm. This does not sound all that “straightforward” after all. Rather, it is directly reminiscent of Justice Scalia’s decision in *Kyllo*, which added the atextual “not available to the general public” limitation to describing Fourth Amendment “search” technology.]

This case is distinguishable from our “open fields” exceptions, “because such fields are not enumerated in the Amendment’s text.” “The home,” however, is constitutionally “first among equals.” At the Fourth “Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion’” (quoting *Silverman*, 1961). **[Now** here comes language that is entirely Justice Scalia’s, despite its Justice Brennan-like tones:] “That right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity: the right to retreat **[Ed. Note:** not in the Amendment’s text] would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window.” **[Ed. Note:** thus the majority’s description of the front porch here as “curtilage,” even though observable from the street, is essential to its result.] “We ... regard ... the curtilage ... as part of the home itself,” a principle that has “ancient and durable roots” (quoting Blackstone, 1769). “The **boundaries of the curtilage are ... easily understood from our daily experience**” (*Oliver*, 1984), and “here there is no doubt that the officers entered it: the front porch is the classic exemplar of **an area adjacent to the home and ‘to which the activity of home life extends.’**”

The decisions in *Entick v. Carrington* (British, 1765) and *Boyd* (1886) “state the general rule clearly: ... no man can set his foot upon his neighbor’s close without his leave.” **[Ed. Note:** citing these two decisions (let alone finding them to state a clear governing principle) is somewhat surprising, as they have repeatedly been devalued in the Court’s Fourth Amendment jurisprudence of the past 45 years.] “All four feet” of the two officers “and of their companion” were “firmly planted on the constitutionally protected extension of Jardines’ home.” And we find that he had not “even implicitly” given his consent for this. The “traditional invitation” of a home’s front door is to “approach by the front path, knock promptly, wait briefly ..., and then (absent invitation to linger longer) leave.” Girl scouts and trick-or-treaters understand this. “But ... a trained police dog ... is something else. There is no customary invitation to do that.” (In a footnote, Justice Scalia says “it is not the dog that is the problem, but the behavior,” and he seems to then say that the police could not use “binoculars” on the front porch either [cf. *Kyllo*]) “The background social norms that invite a visitor to the front door do not invite him there to conduct a search.” The actions here were not “an objectively reasonable search” because the officers’ “purpose [was] to conduct a search.”

Finally, we reject the argument that Jardines had no “reasonable expectation of privacy” on his front porch, as irrelevant to our property-based analysis. “One virtue of the Fourth amendment’s property-rights baseline is that it keeps easy cases easy.” So the argument that sniffing dogs (bloodhounds) “have been commonly used by police for centuries” is also off point. **“When the government uses a physical intrusion to explore the details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.”**

Kagan concurring, with Ginsburg and Sotomayor: “For me, a simple analogy clinches this case -- ...on privacy as well as property grounds.” A stranger using binoculars “to peer through your windows” has trespassed (exceeding the license you have granted) and also violated your reasonable privacy interests. “A drug detection dog is a specialized device for discovering objects not in plain view.” “Property concepts and privacy concepts ... [often] align.” The only difference between the majority’s opinion and mine, is that *Kyllo* “already resolved” this case on privacy grounds. [*Kyllo*, of course, was written by Justice Scalia, the author of the majority opinion here. So apparently Justice Scalia did not think so? Or, more likely perhaps, he preferred to push his property trespass jurisprudence advance more recently (by him) in *Jones* (2012).] And “the dissent’s argument that the device is just a dog cannot change the equation.”

[Ed. Note: In two footnotes, Justice Kagan makes some surprising – some might say inexperienced – statements. First, she says that “we have held, over and over again, that people’s expectations of privacy are much lower in their cars than in their homes.” While this may be true, it is not a holding that a “liberal” would want to unnecessarily embrace. And second, she says that “a human sniff is not a search, we can all agree.” Maybe – although as Justice Scalia has previously pointed out, a plain sense impression (whether smelling, looking, hearing touching or tasting) might still be called a “search,” but just a plainly reasonable one. Such dicta are unnecessary to Justice Kagan’s main privacy-emphasizing point.]

Alito dissenting joined by Roberts, Kennedy and Breyer: The majority’s “putative rule of trespass law ... is nowhere to be found in the annals of Anglo-American jurisprudence.” “Members of the public” generally have a “license ... to approach the front door... and to remain there for a brief time.” Thus we held in *Kentucky v. King* (2011) that police may approach a front door and engage in a “knock and talk” without a warrant, just “as any private citizen might do.” And a “purpose to discover information” obviously does not invalidate the *King* result. Here the dog was on the porch for only a minute or so. This license extends to anyone, even the police. There is “not a single case” anyone has located that says being accompanied by a dog exceeds this license, despite centuries of dog use by police and others. Thus the majority’s trespass rule is “a newly struck counterfeit.”

Likewise, there is also no reasonable expectation of privacy in odors emanating to the outside a house. And the concurrence’s argument about *Kyllo* was already rejected when we upheld dog sniffs as “not a search” in *Caballes* (2005), where Justice Souter advanced it in dissent.

I point out that the majority’s trespass rule will not apply on the public street or in the hallway of a building where the police are lawfully admitted.

Missouri v. McNeely, 133 S. Ct. 1552 (April 17, 2013), 5-4 (Sotomayor; Kennedy concurring; Roberts dissenting in part; Thomas dissenting), affirming 358 S.W.3d 65 (Mo. 2012):

Holding: “In drunk-driving investigations, **the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.**” “[E]xigency in this context must be determined case by case based on the totality of the circumstances.” [Ed. Note: Significantly, the Court does not address the constitutionality of police-administered blood draws on the scene, although that question clearly lurks in the background. The Court proceeds on the assumption that time to get to a hospital for a blood draw is the relevant fact.] The Court is severely divided and produced four separate opinions; perhaps most surprising is the Justice Scalia quietly joined Justice Sotomayor’s majority and plurality opinion in all respects.

Facts: McNeely was stopped at 2am and the officer noted that McNeely demonstrated “several signs that [he] was intoxicated.” McNeely was arrested for DWI after he refused to take a breath test for BAC (blood alcohol concentration). He was taken to a local hospital and his blood was involuntarily drawn, about 27 minutes after the stop, for a BAC test. His BAC was .154, well over the .08 legal limit. Because he had two prior drunk-driving convictions, McNeely was charged with a felony that carried a maximum four-year imprisonment penalty. But the trial judge suppressed the BAC evidence, ruling that there were “no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant.” The Missouri court of appeals stated an intention to reverse but certified the question to the Missouri Supreme Court. That court affirmed the trial court’s suppression order, ruling that *Schmerber* (384 U.S. 757 (1966)) “requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw.”

Sotomayor (joined by Scalia, Ginsburg and Kagan in whole, and by Justice Kennedy in part): “Our cases have held that a warrantless search of the person is reasonable [under the Fourth Amendment] only if it falls within a recognized exception.” Exigent circumstances in one such exception, and it includes acting without a warrant “to prevent the imminent destruction of evidence.” But that exception normally “looks to the totality of the circumstances” and “demands that we evaluate each case based on its own facts and circumstances.... [S]ee also *Richards v. Wisconsin*, 520 U.S. 385 (1997) (rejecting a *per se* exception” to the knock and announce rule for drug cases). Footnote 3: “the general exigency exception ... naturally calls for a case-specific inquiry.”

Meanwhile, “a compelled physical intrusion beneath McNeely’s skin and into his veins” is “an invasion of bodily integrity [that] implicates an individual’s most personal and deep-rooted expectations of privacy.” In *Schmerber*, we permitted a warrantless blood draw in a DUI case, but only on the cases “special facts” where “there was no time to seek out a magistrate and secure a warrant.” It is true that BAC blood evidence is “inherently evanescent” and “gradually declines soon after [a person] stops drinking.” Thus “some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency” and a warrantless blood draw. “That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, [and] not accept the ‘considerable overgeneralization’ that a *per se* rule would reflect” [quoting *Richards*, *supra*]. Although “some delay between the time of the arrest or accident and the time of the test is inevitable,” “a situation in which the warrant process will not

significantly increase the delay” – for example, where one officer applies for the warrant while another officer transports to the hospital – does not “justif[y] ... an exception to the warrant requirement.” And there are today even “more expeditious” techniques for getting warrants quickly (phone, email, “standard-form warrant applications”), “without undermining the neutral magistrate judge’s essential role as a check on police discretion.” On this record, where the officer “testified that he made no effort to obtain a search warrant” and the trial court found “no exigency,” we do not have “an adequate analytic framework for a detailed discussion of all the relevant factors.” We simply affirm the Missouri Supreme Court.

Sotomayor for plurality (Scalia, Ginsburg and Kagan): We reject the Chief Justice’s proposed “modified *per se* rule” because it distort[s] law enforcement incentives.” It “might discourage efforts to expedite the warrant process.” Moreover, the Chief Justice “does not say that roadside blood draws [by officers as opposed to medical personnel] are necessarily unreasonable” -- [Ed. Note: neither does the plurality, other than by implication here] -- and under the Chief’s approach “they would become a more attractive option for the police.” We also reject the idea that a case-by-case approach does not produce sufficient guidance for police. Case-specific justifications are common under the Fourth Amendment, and a “motorist’s privacy interests in preventing an agent of the government from piercing his skin” are significant. While the drunk driving problem is large and serious, many States already limit or prohibit “nonconsensual blood tests” unless a warrant is first obtained. “We are aware of no evidence” indicating that these States have less effective “drunk-driving enforcement efforts.”

Kennedy concurring in part: I agree that it is “prudent” to hold that “always dispensing with a warrant for a blood test ... is inconsistent with the Fourth Amendment.” However, general “rules, procedures and protocols” may well be possible, and we may have to “explore” them “in later cases.”

Roberts (with Breyer and Alito) concurring in part and dissenting in part: I think we should provide more guidance, and “the proper rule is straightforward.” “If an officer could reasonably conclude that there is not [time to secure a warrant before blood can be drawn] ..., the blood may be drawn without a warrant.” “The ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ and we should specify “a general rule” for “the typical case.” We should presume that the natural dissipation of alcohol in the bloodstream” qualifies as an exigency. “The reasonable belief that evidence is being destroyed gives rise to a compelling need.” And reliable BAC evidence is important. For example, we have held that, generally, there is a “burning building” exception to the warrant requirement. *Tyler* (1978). Even though “fire can spread gradually, ... that does not lessen the need and right of the officers to respond immediately.” Similarly, just because BAC level can be extrapolated backwards from a later blood draw based on averages and time lapse, that does not lessen the need for the better and more direct evidence from an immediate blood test. “Second-best evidence” does not lessen the exigency when first-best evidence is being lost.

Of course, “[t]here might ... be time to obtain a warrant in many cases.” “Requiring a warrant whenever practicable” is the normal rule. (The Chief notes that “in one county in Kansas” officers send email warrant requests “to judges’ iPads” and get the warrant back in 15 minutes.) Thus we agree that “if there is time to secure a warrant before blood can be drawn, the police must seek one.” But if an officer “could reasonably conclude that there is

not sufficient time” – or he applies for a warrant but does not get it in time -- then “a warrantless blood draw may ensue.” I simply would offer the police “more meaningful guidance” than the majority does, and I would remand to the Missouri courts for consideration of “the rule I describe,” rather than affirm.

Thomas dissenting [Ed. Note: If memory serves, Justice Thomas once served in the Missouri Attorney General’s office, and he votes in Missouri’s favor here.] “Because the body’s natural metabolization of alcohol inevitably destroys evidence ..., I would hold that a warrantless blood draw does not violate the Fourth Amendment.” I think *Schmerber*, and our more general “destruction of evidence” exception, requires this categorical rule. The police should not be required to “guess” at how long it may take to get a warrant. Moreover, Missouri itself “still requires written warrant applications,” not phone or email. Thus I dissent.

Maryland v. King, 133 S. Ct. 1958 (June 3, 2013), 5-4 (**Kennedy**; Scalia dissenting), reversing 42 A.3d 549 (Md. 2012).

Facts: King was arrested “for menacing a group of people with a shotgun” and charged with assault. Pursuant to a state statute, Maryland’s “DNA Collection Act,” law enforcement “booking” personnel rubbed the inside of King’s cheek with a cotton swab to collect a DNA sample. Three months later King’s sample was uploaded into Maryland’s computerized database, and was found to match a sample from an unsolved 2003 rape. King was indicted for that rape; a second DNA sample then taken pursuant to search warrant confirmed the rape match. King was convicted of the rape and sentenced to life without parole. But the Maryland Court of Appeals reversed, striking down portions of the state statute and ruling that taking a DNA swab from arrested but not yet convicted persons without probable cause violates the Fourth Amendment. The court opined that an arrestee’s “expectation of privacy is greater than the State’s purported interest in” using DNA to identify “cold case” offenders.

Kennedy (joined by Roberts, Thomas, Alito, and Breyer): The **Fourth Amendment allows a statutorily-regulated program of warrantlessly taking DNA swabs from inside the cheek of persons validly arrested for “serious” offenses as part of a “routine booking procedure,”** even though the sample is not needed for the current offense and there is no “individualized suspicion” that the arrestee has been involved in a prior crime. This result, says the Court, is **no different than the judicial approval of routine photographing or fingerprinting of arrestees** when those technologies were new. “DNA technology is one of the most significant scientific advancements of our era.” It has the “unparalleled ability both to exonerate the wrongly convicted and to identify the guilty” (*Osborne*, 2009) [Ed. Note: written by Kennedy -- a bit ironic since in *Osborne* the Court ruled 5-4 that the constitution does not require access to DNA evidence for potential innocence testing). Forensic DNA testing tests only “junk” DNA, which does not show genetic traits but can be “used with near certainty to identify a person.” The cheek-swab procedure is “quick and painless.” And the Maryland statute has various protective limitations: taking samples only from persons arrested for “serious” crimes; not allowing processing until the person is arraigned (and thus never entering DNA data when there are quick dismissals); and destroying the sample if the charges are found not to be supported by probable cause or the person is not convicted. Also, it is a criminal offense to “willfully test a DNA sample for information that does not relate to ... identification.” Moreover, “all 50

States require the collection of DNA from felony convicts,” and that practice is not challenged here.

Undoubtedly, even the minimal intrusion of “using a buccal swab on the inner tissues of a person’s cheek” is a Fourth Amendment “search.” But “the fact that that the intrusion is minimal” is relevant to the constitutional inquiry. “As the [Fourth Amendment] text ... indicates,” reasonableness is “the ultimate measure of the constitutionality of a governmental search.” Although the Court has “preferred” some quantum of individualized suspicion, there is “no [such] irreducible [constitutional] requirement.” *Martinez-Fuerte* (1976). Likewise, the Court has approved searches without traditional search warrants where special needs or other factors render dispensing with warrant requirements “reasonable.” And “the need for a warrant is perhaps least when the search involves no discretion,” as is the case under the statute here. **[Ed. Note:** although the limitation to “serious” crimes obviously leaves some discretionary wriggle room.]

To evaluate whether a warrantless search is “reasonable” in its “scope and manner of execution,” the Court must balance: “legitimate government interests” against the “intru[sion] upon an individual’s privacy. *Wyoming v. Houghton* (1999). Here the governmental interest is “well-established: the need for law enforcement officers in a safe and accurate way to process and identify the persons ... they must take into custody.”

Justice Kennedy goes on to list five legitimate governmental interests that support this DNA sampling process. First, he waxes (characteristically) metaphysical about what “identity” means. “Identity has never been considered limited to the name on the arrestee’s birth certificate.” “Identity” means an array of past and present facts about a person, not simply a way to specify a person as himself; for example, the criminal history of arrestees is a part of their identity. Thus police often, seek additional identifying information, such as comparing physical appearance to wanted-poster sketches, showing mug shots to witnesses, or taking fingerprints. These may provide “a different form of identification than a name or fingerprint, but [the] function is the same.”

Second, like inspection for tattoos indicating gang affiliation, DNA identification can protect law enforcement staff as well as other detainees from risk. Third, collecting a DNA sample before conviction can remove some incentive for prior felons to flee to avoid later DNA testing. Fourth, identifying past criminal conduct can inform decisions such as whether to release the arrestee on bail. DNA matches to prior crimes can help authorities decide if the arrestee poses a risk to the community. (By the way, notes the Court, the reality of releasing someone on bail often can take weeks or even months, so the days or weeks it now takes to get back a DNA “match” does not really unduly delay release – and DNA technology is improving so that 2-day, or even 90-minute, results may soon be possible. **[Ed. Note:** this is the only point at which the majority clearly addresses Justice Scalia’s dissenting point that because current DNA testing takes a relatively long time (in this case, over three months), the claim that it is useful in “identifying” an arrestee or in deciding immediate custodial or release arrangements is, simply put, disingenuous.] Fifth, DNA matching can free people wrongfully convicted of the same offense. **[Ed. Note:** Justice Scalia points out that, while this is theoretically true, this point also seems disingenuous here, because the DNA comparison databanks currently contain samples only from unsolved crimes.]

In the end, there is no real difference between DNA samples and fingerprints, other than “the unparalleled accuracy DNA provides.” Law enforcement have routinely “used scientific advancements in the identification of arrestees” (and here Justice Kennedy provides an interesting, and largely forgotten, history of the controversies surrounding the photographing and fingerprinting of arrestees, photography of arrestees in particular having received a fair amount of judicial attention around the turn of the 20th Century). Meanwhile, “the intrusion of a cheek swab ... is a minimal one,” and “the expectations of privacy of an individual [in] police custody necessarily are of a diminished scope.” (Here the Court cites the controversial ruling from last Term that all arrestees even for minor crimes can be strip-searched (*Florence*, 2012). **King’s “expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks,” and Maryland’s statutory program is “reasonable” as “part of a routine booking procedure.”** (Cf. *Muniz* (1990), approving a “booking questions” exception to *Miranda*).

[**Ed. Note:** The Court stresses that the statute here has a number of protective limitations – perhaps other jurisdictions will now feel they must follow this model. The Court also repeatedly stresses the “fundamental” limitation that there must be “a valid arrest for a serious offense” (elsewhere, “on probable cause for a dangerous offense”) (all emphases added). It is unclear what this may mean for the future – Justice Scalia says he “cannot imagine what principle could possibly justify this limitation” and “make no mistake about it: ...if you are ever arrested rightly or wrongly and for whatever reason,” your DNA “can be taken and entered into a national DNA database.” While I doubt the purported limit of Justice Scalia’s imagination, this is a compelling assertion.]

Scalia, dissenting, joined by Ginsburg, Sotomayor, and Kagan [**Ed. Note:** note the unusual array of Justices, with Justice Breyer not joining his fellow “liberals,” making Justice Breyer effectively the dispositive vote in this important 5-4 case. Moreover, Justice Scalia’s rhetoric here was some of the most entertaining of the Term.] “Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of the crime. It is obvious that no such noninvestigative motive exists in this case.” Indeed, the assertion that DNA is taken here to “identify,” and not to solve prior crimes, “**taxes the credulity of the credulous.**”

“At the time of our Founding, Americans despised the British use of so-called ‘general warrants’” because, at least in part, they were not based on individualized suspicion. The Fourth Amendment was plainly written to constrain that practice. Similarly (Justice Scalia says at the end of his 18-page dissent), “**I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.**”

Although the Court cites many prior examples of warrantless search cases, “in none of these cases did we indicate approval of a search whose primary purpose was to detect evidence of ordinary criminal wrongdoing” (quoting from *Edmond*, 2000 – interestingly a case in which Justice Scalia dissented). “Suspicionless searches are never allowed if their principal end is ordinary crime-solving.” “That limitation is crucial” here. “Searching every lawfully stopped car,” for example, might also turn up useful evidence of unsolved crimes. So too would a DNA search of “everyone who flies on an airplane, applies for a driver’s license, or attends a public school.” But “construction of such a genetic **panopticon**” [**don’t you just love that word!**] is prohibited by the Fourth Amendment.

Realistically, “no one would say that such” searches were “aimed at identifying” persons. The Maryland process here took months – “this search had nothing to do with establishing King’s identify.” **“No minimally competent speaker of English would” use “identification” as the majority does.** Rather, this DNA search was for use in solving (as it did) other crimes. “If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law enforcement aims that have never been thought to justify a suspicionless search.” But, says Justice Scalia (and he is a pretty good vote-counter), “most Members of the Court do not believe” that that rationale passes constitutional muster.

Moreover, “if the purpose of [Maryland’s statute] is to assess whether [an arrestee] should be released on bail,”... why would [the statute] possibly forbid the DNA testing process to begin until King was arraigned?” The Maryland statute does not name “identification of arrestees” as a purpose, and the legislators plainly had other purposes in mind. Because the Court depends on the “identification” purpose to uphold this statute (as related to something other than ordinary crime investigation), disproving this “minor premise” demonstrates the Court’s error.

DNA identification is not like photography, because photographing is not a Fourth Amendment search. It’s not like the old practice of taking an arrestee’s measurements and noting scars, because that process was used to identify repeat arrestees. Finally, DNA identification is not like fingerprinting, because it takes too long to be useful for identification purposes and is not compared to a database that provides names or other identifying information. It is only compared to unknown persons who committed unsolved crimes. A “match” does not identify the arrestee from whom the sample was taken; it oppositely “identifies” the previously unknown perpetrator. [**Ed Note:** at this point Justice Scalia seems to suggest that perhaps routine fingerprinting is also unconstitutional, and he notes that the practice was approved well before current Fourth Amendment privacy analysis was developed.]

Finally, “[a]ll parties concede that it would have been entirely permissible . . . for Maryland to take a sample of King’s DNA as a consequence of his conviction for assault.” Thus the “ironic result” is that “the only arrestees to whom the outcome here will ever make a difference are those who [are] acquitted of the crime of arrest” but whose pre-acquittal DNA samples have led to solution of other, unsolved, crimes. It is true that “solving unsolved crimes is a noble objective.” “[B]ut it occupies a lower place in the American pantheon of noble objectives that the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.”

C. Fifth Amendment

Salinas v. Texas, 133 S. Ct. 2174 (June 17, 2013), 5 (3+2) to 4 (**Alito**; *Thomas* concurring in the judgment; Breyer dissenting), affirming 369 S.W.3d 176 (Tex. 2012).

Facts: Salinas was suspected of murder and was interviewed at the police station. “All agree that the interview was noncustodial” and voluntary, and thus Salinas was not read *Miranda* warnings. Salinas answered a number of questions, but when he was asked whether his shotgun “would match” shells found at the murder scene, Salinas said nothing. “Instead,” according to the police, Salinas “looked down at the floor, shuffled his feet, bit his

bottom lip, clenched his hands in his lap, and began to tighten up.” Then “after a few moments of silence” Salinas answered a few more questions.

At trial, Salinas did not testify, and “over his objection” prosecutors “used his reaction to the officer’s questions as evidence of his guilt.” He was convicted and sentenced to 20 years. On appeal the Texas intermediate appellate court and the Court of Criminal Appeals (Texas’s highest criminal court) affirmed, finding that Salinas’s pre-arrest non-custodial, non-*Mirandized* silence was not “compelled” within the meaning of the Fifth Amendment.

Alito, joined by Roberts and Kennedy: We granted certiorari to resolve a split in lower courts on whether an assertion of the Fifth Amendment privilege in a voluntary non-custodial interview may be used against a defendant. “But because petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question.” Instead, Salinas’s Fifth Amendment claim “fails because he did not expressly invoke the privilege.” The Fifth Amendment privilege is, generally, “not self-executing” and “a witness who desires its protection must claim it” (*Murphy*, 1984; *Monia*, 1943), because “the privilege against self-incrimination is an exception to the general principle that the Government has the right to everyone’s testimony” (*Garner*, 1976). While “no ritualistic formula is necessary to invoke (*Quinn*, 1955), “a witness does not do so by simply standing mute.”

There are “two exceptions” to the rule that a witness must expressly invoke. One is that “a criminal defendant need not take the stand” to assert the privilege “at his own trial.” *Griffin* (1965). This is because “a criminal defendant has an absolute right not to testify.” *Turner*, 1970 (Black, J., dissenting; *Patane* (2004) (plurality) [**Ed. Note:** Since Justice Alito’s opinion is also only a plurality, a majority of the Court still has apparently never endorsed this assertion.] “Second, we have held that” [**note:** this phrase is often used by an opinion-writer to distance him or herself from the holding about to be recited] “a witness’s failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary” (citing *Miranda*; and the oft-criticized *Garrity* (1967) line of cases involving compelled statements in public employment). Also [third?], “where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence (citing *Leary* (1969) regarding filing an incriminating tax return; and *Albertson* (1965) regarding Communist Party registration forms).

None of the exceptions fits here “because it is undisputed that his interview with police was voluntary.” The “circumstances” (referencing the dissent) did not “deprive” Salinas “of the ability to voluntarily invoke the Fifth Amendment.” And because he did not invoke that Amendment, the “use of his noncustodial silence” did not violate it. We decline to adopt a new exception based merely on questioning by officials who suspect that an answer may be incriminating. A number of our precedents “establish that a defendant normally does not invoke the privilege by remaining silent” (noting in particular *Berghuis* (2010). [Indeed, it appears clear that if Salinas had answered the officer’s question, his voluntary response could be used against him.] An exception for silence, but not for voluntary answers, would “needlessly burden the government’s interests in obtaining testimony and prosecuting.” [**Ed. Note:** Although a lot of those pesky Constitutional amendments have that effect.]

It is suggested that it is “unfair” to require “a suspect unschooled in ... legal doctrine to do anything more than remain silent.” Our response: “popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be ‘compelled in any criminal case to be a witness against himself;’ **it does not establish an unqualified ‘right to remain silent.’**” And “it is settled that forfeiture of the privilege ... need not be knowing” (*e.g.*, statements against interest).

Finally, our ruling is far less “unworkable” than the dissent’s would be; for example, when does conduct while silent (as in this case) become “expressive” conduct that would be admissible? In addition, police are indeed permitted to tell suspects that their silence, in a voluntary noncustodial interview, “could be used in a future prosecution.” This is not a “trick.” To the contrary, police are permitted to “accurately state the law.” **[Ed. Note:** of course, an argument that police tactics have “compelled” a statement, or silence, is always available.]

Thomas, joined by Scalia, concurring in the judgment: There is “a simpler way to resolve this case:” overrule *Griffin* (1965), which held that prosecutorial comment on a defendant’s failure to testify violates the Fifth Amendment. “The threat of an adverse inference does not compel anyone”, and *Griffin* “lacks foundation in the Constitution’s text, history, [and] logic.” *Mitchell*, 1999 (Thomas and Scalia dissents).

Breyer dissenting, joined by Ginsburg, Sotomayor and Kagan: The majority’s “conclusion is inconsistent with this Court’s case law and its underlying practical rationale.” Many of the cases the majority relies upon are “[f]ar” afield from today’s case.” Meanwhile, we explained in *Miranda* that because it is unconstitutional to “penalize” an exercise of the Fifth Amendment privilege, “the prosecution may not use at trial the fact that [a suspect] stood mute.” **[Ed. Note:** Justice Breyer appears to discount the difference that, in *Miranda* cases, the setting is viewed as “inherently compelling” and normally the suspect has received express Fifth Amendment warnings.] “Much depends on the circumstances of the particular case.” **[Ed. Note:** this is a typically Breyerian statement, and one imagines that his dissenting colleagues are biting their tongues.] Justice Breyer then offers a relatively complicated and generalized three-factor analysis, to conclude that “Salinas need not have expressly invoked the Fifth Amendment” in an interview where the police plainly suspected Salinas of a serious crime and expected that his truthful answer would be incriminating, their question was an abrupt “switch in subject matter,” he had no counsel, and the police had no special need to know expressly that Salinas was staying silent to invoke the Fifth Amendment privilege.

Meanwhile, the “administrative problems” under the “plurality’s approach” are “even worse” than my circumstance-specific analysis. For example, where is the line defining “express” invocation? **[Ed. Note:** of course, this difficulty already exists under the “unambiguously invoke” standard for the Fifth Amendment right to counsel.] Meanwhile, it is unfair to persons like Salinas who “are likely unaware of any such linguistic detail.” “Far better” would be my direct inquiry, which serves “the need for simplicity:” “Can one fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment privilege?” **[Ed. Opinionated Assessment:** This is not one of Justice Breyer’s stronger dissents, and it is difficult to view his “all the circumstances” approach as either simple or easy to administer, let alone clearly derived from precedent or the Fifth Amendment’s text. A reader who is sympathetic to the dissenting position is, perhaps, left

somewhat hungry for what likely would have been a more passionate dissent if authored by Justice Sotomayor, or a more rhetorically stinging one if authored by Justice Kagan.]

Evans v. Michigan, 133 S. Ct. 1069 (Feb. 20, 2013) 8-1 (**Sotomayor**; Alito dissenting), reversing and remanding 491 Mich. 1 (2012).

Facts: Michigan tried Evans for criminal “burning other real property,” and the prosecution rested after presenting evidence that Evans had burned down an unoccupied house. But the state jury instructions suggested that the prosecution had to prove that the structure was “not a dwelling,” and the trial judge then ordered an acquittal, finding that the prosecution had not proved this “element” of the crime. The Michigan Court of Appeals reversed, however, finding that under Michigan law there was no element of “not a dwelling.” The court therefore ordered a new trial, and the Michigan Supreme Court affirmed, ruling that “when a trial court grants a defendant’s motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court’s ruling does not constitute an acquittal for the purposes of double jeopardy.”

Sotomayor (for eight): This Court has long followed the principle that **the Double Jeopardy Clause “bars retrial following a court-decreed acquittal, even if the acquittal is “based on an egregiously erroneous foundation.”** *Fong Foo*, 1962. The Court has barred retrial after acquittals in cases similar to Evans’, among them; “an erroneous decision to exclude evidence” (*Sanabria*, 1978), a “mistaken understanding of what evidence would suffice to sustain a conviction” (*Smith*, 2005), and “a ‘misconstruction of the statute’ defining the requirements to convict” (*Rumsey*, 1984). Although these circumstances may affect the “accuracy” of an acquittal, they do not affect its “essential character.” **An acquittal “encompass[es] any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.”** *Martin Linen* (1977). By contrast, a dismissal or mistrial based on procedural error or something unrelated to substance does not bar retrial. The essential difference is that those cases “‘are unrelated to factual guilt or innocence,’ but ... ‘serve other purposes,’ including ‘a legal judgment that a defendant, although criminally culpable, may not be punished’ because of some problem like an error with the indictment.” **[Ed. Note:** In light of the precedents, one might wonder why the Court’s opinion extended beyond the first page.]

Just as a sense of “repose” should accompany a factual finding of innocence (*Scott*, 1978), a defendant in Evans’ circumstances should not be subjected to “embarrassment, expense, and ordeal” or compelled to live “in a continuing state of anxiety and insecurity.” Allowing a retrial after such a finding might allow the Government to “wear down the defendant so that ‘even the innocent may be found guilty.’” Thus, here, “there is no question that the trial court’s ruling was wrong; But that is of no moment.”

The State argues that there is a difference between cases where a court acquits based on errors in proving a case, as opposed to adding an element. No dice. “Labels do not control our analysis in this context; rather, the substance of a court’s decision does.” The mistake in Evans’s case could easily be termed a “misinterpretation” of the statute, rather than an “erroneous addition” of an element. **“Seeing no meaningful constitutional distinction between a trial court’s “misconstruction” of a statute, and its erroneous addition of a statutory element, we hold that a midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes.”** “We reject the notion that a

defendant's constitutional rights would turn on the happenstance of how an appellate court chooses to describe a trial court's error." We believe "that courts exercise their duties in good faith."

In addition, "to hold that defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests, and would vitiate one of the fundamental rights established by the Fifth Amendment." Even if precedents can be "distinguished," this case is unremarkable in light of precedent, the prior standards are not unworkable. And our result need not result in a "windfall" for defendants while denying the prosecution a "full and fair" opportunity to present their case. Instead, courts can mitigate errors like this one by following the federal practice of deferring ruling on a motion to acquit until after the jury decides. If a jury convicts and the court *then* acquits, the government can appeal because reversal would merely result in reinstatement of the jury's verdict, not a second trial.

Alito, dissenting: "The Court's holding is supported by neither the original understanding of the prohibition against double jeopardy nor any of the reasons for that prohibition." The original intended object of the Double Jeopardy Clause was to "prevent[] the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *Scott*, 1978. This applied, according to Justice Alito, only in cases where a *jury* had returned a *verdict*, not "whenever a *judge* issues a *preverdict* [legally erroneous] ruling." Justice Alito finds the Court to depart wildly from the common law origins of the Double Jeopardy Clause, as well as its purposes. Here, the trial court allowed the *defense* to terminate a trial that "the defense obviously did not want to run to completion." This deprives Michigan of the guarantee of "one complete opportunity to convict those who have violated its laws" (*Sattazahn*, 2003).

An acquittal should be "a decision that 'actually represents a resolution, correct or not, of some or all of the elements of the offense charged.'" *Smith*, 2006. The majority here engages in a "reformation of double jeopardy law," by saying that "the touchstone is *not* whether the elements were resolved" but rather whether the grounds for acquittal were substantive or procedural. This is wrong; when a judge "fabricates" an element and then erroneously "acquits," the defendant suffers no injury. In each precedent the majority cites, the prosecution failed to prove, or the court misconstrued, *actual* elements. There is no difficulty in identifying cases where a nonexistent element is fabricated, and "[p]ermitting retrial in these egregious cases is especially appropriate.

D. Sixth Amendment

1. Effective Assistance of Counsel in Guilty Pleas

Chaidez v. United States, 133 S. Ct. 1103 (Feb. 20, 2013), 7 (6 + 1) to 2 (**Kagan**; *Thomas* concurring in the judgment; Sotomayor dissenting with Ginsburg), affirming 655 F.3d 684 (7th Cir. 2011).

Facts: Roselva Chaidez became a lawful permanent U.S. resident in 1977. Some 25 years later, she pled guilty to two counts of federal mail fraud and was sentenced to probation. But her attorney (allegedly) never told her this could subject her to mandatory removal. When Chaidez applied for citizenship in 2009, the government instead sought her removal.

Chaidez then filed for a writ of *coram nobis*, alleging that her prior conviction was invalid because her attorney's failure to advise her constituted ineffective assistance of counsel, a claim we "vindicated" in 2010 in *Padilla*. The government argued, however, that *Padilla* should not be applied retroactively to convictions that were final before *Padilla* was decided, because it was a "new rule" under *Teague v. Lane* (1989). This district court rejected that view, but the Seventh Circuit agreed with the government, 2-1.

Kagan (for 6): "When all we do is apply a general standard to ... factual circumstances it was meant to address," it will "rarely" constitute a non-retroactive "new rule" under *Teague*. Thus "garden variety applications of ... *Strickland* ... for assessing claims of ineffective assistance of counsel to not produce new rules." "But *Padilla* did something more." It also resolved a "threshold question" of whether "collateral consequences" like deportation are "categorically removed" from the scope of the Sixth Amendment. "That preliminary question ... required a new rule." We noted that "no decision ... committed us to apply" a collateral/direct consequence distinction; and that in any case, "deportation ... is unique." We thus "breach[ed] the previously chink-free wall," and "if that does not count as 'breaking new ground' ..., we are hard pressed to know what would." *Padilla's* result "was not 'apparent to all reasonable jurists'" (*Lambrix*, 1997). In particular, we do not think our 2001 decision in *St. Cyr* indicated that holding (and neither did lower courts). Because *Padilla* thus stated a new rule, it does not apply retroactively to convictions final before its announcement.

Thomas concurring in the judgment: Because I believe *Padilla* was wrongly decided (I dissented there), I need not apply any *Teague* analysis. Chaidez loses either way.

Sotomayor dissenting with Ginsburg: "*Padilla* did nothing more than apply the existing rule of *Strickland*," and thus was not a "new rule" barring retroactive application. As Justice Kennedy noted in *Wright v. West* (1992), "it will be the infrequent case that yields a result so novel that it forges a new rule." Like other applications of *Strickland*, *Padilla* was just a "garden variety" application of the principles of ineffective assistance to a particular context. It simply "correspond[ed] to an evolution in professional norms." Meanwhile, we rejected the collateral/direct consequences distinction in *Padilla*, so that was not adopting a "new" decision. [Further details of Justice Sotomayor's 13-page dissent are omitted here.] "The fact that a decision was perceived as momentous or consequential [or a "serious disruption" in precedent] ... does not control the *Teague* analysis." "Today's decision deprives defendants of the fundamental protection of *Strickland*." **[Ed. Note:** But this is, of course, true of the *Teague* non-retroactivity doctrine in general, and also seems irrelevant to the "new rule" analysis. It is, instead, a critique of the underlying doctrine, and takes us directly back to the Justice Harlan debates of the 1960s.]

2. Speedy Trial Right

Boyer v. Louisiana, No. 11-9953, 133 S. Ct. 1702 (Mem.) (April 29, 2013), certiorari dismissed as improvidently granted ("DIG"), 5-4 (*Alito* concurring; *Sotomayor* dissenting).

Alito concurring with Scalia and Thomas [Justices Roberts and Kennedy simply remain silent while agreeing with the DIG]: "The premise of the question" we granted cert on was that "Louisiana's system for paying" for indigent capital defendants had broken down (in part due to Hurricane Katrina) and caused most of the lengthy delay between [Boyer's] arrest and trial," some seven years. "Because the record shows otherwise, I agree" with the DIG. "The single largest share of the delay was ... defense requests for continuances ... and

much of the rest of the delay was caused by events beyond anyone's control." When the Louisiana court said that "the majority of the seven year delay was caused by lack of funding," it "most likely" meant that the funding issue was the source of delay – but much of this was "defense requests for continuances ... on the issue of funding. And the state never "conceded" to the contrary, it merely argued in the alternative on occasion.

Sotomayor dissenting, with Ginsburg, Breyer and Kagan: Rather than "second-guess" the meaning of a clear state court "factual determination" (that lack of funding caused a seven-year delay here), we should simply provide a "clear answer" to the Question we granted cert on: delay attributable to lack of state funding for counsel must count against the state in the Speedy Trial analysis, even if the "causes" of the lack of funding are seemingly not in control of the prosecution (here a legislative impasse, and perhaps two hurricanes). In *Barker v. Wingo* (1972), we explained that there is a four-factor Speedy Trial analysis, and that even "negligence" and "overcrowded courts" must be counted as "the ultimate responsibility" of the government in that analysis. The Louisiana court's contrary conclusion was "a critical misapprehension of our precedents." Once we issue this clear answer to the narrow question presented, everything else, including whether Boyer also bears some responsibility, would be open on remand, for an accurate "*Barker* analysis anew." But "the Court's failure to resolve this case is especially regrettable, because" it is "illustrative of larger, systemic problems in Louisiana." Research shows serious problems in offering speedy trials in Louisiana, and it is "unfortunate" that we do not provide the state some clear guidance.

3. Apprendi (Jury) Sentencing:

Alleyne v. United States, 133 S. Ct. 2151 (June 17, 2013), 5 (4-1) to 4 (**Thomas**; *Sotomayor* concurring in full; *Breyer* concurring in part and in the judgment; **Roberts** dissenting; Alito dissenting), vacating 457 Fed. App'x 348 (4th Cir. 2011).

Facts: After Alleyne and an accomplice planned a robbery and his accomplice approached the victim with a gun, Alleyne was charged with (among other things) "using or carrying a firearm in relation to a crime of violence," 18 U.S.C. § 924(c)(1)(A). That crime always requires a five-year minimum term of imprisonment; but if the gun is "brandished" a minimum seven-year term is required, and if "discharged," a minimum ten years. The jury convicted Alleyne (presumably through accomplice liability principles) of "using or carrying" the firearm, but did not check a box finding that he had "brandished" it. Nevertheless, the probation report recommended a seven-year term for brandishing, and the judge imposed that term over Alleyne's objection. The judge noted that under *Harris* (2002), a judge could find a fact like "brandishing" by a preponderance, even if the jury's verdict could be read as finding that it was not proved beyond reasonable doubt. (*Harris* had expressly rejected the argument that *Apprendi* required a jury finding beyond reasonable doubt, as that decision was read to apply only to facts that raise a statutory maximum.)

Thomas (joined by Ginsburg, *Sotomayor* and *Kagan* in full, and in part by *Breyer*): The division between facts that are "elements" of a crime and those that are "sentencing factors" was first introduced in *McMillan* (1986), which first rejected the argument (accepted today) that the Constitution requires facts that set a mandatory minimum sentence must be found by a jury beyond reasonable doubt under *Winship*. However, in *Apprendi* (2000) we adopted a new analysis and "declined to extend *McMillan*" to facts that

increased a statutory maximum sentence. *Apprendi* decided, under the Due process Clause applied in *Winship* as well as the Sixth Amendment's jury trial guarantee, that any fact that increases a statutory maximum sentence must be treated as an "element" and found beyond reasonable doubt by the jury, not a judge. "The logic of *Apprendi* prompted questions about the continuing ... validity of *McMillan*." But in *Harris* the Court still reaffirmed *McMillan*, because the judge could have imposed the minimum term "with or without" a jury's finding. That is, the jury's verdict of conviction "authorized" a range that encompassed the minimum term. But *Harris* was only a plurality opinion -- Justice Breyer concurred only because he (in 2002) "could not yet accept" *Apprendi*.

Today the Court now agrees that *Harris* "cannot be reconciled with our reasoning in *Apprendi*, so we overrule it. "It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences" and "aggravates the punishment." We think "it is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." "This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Thus "*Apprendi's* definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor." **[Ed. Question:** the Court seems to be very careful to repeat that its ruling applies to facts that "increase" a mandatory minimum," as opposed to the facts that "set" the minimum. Can the Court possibly mean that its ruling today does not apply to minimum setting facts? That seems unlikely. More likely is the idea that facts which set a mandatory minimum are already viewed as "elements" of the offense.]

As for *stare decisis*, the Court says only that "there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum," and in a footnote (presumably added after Justice Alito circulated his separate dissent, and possibly after Justice Sotomayor circulated hers, stating the same principle) adds that "the force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."

The Court reads history to accept the common law idea of punishments as fixed by the jury's conviction, and thus adopts a 1872 Bishop treatise statement that "Crimes" consist of "every fact which is in law essential to the punishment" (citing liberally from Justice Thomas's concurring opinion so arguing in *Apprendi*). Justice Thomas also repeats his idea that there was a "well-accepted practice of including in the indictment every fact that was a basis for imposing [my emphasis] or increasing punishment." However -- and presumably in order to keep his five-Justice majority -- Justice Thomas stresses that today's ruling does not apply to every fact used to "impose" a sentence. "We take care to note what our holding does not entail. Our ruling ... does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." **[Ed. Note:** Thus the interesting result here is, presumably, that although a judge in this case might still (on remand) decide in his or her discretion to impose a seven-year sentence, based upon a determination that a gun was in fact brandished, the judge cannot be required by the legislature to impose that sentence unless a jury finds that fact. The Court directs that the case is remanded for resentencing "consistent with the jury's verdict." One can imagine an argument about what that, really means. But a dispute about it seems unlikely in this case, as one imagines all will accept a new, five-year, term.]

[Further Ed. Note: In footnote 1, the Court notes that *Almendarez-Torres* (1998) provides a “narrow exception” to *Apprendi*, for “the fact of a prior conviction.” But rather than endorse that holding, Justice Thomas’s opinion says only that “because the parties do not context that decision’s vitality, we do not revisit it ... today.” One imagines that Justice Thomas does not agree with *Almendarez-Torres*. But one can only wonder what Justice Breyer -- the author of *Almendarez-Torres*, a longtime critic of *Apprendi*, yet also the necessary fifth vote today, thinks of *Almendarez-Torres* now that he has “accepted” *Apprendi*. A future ruling applying *Apprendi* to the facts of prior convictions -- that is, requiring juries to find that priors exist, rather than judges -- would certainly be a large administrative sea change in current criminal sentencing procedures.]

Sotomayor, concurring, joined by Ginsburg and Kagan **[Ed. Note:** One “story” of this Term is that this has become the “Term of the Three-Female-Justices Opinion.” I believe this is at least the third time this Term that these three have joined in a separate opinion. Hopefully we will cease to remark upon this, now that it appears to have become common.]

I fully join the Court’s opinion, which “persuasively” applies *Apprendi* as well as “the original meaning of the Sixth Amendment.” Still, I agree with Justice Alito (dissenting) that “it would be illegitimate to overrule a precedent simply because there are currently five Justices willing to do so.” So I want to explain at greater length the “special justifications” present here that support overruling *Harris*: this is a merely a procedural rule, it’s “reliance” interests are “minimal,” and “subsequent developments of constitutional law” have “eroded” *Harris*’s underpinnings. Moreover, even in *Harris*, five Justices recognized that its result was incompatible with *Apprendi* -- Justice Breyer simply “declined” to apply *Apprendi*. Thus only a plurality ever endorsed *Harris* to begin with. Justice Alito’s criticism is “not plausible” and he “exaggerates” that this case is an “important precedent about precedent.” To the contrary, “rarely will a claim for *stare decisis* be as weak as it is here.

Breyer concurring in part and in the judgment: “I continue to disagree with *Apprendi*,” but “the law should no longer tolerate the anomaly that the *Apprendi/Harris* distinction creates.” If a judge cannot impose a higher sentence s/he “wishes to impose” without a jury finding, then a judge ought not be required to impose a higher sentence that s/he “does not wish to impose” without a similar jury finding. “In both instances the matter concerns higher sentences,” factfinding “triggers the increase,” and “jury-based factfinding would act as a check.” *Apprendi* has been the law longer than *Harris* **[Ed. Note:** but not *McMillan!*] and “it is time to end this anomaly.”

Roberts dissenting with Scalia and Kennedy: “No one thinks” that a judge who sentenced Alleyne to seven years rather than five “because he finds that the defendant used a gun during the crime” would violate the defendant’s constitutional rights. A legislature’s decision to require this in every case “has no effect on the role of the jury,” which still must convict of the offense. “The Framers envisioned the Sixth Amendment as a protection for defendants from the power of the government,” not a “protection for judges from the power of the legislature.” Thus I respectfully dissent.

I accept the fact that the Court has decided that the “common law rule best reflects what the Framers understood the Sixth Amendment jury right to protect: jury findings of facts “essential to the punishment.” Thus *Apprendi* and its progeny apply to sentences not otherwise authorized by the jury’s verdict alone. This “properly preserve[s] the jury right as

a guard against judicial overreaching.” **[Ed. Note:** Thus Chief Justice Roberts quietly distances himself from the repeated overall criticisms of *Apprendi* that his predecessor, and former boss, Justice Rehnquist repeatedly embraced. Justice Alito’s separate dissent, below, does not accept *Apprendi* on any level, and he notably does not join the Chief’s dissent here.] But here the jury’s conviction already authorized a term of five years to life in prison. “The jury’s role was completed, the jury was discharged, and the judge began” to determine “where within that range” to sentence Alleyne.” “Everyone agrees that ... the judge was free to consider any relevant facts ... including facts not found by the jury beyond a reasonable doubt.” Meanwhile, unlike old cases that supported the result in *Apprendi*, there is not “a single case” holding that facts affecting a “sentencing floor” should be treated as elements. And the “penalty” has never included “the bottom end of the statutory range.” Thus, for example, other important rights “focus on the maximum sentence while ignoring the minimum:” the right to a jury trial (exposure to over six months), and barring the rights to vote and bear arms from felons (persons exposed to a maximum term of more than one year).

Why can’t a legislature tell judges what weight to give some facts, within sentencing ranges authorized by the jury? The majority’s “new rule [is] impossible to square with the historical understanding of the jury right as a defense from judges, not a defense of judges.” The Sixth Amendment does not protect judges from legislative direction; “it limits legislative power only to the extent that [its] power infringes on the province of the jury.” Because I don’t think we should overrule *Harris*, “I will not quibble” regarding *stare decisis*. I respectfully dissent.

Alito dissenting: “If the court is of a mind to reconsider existing precedent, a prime candidate should be *Apprendi*.” That case is based on bad history regarding the “original understanding” of the Sixth Amendment **[Ed. Horn-Tooting:** citing, *inter alia*, Little & Chen, 17 Fed. Sent. Rptr. 69 (2004).] The majority “barely mention[s]” *stare decisis* – but its decision “creates a precedent about precedent that may have greater precedential effect than the dubious decision” today. [Justice Alito then appends a footnote response to Justice Sotomayor’s concurrence that is a page and a half long. Among other things, he points out that if the four-Justice-plurality critique of *Harris* is correct, then “the Court’s opinion in this case” is similarly suspect, since “only four Members of the court think that the Court’s holding is the correct reading of the Constitution.”]

B. FEDERAL STATUTES

A. Conspiracy:

Smith v. United States, 133 S. Ct. 714 (Jan. 9, 2013) 9-0 (**Scalia**), affirming 651 F.3d 30 (D.C. Cir. 2011).

Facts: Smith was indicted for conspiracy based on his alleged involvement in a ten-year drug distribution conspiracy. Smith had been in prison during the last six years of this alleged ten-year period. Smith moved to dismiss the conspiracy charges as barred by the five-year statute of limitations -- because he had been in prison for the last six years of the conspiracy, he argued he had “withdrawn” from the conspiracy and none of his acts had occurred within the five-year period prior to indictment. The court denied dismissal, however, and at trial instructed the jury that in order to withdraw from a conspiracy, the defendant must perform “affirmative acts inconsistent with the goals of the conspiracy”

that ‘were communicated to the defendant’s co-conspirators.’” The court also instructed that once the government has proved that the defendant was in the conspiracy, the defendant has the burden to show, by a preponderance of the evidence, that he had withdrawn, in order to receive that defense. The jury convicted and the Court of Appeals affirmed. Noting a split in authority as to who bears the burden of proving or disproving withdrawal before the statute of limitations period, the D.C. circuit ruled that the defendant should bear the burden and that the Due Process Clause does not require otherwise.

Scalia (for a unanimous Court): It is standard law that a conspiracy defendant bears the burden of proving withdrawal by a preponderance of the evidence. “Proof of the nonexistence of all affirmative defenses has never been constitutionally required.” *Patterson v. New York* (1977). Although the burden to prove all the elements of a crime rests firmly with the prosecution (*Winship*, 1970), the burden to *disprove* shifts to the prosecution only when an affirmative defense negates an element of the crime, rather than “excus[ing] conduct that would otherwise be punishable” (*Dixon*, 2006). Withdrawal is not such a defense. It does not negate an element of the crime; it merely removes liability for crimes committed by co-conspirators after the withdrawal. Similarly, “a statute-of-limitations defense does not call the criminality of the defendant’s conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill-suited for prosecution.” Thus the burden to prove withdrawal rests on the defendant even if the allegation is that he withdrew before the limitations period began.

Due Process does not require otherwise; the burden to prove affirmative defenses has traditionally rested on defendants. Although Congress could have shifted the burden of proving “the nonexistence of withdrawal,” it chose not to do so. Instead, Congress logically left the burden with the party asserting withdrawal, because that party is more likely to have access to the facts necessary to prove the withdrawal, than the prosecution will to prove its absence. Similar logic holds for the statute-of-limitations defense. Although the Court has held that the government must prove that a conspiracy continued into the statute of limitations period, it is not the burden of the Government to prove that the defendant did not withdraw before the statute of limitations period began.

B. Aggravated Felonies and Immigration Removal

Moncrieffe v. Holder, 133 S. Ct. 1678 (April 23, 2013), 7-2 (**Sotomayor**; Thomas dissenting; Alito dissenting), reversing 662 F.3d 387 (5th Cir. 2012):

Facts: A noncitizen who has been convicted of an “aggravated felony” of “illicit [drug] trafficking” may be deported from the U.S. without any opportunity for discretionary relief. Such a felony includes any state crime that would be “punishable” as a felony under federal controlled substances laws. Moncrieffe came to the U.S. at the age of three, from Jamaica. In 2007 when he was 26, police in Georgia found 1.3 grams of marijuana (“the equivalent of about two or three marijuana cigarettes”) in his car. He pled guilty to a Georgia felony that permits withholding of a judgment of conviction and complete expungement if probation is successfully completed. Nevertheless the federal government sought to deport Moncrieffe, because he currently stands “convicted” and his Georgia offense could meet the federal felony definition of “possession with intent to distribute,” 21 U.S.C. § 841(a). Moncrieffe argued that § 841(b)(4) provides that marijuana distribution is a misdemeanor if it involves “a small amount of marijuana for no remuneration,” and because the Georgia statute at issue would encompass such an offense, it “categorically” could

constitute the federal misdemeanor rather than an aggravated felony. But the BIA and the Fifth Circuit rejected this view.

Sotomayor (for 7): We reverse. [Ed. Note: the complicated statutory and precedential details are largely omitted in this Summary.] A state drug-trafficking offense that by its terms can also extend to **“the social sharing of a small amount of marijuana” is not an “aggravated felony”** under our normal “categorical” approach. We have always applied a “categorical approach” to evaluating whether state crimes are “aggravated felonies” for immigration purposes. *Nijhawan* (2009); *Lopez* (2006); *Taylor* (1990). Whether the person’s “actual conduct” involved more serious facts is “quite irrelevant;” “we must presume that the conviction ‘rested upon nothing more than the least of the acts’ criminalized.” [Former CA2 Judge Sotomayor memorializes these quotes as, now, the Supreme Court’s law, from the patron saint of CA2, Judge Learned Hand, in *U.S. ex rel. Guarino v. Uhl*, 107 F.2d 399 (CA2 1939) (emphasis added, punctuation altered).] “The reason is that the INA asks what offense the noncitizen was ‘convicted’ of, not what acts he committed.” *Carachuri-Rosendo* (2010).

Under this analysis, Moncrieffe’s conviction for “possession with intent to distribute” could be, without more, the misdemeanor offense described in 841(b)(4): possession of a small amount of marijuana for no remuneration. (Footnote 7: “small amount” is not defined but the BIA suggests 30 grams as a “useful guidepost” – we don’t decide this.) We reject the argument that 841(b)(4) is merely a “mitigating exception” and that 841(a) “presumptively” defines any such offense as a felony. That is “simply incorrect.” And in *Carachuri-Rosendo* we rejected the view that actual “conduct” can or must be examined. Moreover, the government’s view could “render even an undisputed misdemeanor an aggravated felony” (describing a New York state offense). We don’t believe Congress ever intended such a result. We also reject the idea that a noncitizen could be allowed to prove the misdemeanor conduct at his removal hearing – that is “entirely inconsistent with both the INA’s text and the categorical approach,” as well as realistically undesirable. “The cure is worse than the disease,” and “we prefer ... [to] err on the side of underinclusiveness.” The government’s approach, for the “third time in seven years, ... defies the commonsense conception” of the statute. It makes more sense simply to hold that the Georgia offense, so broadly written, does not meet the specific definition of an “aggravated felony.”

Thomas dissenting: I have dissented from the Court’s “categorical approach” since *Lopez*, and I continue to think it wrong. Georgia law defines what Moncrieffe pled guilty to as a felony, and it is undoubtedly “punishable” as such under the federal statute. That should be the end of the matter. “The only principle uniting [the precedents] ... appears to be that the Government consistently loses.”

Alito dissenting: The Court’s decision “leads to a result that Congress clearly did not intend.” In Florida Moncrieffe’s crime would be an “aggravated felony;” but across the line in Georgia it now is not. But Congress intended to create uniform federal law for immigration purposes. I agree with the Court that 841(b)(4) indicates that Congress would not want to treat distribution of a small amount of marijuana for no remuneration as an “aggravated felony.” So I would not use the pure “categorical” approach, but rather would allow noncitizens to prove that their offenses involved the conduct excepted in 841(b)(4), at their removal proceeding. This best achieves the legislative intent while allowing federal courts to apply the federal laws uniformly, despite different wordings in state criminal

statutes. Here, Moncrieffe did not attempt to show that his conduct actually met the 841(b)(4) standard. So “I think we have no alternative but to affirm.”

Henderson v. United States, 133 S. Ct. 1121 (Feb. 20, 2013) 6-3 (**Breyer**; Scalia dissenting), reversing 646 F.3d 223 (5th Cir. 2011).

Facts: Henderson pled guilty to “felon in possession” of a firearm. When the district judge sentenced Henderson to 60 months in prison -- a sentence above the Guidelines range -- his stated reason was to make Henderson eligible for a drug treatment program. Henderson himself had asked for a sentence that would help him address this problem (although he did not ask for an above-Guidelines sentence). Henderson did not object. At the time of sentencing, the law regarding this reason was unsettled in the Fifth Circuit, and outside the Fifth Circuit the courts were “split” on whether “promoting rehabilitation” could lawfully justify an above-Guidelines sentence.

Henderson appealed, and after his sentencing but before his appeal was heard, the Supreme Court settled the Circuit split in *Tapia* (2011), holding it “error for a court to ‘impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation.’” Thus by the time Henderson’s appeal reached the Fifth Circuit, the sentencing error was “plain,” but it had not been “plain” at when the trial court acted. The Fifth Circuit declined to change Henderson’s sentence, despite that *Tapia* error, ruling an error must be “plain ... at the time of trial” to be correctable under Fed.R.Crim.P. 52(b).

Breyer (joined by Roberts, Kagan, Sotomayor, Ginsburg, and Kennedy): Fed.R.Crim.P. 52(b) states that a “plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” Today we hold that “as long as the error is ‘plain’ at . . . the time of appellate review,” the error is plain within the meaning of the Rule. The Court of Appeals “may ... consider” such an error even though “not brought to the [trial] court’s attention.”

This case presents “a conflict between two important, here competing, legal principles.” First, rights normally may be forfeited by failing to timely assert them before the court. *Olano* (1993). Rule 52(b) does not undiscerningly permit all unobjected-to errors to be corrected on appeal, and the rule thus encourages timely objections. But second, an appellate court is normally bound to apply the law in effect at the time of its decision. *Thorpe* (1969). The first principle favors a finding of plainness to be limited to the time of the error, the second favors allowing a finding of error at the time of appeal. In *Olano*, we noted that Rule 52(b) requires application of this second principle when “fundamental justice” dictates it.

Consistency among our precedents requires a “time of appeal” rule here. In two prior cases, we ruled that errors may be corrected as “plain” despite the lack of a contemporaneous objection. In *Olano* the error was perfectly clear when the district court ruled. The Court approved correction of such “plain errors,” subject to the following four-step analysis: (1) there is an error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” Then in *Johnson* (1997), the Court addressed the opposite situation and again applied a “time of appeal” rule. In *Johnson*, the district court had ruled correctly

under settled law at the time -- but then an intervening Supreme Court decision to the contrary made the trial court's ruling clearly wrong by the time of appeal. We held that requiring defendants to object in the trial court to a ruling that is clearly correct would be inefficient as well as futile, so again such unobjected-to issues may be corrected when the law is clear by the time of appeal. And after *Johnson*, there is no longer a textual argument that the word "was" in the Rule requires that the error must have occurred in the past.

Not granting relief to Henderson would be anomalous after *Olano* and *Johnson*. His situation, where the law is not clear one way or the other at the time of trial, would be the only one not correctible under Rule 52(b). "Why should [the rule] not also cover cases in the middle?" As well as "anomalous," there is "no practical [reason] for making this distinction."

Moreover, it seems unlikely that any lawyer would consciously choose not to object when the law is unsettled, hoping that an intervening Supreme Court decision would soon be favorable and transform the ruling into plain error on appeal. "[L]ike the unicorn," such a lawyer "finds his home in the imagination, not the courtroom."

Whether Henderson's *Tapia* error must be corrected depends on application of the final *Olano* factor: "whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Henderson's case is remanded for that determination (and the majority notes that his failure to object when the law was unsettled "may well count against the grant of Rule 52(b) relief").

Scalia, dissenting (joined by Alito and Thomas): The majority "misconceiv[es] our task," which is "not the exalted philosophical one of deciding where justice lies." Instead, we must apply the "entirely clear" text of Rule 52(a) when read together with (b). Rule 51(a) provides that "A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought - of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Rulings based on unsettled laws that are not objected to are not such error.

It is not futile to object when the law is unsettled, as it was in *Johnson*. Rule 52(b) should be interpreted to require objection, or a forfeit of the right to object, to such error. Only a defendant who is "remiss" for not raising an objection when it might have done some good will be barred on appeal, and there is nothing unfair about that. Justice Scalia criticizes the majority's "touching faith in the good sportsmanship of defense counsel" and its "Pollyannaish rejoinder" to the warnings of reversed convictions and sentences where counsel has failed to assist the trial judge in pointing out errors. He finds it completely plausible that "[w]here a criminal case has always been, or has shown at trial to be, a sure loser with the jury, it makes entire sense to stand silent while the court makes a mistake that may be the basis for undoing the conviction." Meanwhile, the uncertainty in application of the other *Olano* factors is unsatisfactory.

United States v. Davila, No. 12-167 (June 13, 2013), 9 (7-2) to 0 (**Ginsburg**; *Scalia* concurring in part and in the judgment), vacating 664 F.3d 1355 (11th Cir. 2011).

Facts: Davila was indicted for filing over 120 false tax returns (allegedly fraudulently receiving \$423,000 from the IRS). He soon requested replacement of his appointed counsel because (he said) that lawyer had done nothing but advise Davila to

plead guilty. At an *in camera* hearing, a magistrate-judge denied the request and then went on to tell Davila that sometimes the best strategy might well be to plead guilty. Pleading guilty, the magistrate suggested, could get Davila the “reduction for acceptance of responsibility” that “someone with your criminal history needs.” Indeed [**Ed. Note:** in a statement repeated a few times, that perhaps drew the most attention to this case], the magistrate told Davila, “you’ve got to go to the cross. You’ve got to tell the probation officer everything.”

Three months later, Davila did indeed plead guilty (to a single count), but before a District Judge, not the magistrate that had made the offending statements. There was no reason to believe that this judge even knew of the prior *in camera* hearing, let alone the magistrate’s remarks. Meanwhile, Davila did not mention them, and instead said under oath that he had not been pressured by anyone to plead guilty. Then, before sentencing, Davila moved to vacate his plea, stating that he had pled guilty only for “strategic” reasons (to gain discovery and show that there were indictment errors). Again Davila did not mention the magistrate’s prior remarks. The district court denied this motion and sentenced Davila to 115 months in prison.

On appeal, Davila’s counsel sought to withdraw on the basis that there were no meritorious appellate issues, but the Eleventh Circuit denied that motion and *sua sponte* ordered the attorney to brief the “irregularity” in the magistrate’s remarks. Both sides then acknowledged that the magistrate’s remarks violated Fed.R.Crim.P. 11(c)(1), which directs that the “court must not participate in plea discussions.” But the government argued that on this record, the violation did not “affect [Davila’s] substantial rights” under Rule 11(h) [and F.R.Cr.P. 52]. But the Eleventh Circuit ruled that a violation of Rule 11(c)(1) requires “automatic vacatur” of a guilty plea.

Ginsburg (joined by Roberts, Kennedy, Breyer, Alito, Sotomayor, and Kagan): Subsection (h) of Rule 11 states that “a variance from the requirements of this Rule is harmless error if it does not affect substantial rights.” Even though the Advisory Committee Notes explain that subsection (c) of the Rule was amended in 1974 to eliminate the prior practice (a practice still followed in a number of States) of judicial involvement in plea negotiations, there is no exception in subsection (h) for subsection (c) violations. The Advisory Committee Notes also explain that Rule 11(h) meant that Rule 11 errors would be brought within the “plain error” rules of Rule 52(a). Thus the plain language of Rule 11(h), as well as its intent, requires rejection of any “automatic” reversal doctrine.

The Court has also ruled in *Vonn* (2002), and *Dominguez-Benitez* (2004), that Rule 11 errors are subject to the normal harmless and plain error rules of Rule 52(a). While some “structural” errors can “trigger automatic reversal,” Rule 11 violations “do[] not belong in that highly exceptional category.” Judicial involvement in plea negotiations does not implicate constitutional rights like the right to counsel [**Ed. note:** this seems necessary to say so that contrary state practices are not endangered]. No doubt the magistrate’s remarks in this case “were indeed beyond the pale” and in clear violation of Rule 11(c)(1). But the record here also shows some powerful reasons why the error might not have “affected substantial rights.” “Our essential point is that particular facts and circumstances matter,” and because there was no objection by Davila here, his claim must be assessed “in light of the full record” to examine on remand “whether it was reasonably probable that, but for the Magistrate Judge’s exhortations, Davila would have exercised his right to go to trial.”

Scalia, concurring in part and concurring in the judgment (joined by Thomas): Rule 11(h), stating a harmless error rule, is “crystal clear” and “the beginning and the end of this case.” I’ve said before (*Black*, 2010) that we ought not reference Advisory Committee notes because “the Committee’s view is not authoritative.” [Ed. Note: This objection is similar to Justice Scalia’s well-known view that legislative history ought not be examined for statutory meaning.]

Descamps v. United States, 133 S. Ct. 2276 (June 20, 2013), 7 (6/1) to 2 (Kagan for 7; Kennedy concurring; Thomas concurring in the judgment; Alito dissenting), reversing 466 Fed. Appx 565 (CA9 2012) and the underlying precedent, *U.S. v. Aguilar-Montes de Oca*, 655 F.3d 915 (CA 9 2011).

Facts: Descamps was convicted of felon-in-possession, which normally carries a maximum 10 years (18 U.S.C. § 924(g)). But the government alleged he had three prior convictions for “violent felonies” under the Armed Career Criminal Act (ACCA, § 924(e)), and the district court agreed, sentencing Descamps to about 22 years in prison.

Descamps had argued, however, that his California burglary conviction should not count, because the state statute defines “burglary” more broadly than the “generic” type of burglary that the Supreme Court has ruled must be present to apply the ACCA (*Taylor*, 1990). Indeed, California does not require “unlawful entry” as an element of burglary (thus shoplifters are burglars in California), and under the “categorical” approach of *Taylor* – looking to the statutory elements only – this would not be “generic burglary.” However, the Court has held in subsequent cases that a sentencing judge may examine the documents in a specific case (like a guilty plea agreement or transcript) to see if a burglary conviction was “generic.” This is the “modified” categorical approach. The government argued that here, Descamps’ transcript showed that his conviction actually “involved the breaking and entering of a grocery store” (because the prosecutor said this and Descamps did not contest it). The government argued that, applying the “modified categorical approach,” this transcript proved generic burglary with an unlawful entry. The district court agreed, and on appeal the Ninth Circuit had to affirm because it had recently decided *en banc* that Descamps’ “categorical” argument must be rejected if documents other than the statute itself showed he had in fact pled guilty to “generic” burglary (applying the “modified categorical approach”). The Supreme Court granted cert to decide whether the modified categorical approach may be applied to a state statute with “indivisible” (rather than alternative) elements. The answer today is that it cannot be.

Kagan (joined by Roberts, Scalia, Ginsburg, Breyer, Sotomayor): “We hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.” [Ed. Note: I am not going to spend as much time unpacking this as the Court’s 23-page opinion does.] Our precedents “all but resolve” the case. We have only allowed a “modified” categorical approach when a state statute provides alternative elements for committing burglary – we call this a “divisible” statute. In such a case, looking to documents beyond the statutory elements is simply a tool to see what elements the factfinder actually must have found. But where a state statute is “indivisible” – that is, it does not specify alternative elements for committing burglary, but rather defines burglary as a single crime with elements broader than “generic” burglary – we have never allowed a court to look behind the statute to see what the defendant “actually” did. That is because “the key” to deciding whether a “burglary” was committed within the federal definition “is elements, not facts.” Indeed, we

believe that allowing a court to examine the record to see whether a defendant committed acts not defined as elements in the statute would likely violate the Sixth Amendment, under *Apprendi*, because the ACCA makes the fact of a prior conviction the key to raising the statutory maximum. Although we have held that the fact of prior conviction is an exception to the jury-finding rules of *Apprendi* (in *Almendarez-Torres*, 1998), we want to avoid that constitutional question here. **[Ed. Note:** Why? Because Justice Thomas has said for years that *Almendarez-Torres* should be overruled and the exception for prior convictions be eliminated – and last week’s *Alleyne* decision brings that prospect ever closer.]

Note that Justice Kagan appears to go out of her way to criticize the Ninth Circuit – which has been a favorite pastime of some of her colleagues for years, but not generally for the “liberal” Justices. But here the politics are reversed. The author of the Ninth Circuit’s *en banc* opinion was Judge Jay Bybee, a conservative favorite from the Bush Administration; while the dissenter in that case was Judge Marsha Berzon, generally a liberal favorite. Justice Kagan expressly endorses Judge Berzon by name (p. 11), while saying of the *en banc* opinion (while not naming Judge Bybee) that is not only “has no roots in our precedents,” “[b]ut more: [it] subverts th[em].” Based on statutory “text,” the Sixth Amendment, and “practical difficulties and potential unfairness,” “the Ninth Circuit’s ruling strikes out swinging.” It “flouts our reasoning.” This seems a bit harsh: surely the Court’s “modified categorical approach” hardly seemed as clear as the Court makes it out today. And Justice Alito’s dissenting view – that Descamps’ burglary apparently was for “what everyone imagines when the term ‘burglary’ is mentioned” – does give the statute “a more practical reading.”

Finally, Justice Kagan’s opinion engages Justice Alito’s dissent (and Judge Bybee’s *en banc*) on a theoretical level: is there any real, identifiable difference between a “divisible” and “indivisible” criminal statute? As she concedes, “every indivisible statute can be imaginatively reconstructed as a divisible one.” But “this would altogether collapse the distinction between a categorical and a fact-specific approach.” (Justice Kagan invokes the board game “Clue” here; Justice Alito has a little fun with that in n.3 of his dissent.) “All is in the eye of the beholder, and prone to endless manipulation.” At this point we seem to be off to the law-school-hypothetical races. But Justice Kagan ends it by simply noting that “we have expressly and repeatedly forbidden” using something other than a categorical – that is, statutory elements-based – approach. You can’t constitutionally use case-specific documents to supply findings on elements that the original factfinder did not make. Here, Descamps may not have contested the prosecutor’s claim for various strategic reasons – and the judge did not have to “find” an element of “breaking and entering” because the California statute simply does not require it. Thus, California’s “overbroad” burglary statute can never serve as a prior conviction predicate under the federal ACCA.

***Kennedy* concurring:** Both the Court and Justice Alito’s dissent raise “troubling” points. Assigning powerful force to “facts” that may simply have been uncontested without consideration to future sentencing impacts is a “substantial concern.” At the same time, the distinction between divisible and indivisible statutes “is not all that clear,” and requiring states to amend their criminal statutes to meet the [odd] demands of the ACCA “is an intrusive demand on the States.” **[Ed. Note:** OMG, is that a foreshadowing of the Court’s yet-to-come Voting Rights decision in *Shelby*, or what?!] While I am persuaded that the majority reaches the correct result, the “disruption to the federal policy underlying the ACCA ... is troubling and substantial” [because no burglary conviction in California can

now trigger the ACCA's more severe penalties, while burglary convictions from states with differently-written statutes can.] "Congress should act at once" and "modify" the statute.

Thomas, concurring in the judgment [only]: I explained in *James* (2007) that the ACCA "runs afoul of" *Apprendi*, because there should be no "fact of prior conviction" exception to *Apprendi*'s rule. "This Court has not yet reconsidered *Almendarez-Torres*" [but it should]. [Ed. Note: As noted in my prior summary of last week's *Alleyne* decision, counting the votes of current Justices on *Almendarez-Torres* will now be the latest *Apprendi* tea-leaf-reading game.]

Alito dissenting: "I would give ACCA a more practical reading" because it seems apparent that Descamps pled guilty to "what everyone imagines when they" think of "burglary." The Court's approach is "highly technical" and not required by the ACCA's text or the constitution. And the "practical difficulties" of the majority's approach as far worse than line-drawing might be under mine. A "conviction should qualify" whenever it is "clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary."

Neither the statute's text, nor our precedents, require an exclusively elements-based approach. In fact [and without going into the details], the state statutes at issue in our prior cases might well be described as "divisible" in the way the Court says allows a "modified" categorical approach. We need not overrule our precedents -- we should simply have "a practical understanding of the modified categorical approach." As for Descamps not contesting the prosecutor's proffered factual basis here, this attributes to defendants and their attorneys "a degree of timidity that may not be realistic." [Ed. Note: This is said, gently, by a former prosecutor who has tried cases, in an argument with a former law professor who has not. Although neither Justice has ever tried a case for the criminal defense.] I agree that we ought not allow judges to determine "what the defendant [actually] did;" but they can determine what the factfinder necessarily found or the defendant admitted. So there is no Sixth amendment problem. "Where the record is clear, I see no reason for granting a special dispensation."

Meanwhile, the Court seems not to consider that its ruling will "frustrate fundamental" congressional objectives: subjecting federal offenders with substantial prior records of violence to severe sentences. It is clear that Descamps had a significant prior record of violent offenses, so I would affirm the sentence below.

United States v. Kebodeaux, 133 S. Ct. 2496 (June 24, 2013), 7(5-2) to 2 (**Breyer**; **Roberts** concurring in the judgment; **Alito** concurring in the judgment; **Scalia** dissenting; **Thomas** dissenting), reversing 687 F.3d 232 (5th Cir. 2012) (*en banc*).

Facts: In 1999 when Kebodeaux was in the United States Air Force, he was convicted by court-martial of sex with a 15-year-old. "Several years after Kebodeaux had served his [three-month] sentence and been [bad conduct] discharged, Congress enacted" SORNA – the Sex Offenders Registration and Notification Act of 2006. Kebodeaux had moved to Texas after his discharge, where he lawfully registered as required pre-SORNA as a sex offender. But he then moved, within the State, and failed to change his registration, as by then required under SORNA. He was then prosecuted under SORNA, convicted, and sentenced to one year and a day in prison (more time than he could have gotten pre-SORNA). A panel of the Fifth Circuit affirmed the conviction, but a 10-6 *en banc* court

reversed, ruling that Congress had no authority under the Necessary and Proper clause to retroactively apply criminal penalties to a former federal defendant who had already been “unconditionally released” from federal custody.

Breyer (joined by Kennedy, Ginsburg, Sotomayor and Kagan): **Because Kebodeaux was already subject to valid federal sex offender registration requirements, Congress had authority under the Necessary and Proper Clause to alter those requirements for Kebodeaux even after his criminal sentence was served.** “We disagree” with the Fifth Circuit’s “critical assumption:” that Kebodeaux’s release was “unconditional.” “To the contrary, ... tracing through a complex set of statutory cross-references,” Kebodeaux was already subject to federal sex offender registration requirements under the Wetterling Act. Because he was already, and validly, subject to federal registration requirements, Congress had power under the Necessary and Proper Clause to “modify” those requirements and impose “very similar” requirements under SORNA. (Because Kebodeaux has disavowed any Due Process challenge, “we assume” compliance with the constitutional Ex post Facto clauses. **[Ed. Note:** this is obviously a very critical assumption, one with which Justice Thomas, at least, disagrees with in dissent.])

The Constitution grants Congress the power to “make Rules for the ... Regulation of the land and naval forces.” **[Ed. Note:** As I often point out to my ConLaw students, this means that the air force is textually unconstitutional, right?] And we have ruled that the additional power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers” gives Congress the power to “create federal crimes” and regulate federal offenders, including confining a federal “prisoner civilly after the expiration of his or her term of imprisonment. *Comstock* (2010).” **[Note** that Justice Thomas, a dissenter in *Comstock*, today points out that in *Comstock* the prisoner so confined was currently in federal custody, NOT discharged after service of his sentence like Kebodeaux, and the majority in *Comstock* expressly “limited” its holding to such in-custody prisoners.] Similarly, the registration requirements here were imposed as “a consequence of [Kebodeaux’s] violation of federal law.” Meanwhile, sex offender registration requirements are “eminently reasonable” because they “can help protect the public.” (Justice Breyer acknowledges that the empirical evidence for the value of sex offender registration requirements is “conflicting,” but notes that Congress has authority to choose, if rational, among conflicting evidence.)

Once Congress has authority to impose registration requirements on sex offenders, the parties “come close to conceding” the validity of SORNA – and “we believe they would be right to make this concession.” In this “as applied” challenge, SORNA “ma[d]e few changes” to the Wetterling registration requirements that Kebodeaux was “already subject to” (and while it did increase the potential penalty, from 1 to 10 years imprisonment, it “reduced” other requirements (emphasis in original). “No one here [he must mean the parties, not the dissenting Justices] claims that these changes are unreasonable or that Congress could not reasonably have found them ‘necessary and proper’ means for furthering its preexisting registration ends.” **[Ed. Note:** It is painfully apparent, as Justice Thomas points out in dissent, that Justice Breyer does not say anything about how or why the registration requirements “further” the enumerated constitutional power to regulate the military.]

Roberts, concurring only in the judgment: Congress had power to impose the registration requirements “as a consequence for a violation of military rules,” for deterrent

purposes: “A servicemember will be less likely to violate relevant military regulations if he knows” he will be required to register for “years into the future.” [As Justice Thomas points out, however, SORNA could not possibly serve this purpose for Kebodeaux, because it was not enacted until long after Kebodeaux committed his offense.] While perhaps the increase of Kebodeaux’s sentence to a year and a day, from the initially-potential year, might raise “other constitutional concerns,” it is valid as an exercise of necessary and proper power. Once a proper deterrence power for the military is recognized [although the majority does not express this deterrence theory], the rest of the majority’s analysis of “the general public safety benefits of the registration requirement” is “beside the point.”

Although “such surplusage might not [“ordinarily”] warrant a separate writing, ... I worry that incautious readers will” find something that is not here and not in the Constitution -- “because it does not exist” – that is, “a federal police power.” The Solicitor General advanced such an argument, but we have repeatedly and firmly rejected it. *Morrison* (2000); *McCulloch* (1819); *Comstock* (2010, Kennedy concurring [but note that Justice Kennedy joins the majority here]). “The fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public for the convict’s purely intrastate conduct.”

Alito concurring only in the judgment: “I concur in the judgment solely on the ground” that Congress has the necessary power to “eliminate or at least diminish” a “gap in the laws” created by its exercise of a valid power. Here, Congress validly created separate federal military courts; but because those courts are not part of the state criminal system, their defendants do not fall under the State’s sex offender registration laws. Congress therefore has the necessary and proper authority to enact federal sex offender laws that apply to military convictees.

Justice Scalia dissenting: I join Justice Thomas’s dissent with the exception of Part III-A. As I explained in *Raich* (2006), I believe that if Congress has power to enact a law, then it has further authority to enact laws to make the original, valid law “effective.” But here, it is “dubious” that Congress has authority to enact federal sex offender registration laws at all, and it is “obviously untrue” that SORNA was necessary to make those prior registration requirements effective.

Thomas dissenting (joined in part by Justice Scalia): [In what is largely a reprise of his *Comstock* (2012) dissent,] Justice Thomas opines that federal sex offender registration requirements do not “carry into Execution” any enumerated congressional power, and instead “usurp the general police power vested in the States.” “Congress does not retain a general police power over every person who has ever served in the military.” Moreover, SORNA was “enacted long after Kebodeaux had completed his sentence” and “retroactively increasing his punishment would violate the *Ex Post Facto* clause” (citing *Peugh*, decided less than two weeks ago). “Not one line of the opinion explains how SORNA is directed at regulating the armed forces.” As such, the majority’s “analysis is untethered from the Constitution.”

Sekhar v. United States, 133 S. Ct. 2720 (June 26, 2013), 9 (6-3) to 0 (Scalia; Alito concurring in the judgment with Kennedy and Sotomayor), reversing 683 F.3d 436 (2d Cir. 2012).

Facts: Sekhar managed an investment fund, and in 2009 the New York state Comptroller was considering whether to invest in Sekhar's fund. The general counsel to the Comptroller had the power to make a recommendation as to whether or not to invest in the fund. Law enforcement traced to Sekhar's computers some emails that threatened to expose an alleged affair of the general counsel's if the general counsel did not favorably recommend Sekhar's fund. When the jury convicted Sekhar of federal "Hobbs Act" extortion (18 U.S.C. 1951), it specified that the "property" Sekhar had attempted to obtain was "the General Counsel's recommendation to approve the" investment. In affirming Sekhar's conviction, the Second Circuit "recharacterized" this (says Justice Alito in concurrence), ruling that the general counsel "had a property right in rendering sound legal advice to the Comptroller ... free from threats." The question is whether this meets the Hobbs Act's definition of extortion as "the obtaining of property from another [etc.]," 18 U.S.C. § 1951(b)(2).

Scalia for 6: [Ed. Note: Perhaps the most amusing thing about this decision is that it was announced on the final opinion day of the Term (June 26), sandwiched in-between the two same-sex marriage cases. Thus, when Justice Scalia began his announcement of *Sekhar* from the bench, he reportedly began by saying something like "sorry, but this won't take long." Some observers had forgotten that Justice Scalia is senior by over a year to Justice Kennedy, who had first announced the DOMA decision (and junior by dint of office to the Chief, who next announced the Proposition 8 decision). So when Justice Kennedy read first, there was some humorous confusion: could Justice Scalia possibly be reading the Prop 8 decision? Of course the answer was "no"; Sekhar briefly intervened).

The recommendation of a government lawyer regarding a potential governmental investment is not "property" within the meaning of the Hobbs Act (if at all). "What was charged in this case was not extortion," whether viewed under the common law, the text and genesis of the statute, or this Court's prior cases. While extortion is "one of the oldest crimes in our legal tradition," it originally applied only to "extortionate action by public officials." Moreover, it "did not cover mere coercion to act" – the defendant had to "obtain[] items of value." (So, for example, when Congress modeled the Hobbs Act on New York State's extortion statute, it did not adopt the separate New York crime of "coercion." [Ed. Note: Justice Scalia comes very close to relying on Hobbs Act legislative history here.] "*Interference with rights*" was clearly coercion, not extortion. Thus in *Scheidler* (2003), we ruled that extortion "requires not only the deprivation but also the acquisition of property." Thus [here's the majority's holding for this case:] "**the property extorted must therefore be *transferable***" (italics in original).

The government's attempt to distinguish *Scheidler* is "nonsensical." There is no distinction between coercing someone to do something versus coercing them to do nothing – and neither is extortion. In *Scheidler* we ruled that interfering with the business of abortion clinics was not extortion because the defendants there "did not pursue or receive 'something of value from' the clinics that they could then 'exercise, transfer, or sell.'" This case is "easier than *Scheidler*," where the defendants did at least occupy the physical property of the victims. Even if the general counsel's right to make a recommendation could be called "property in a broad sense," it "certainly was not *obtainable property* under the Hobbs Act." ("We are not sure" of the dissent's contention that the right to make a recommendation is not property at all. "But the point relevant" here is that it *cannot be transferred*," so it is not property within the Hobbs Act.) [Ed. Note: Justice Scalia goes on to call the government's arguments "absurd," "sophistic," and something that "no fluent speaker of the English language" would say. We will charitably attribute this vitriol to the End of Term pressures that all laborers at the Court feel by June.]

Alito concurring in the judgment with Kennedy and Sotomayor: The definition of “property” was extensive at common law (and when Congress adopted the Hobbs Act) as encompassing “anything of value.” However, it “plainly does not reach everything that a person may hold dear.” “A mere internal recommendation that a state government take an initial step that might lead eventually to an investment” simply “stretches the concept of property beyond the breaking point.” No case has been cited to support the government’s theory. And the Second Circuit’s “recharacterization” does not help, because the “right” to make such a recommendation is not property if the recommendation itself is not. Because such an internal recommendation is not property, “it is unnecessary for me to determine whether or not petitioner sought to obtain it” (thus the majority’s “not transferable” rationale is “a different reason” than mine. (Justice Alito cites some lower court Hobbs Act cases that might support application of the Hobbs Act “on these same facts” but “under some other theory.”) By the way, the “rule of lenity” would counsel in favor of our judgment today, “even if the Hobbs Act were ambiguous” [but apparently it is not].

C. HABEAS CASES

Ryan v. Gonzales, 133 S. Ct. 696 (Jan. 8, 2013), 9-0 (**Thomas**), reversing *Carters*, 644 F.3d 329 (6th Cir. 2012) and *Gonzales*, 623 F.3d 1242 (9th Cir. 2010).

Facts: In two different cases, the Ninth and Sixth Circuits held that “death row inmates pursuing federal habeas corpus are entitled to a stay of proceedings when found incompetent.” Gonzales received the death penalty for the stabbing death of a 7-year-old during a burglary; Carter for stabbing his adoptive grandmother to death. In Gonzales, the Ninth Circuit applied its precedent (*Rohan*, 2003) which held that the statutory right to counsel in federal habeas proceedings (18 U.S.C. § 3599(a)(2)) could not “faithfully be enforced” unless the petitioner was judged competent, and that declining to stay habeas proceedings until competency is established violates the statutory right to counsel. Thus although the district court here denied a stay because it found that Gonzales’s claims were all “record based or resolvable as a matter of law,” the Ninth Circuit reversed because its new precedent (*Nash*, 2009) held that “meaningful assistance of counsel” requires at least “rational communication between counsel and [the] habeas petitioner.”

The Sixth Circuit took a different statutory route. It ruled that 18 U.S.C. § 4241 (providing a right to competency exam in federal trial proceedings) and a “unique one-sentence order” in an old Supreme Court case (*Rees II*, 1967) supported (by a complicated analysis not particularly relevant now) a right to competency for habeas petitioners.

Thomas (for a unanimous Court): “**The assertion that the right to counsel implies a right to competence**” not only “**lack[s] any basis in the statutory text,**” but also “**is difficult to square with our constitutional precedents.**” The right to counsel in a criminal trial is in the Sixth Amendment, but we have ruled that the criminal trial of an incompetent defendant violates Due Process, not the Sixth Amendment. **[Ed. Question:** So what?] But “there is no constitutional right to counsel on federal habeas” and “no due process right to collateral review at all.” Meanwhile, “we are not persuaded” that a habeas petitioner’s incompetence could “eviscerate” his statutory right to counsel. “Attorneys are quite capable of reviewing the state court record” and evaluating “the backward-looking, record-based nature of most federal habeas proceedings.” Finally, the fact that in the “unique” case of *Rees*, this Court “held without action” the cert petition of an incompetent petitioner for “several decades,” had “no rationale” and “offers no support” for “this case” or

the Ninth Circuit's relevant precedents. **While incompetence might support a stay of execution (*McFarland*, 1994), it does not support an indefinite stay of resolving the legal proceedings.**

Meanwhile, “the statutory right to competence provided in 18 U.S.C. § 4241 by its plain language applies only to federal cases, and only at trial. It “is simply inapplicable to federal habeas proceedings,” particularly from state convictions.

As for the undoubted “equitable power” of district courts to issue stays, “we do not presume that district courts need unsolicited advice from us on how to manage their dockets,” but we do “address its outer limits.” “A stay is not generally warranted when a petitioner raises only record-based claims,” as the Arizona district court correctly ruled here. “Counsel can read the record” without the petitioner’s assistance. **[Ed. Note:** although experience suggests may not be as easy as Justice Thomas indicates, in some cases – transcripts and records are often confused, error-ridden, and require contextual interpretation.] An (in the Ohio case) even if some claims might be not purely record-based, and unexhausted and not defaulted (the Court suggests this will be rare if ever), the purpose of federal habeas law is to encourage finality and “reduce delays in the execution of state and federal criminal sentences.” “At some point, the State must be allowed to defend its judgment of conviction,” and **in a habeas case “where there is no reasonable hope of competence,” “an indefinite stay would be inappropriate.”**

Johnson (Warden) v. Williams, 133 S. Ct. 1088 (Feb. 20, 2013), 9 (8/1) to 0 (Alito; Scalia concurring in the judgment), reversing 646 F.3d 626 (9th Cir. 2011).

Facts: The specific facts here seem irrelevant to the holding. Williams was convicted of first-degree murder for her role as the getaway driver in a liquor store robbery/murder. During deliberations the trial judge dismissed a juror for “bias” on a record that arguably showed dismissal simply for holding a strong view of proof beyond reasonable doubt. On appeal, Williams raised issues of both state and federal (Sixth Amendment, Due process) law, challenging the dismissal. The California appellate court affirmed the conviction, but although it cited some federal precedents, it “did not expressly acknowledged that Williams had invoked a federal basis.” On habeas, the district court found that the record “amply supported the trial judge’s determination that good cause existed for the discharge.” But the Ninth Circuit reversed, saying it was “obvious” that the California courts had “overlooked or disregarded” Williams federal constitutional claim. The Ninth Circuit panel therefore applied a *de novo* standard, rather than the deferential standards normally required on habeas, and found in favor of Williams.

Alito, with Roberts, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan: Our decision today “follows logically from our decision in *Harrington v. Richter* (2011), which held that a summary denial of all claims, without explanation, must be presumed to have been on the merits. Thus, **when a federal claim is presented to a state court which then denies relief in an opinion not mentioning the federal grounds, the federal claim “must be presumed to have been adjudicated on the merits”** and the deferential AEDPA habeas standards must be applied. “We see no reason why the Richter presumption should not also apply when a state-court opinion addresses some but not all of a defendant’s claims. **[Ed. Note:** Justice Alito’s detailed and reasonable explanation for this presumption is not further elucidated here.]

However, we reject the State's more extreme argument ("not satisfied with a strong rebuttable presumption") that the presumption should be irrebuttable. A claim is normally said to be "adjudicated "on the merits" (quoting AEDPA) if it is "heard and *evaluated*" by the court (emphasis in original). **"If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated."** An irrebuttable presumption, therefore, "would improperly excise" the statutory "adjudicated on the merits" requirement. This has been the rule in courts of Appeal before now, and it "did not prompt an unmanageable flood of litigation." However, it is "inescapable" based on the record here that the California courts did not inadvertently overlook Williams' federal claim. Because there is no evidence in this case that would rebut the presumption – indeed, the state court's citation and discussion of our constitutional precedents suggests to the contrary -- habeas relief should have been denied. (By the way, the fact that California's standard for this claim may not agree with federal Circuit courts, is irrelevant – only "*Supreme Court* precedent" (emphasis in original) is relevant to the AEDPA habeas standard.

Scalia concurring in the judgment: "I agree with the Court's rejection" of an irrebuttable presumption. However, its definition of "adjudicated on the merits" as requiring "evaluation" or "decided after due consideration" is not "and has never been" the meaning of this "legal term of art." "A judgment that denies relief *necessarily* denies – and thus adjudicates – *all* the claims a petitioner has raised." Even "an unconsidered, inadequately considered, or inadvertent rejection" is still an "adjudication on the merits." The phrase simply means that relief was denied on non-procedural grounds. "What is accorded deference" under AEDPA "is not the state court's reasoning but the state court's judgment." Thus I think the Court errs by allowing a "case-by-case" evaluation of whether state courts have "evaluated" federal claims that were presented but unaddressed. "This newly sponsored enterprise of probing the judicial mind is inappropriately intrusive upon state court processes."

[Ed. Note: A July 3, 2013, Order after remand from the Ninth Circuit in this case provides an interesting footnote, and suggests that they story may still not yet be over for Williams. The Ninth Circuit panel (Kozinski, Reinhardt, and DJ Whyte) expressed confusion over the Supreme Court's remand, because in the opinion's "introduction" it stated that "under that standard [AEDPA] respondent is not entitled to relief." The panel concluded that the Court's opinion "foreclosed" the possibility of their reviewing Williams' claim now, even under the deferential standard of AEDPA. Rather, the panel concluded that it was required to flatly deny relief – even though it had never reviewed the claim under AEDPA. Both Judges Reinhardt and Kozinski wrote concurring opinions saying they were "troubled" by this apparent foreclosure of relief but "deference to the judicial hierarchy leaves room for no other course of action on our part."]

Metrish (Warden) v. Lancaster, 133 S. Ct. 1781 (May 20, 2013), 9-0 (Ginsburg), reversing 683 F.3d 740 (6th Cir. 2011).

Facts: In 1994, Lancaster, who had a "long history of severe mental health problems, was convicted of first-degree murder in Michigan state court, after the jury rejected his "diminished capacity" defense. However, his conviction was vacated when he successfully obtained habeas relief in 2003 due to a *Batson* violation. At his retrial, Lancaster's judge disallowed his attempt to use the diminished capacity defense, because in 2001 the Michigan Supreme Court had ruled that the state legislature's 1975 codification of mental illness defenses had abolished the defense (even though subsequent state appellate decisions had referred to it as still existing). Lancaster was again convicted of first-degree murder, and the

Michigan court of appeals rejected his appeal based on denial of the diminished capacity defense. That court recognized that retroactive application of judicial decisions can violate Due Process in some cases, but here the decision was not unforeseeable and did not “change” the law, because the 1975 statute was unambiguous and the 2001 decision was the first time the Michigan Supreme Court had construed it. However, the Sixth Circuit reversed the district court’s reversal of federal habeas relief, ruling that the 2001 decision had in fact been “unforeseeable,” because (1) Michigan trial and appellate courts had continued to allow diminished capacity; (2) the Michigan Supreme Court had repeatedly referred to it without casting doubt on its existence, and (3) it was still included in the Michigan State Bar’s pattern jury instructions.

Ginsburg (for 9): AEDPA (the 1996 amendments to the federal habeas statutes) prohibits relief unless the Michigan court “unreasonably applied federal law clearly established in our decisions” (28 U.S.C. § 2254(d)(1)). The petitioner “must show ... an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement” (*Harrington*, 2011). Under this standard, Lancaster’s case does not merit federal habeas relief. Two of our precedents set the “clearly established law” in this area. In *Bowie* (1964), we did hold that South Carolina could not retroactively apply a definition of “trespassing” to African-American lunch counter protestors. “Due process does not countenance an unforeseeable and retroactive judicial expansion of narrow ... statutory language.” But then in *Rogers* (2001), we ruled that Tennessee could retroactively apply its abolition of the “year and a day” common law limitation on murder prosecutions. “Judicial alteration of a common law doctrine” violates constitutional principles “only where it is unexpected and indefensible.”

Under these precedents, Michigan’s decision was not an unreasonable application of clearly established law. “This is a far cry from *Bowie*.” Here, the diminished capacity defense was “reasonably found to have no home” in the 1975 statute. Although it is not an “outdated relic” and has been repeatedly mentioned by Michigan’s appellate and Supreme Court, it cannot reach AEDPA’s “demanding standard.” “An unreasonable application of federal law is different from an incorrect application” (*Williams v. Taylor* (2000)). “This Court has never found a due process violation in circumstances remotely resembling Lancaster’s case,” and “fairminded jurists could conclude” that Michigan’s decision here was not “unexpected and indefensible.” **[Ed. Note:** The Court does not grapple with the literal meaning of the word “unexpected.” Surely the decision not to allow the diminished capacity defense here was “unexpected” in light of the repeated mentions of it by even the Michigan Supreme Court. The opinion here seems to mean something other than a standard of merely “unexpected” – perhaps “unfair”? This is often the problem with unanimous decisions: the author is not compelled by a well-written dissent to grapple with the weaker points in her argument.]

Trevino v. Thaler (Warden), 133 S. Ct. 1911 (May 28, 2013), 5-4 (**Breyer**; Roberts dissenting; Scalia dissenting), vacating 449 Fed. App’x 415 (5th Cir. 2011).

Facts: In *Martinez v. Ryan* (2012), the Court decided that in a state that does not permit ineffective assistance to be raised on direct appeal, a habeas petitioner could allege ineffective assistance of counsel in his first state collateral proceeding for not raising ineffectiveness as an issue. That is, because a petitioner can usually allege ineffective assistance of appellate counsel, where an issue can’t be raised on direct appeal, the petitioner can allege ineffective assistance of the lawyer that handled the first proceeding in which the claim could have been (but was not) raised. All this is in order to avoid the

“procedural bar” that usually exists to habeas when a petitioner has not raised an issue in the state court proceedings.

In *Martinez*, the state law had said that ineffective assistance “must” be raised in the collateral review proceeding. Here, “Texas state law does not say ‘must’.” Rather, it permits ineffective assistance to be raised on direct appeal – but “in actual operation” the “structure and design of the Texas system ... make it ‘virtually impossible’ for an ineffective assistance claim to be presented on direct review” (quoting Texas Crim. App. 2000). Here, Trevino was sentenced to death after his counsel presented only one witness in the penalty phase. On direct appeal, and also in a Texas collateral proceeding, Trevino did not raise ineffective assistance. Then, during a remand in the federal habeas proceedings, the Texas court ruled that Trevino had defaulted on this ineffective assistance claim because he had not raised in his first collateral proceeding. The district court abided by this “procedural default” ruling, even though “the most minimal investigation ... would have revealed a wealth of additional mitigating evidence.” The Fifth Circuit affirmed – because Texas law does not expressly prohibit raising ineffective assistance on direct appeal, the *Martinez* exception did not apply.

Breyer with Kennedy, Ginsburg, Sotomayor and Kagan: In *Martinez*, “we recognized the historic importance of federal habeas corpus.” Also, “the right to the effective assistance of counsel at trial is a bedrock principle.” Here, “as a systemic matter,” Texas does not afford a “meaningful review” of ineffective assistance in direct appeals. “What the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course.” Therefore, there is “no significant difference between this case and *Martinez*.” The case is remanded. Whether Texas state courts should first be permitted to decide the merits of Trevino’s ineffective assistance claim, and whether it has merit, are issues for remand.

Roberts dissenting with Alito: “In order to prevent circumvention of state courts and ... unjustified intrusion on state sovereignty,” we enforce state procedural defaults, with an exception for “fundamental miscarriage of justice” that is not at issue here. We used “aggressively limiting language” in *Martinez*, restricting it to states where state law expressly prohibited ineffective assistance claims on direct appeal. The majority today “throws over th[is] crisp limit” and “takes all the starch out of” our rule. Today’s standard is “so opaque and malleable” that “state-by-state litigation” will be required to apply it. This “invitation to litigation undermine[s] the finality of sentences” and is “inconsistent” not just with our precedents but with “principles of discretion and comity.”

Scalia dissenting with Thomas: I wrote in my dissent in *Martinez*, “That line lacks any principled basis, and will not last.” See, I told you so.

McQuiggen (Warden) v. Perkins, 133 S. Ct. 1924 (May 28, 2013), 5-4 (**Ginsburg**; **Scalia** dissenting), vacating 670 F.3d 665 (6th Cir. 2011).

Facts: The federal habeas statute requires that a federal petition must be filed, “at the latest, within one year of the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). Perkins was convicted of first-degree murder in Michigan state court and sentenced to LWOP, although he steadily maintained that the killing had been committed by another person (Jones). Eleven years after his conviction became final (1997 to 2008), Perkins filed a federal habeas petition. He alleged ineffective assistance at his trial, and to overcome the one-year filing limitation period, he alleged actual innocence based on three affidavits that described Jones as the murderer. The most recent affidavit, however, was

from six years earlier (2002), and the district court described them as “dubious” evidence of innocence, and also found a lack of “due diligence,” and denied relief. But on appeal, the Sixth Circuit ruled that a claim of “actual innocence” did not require “due diligence,” and remanded to consider the merits of the actual innocence claim as a “gateway” to avoiding the one-year limitation period.

Ginsburg, with Kennedy, Breyer, Sotomayor, and Kagan: We first hold that a **showing of actual innocence can excuse a failure to meet the one-year filing limitation.** This is not “equitable tolling,” but rather simply an “exception” to the statutory stricture. “A credible showing of actual innocence” is a type of “fundamental miscarriage of justice exception” which rests in the “equitable discretion” of federal courts which, we have ruled, AEDPA (1996) did not wholly eliminate (citing *Calderon* (1998), *Bousley* (1998), *House* (2006) and *Holland* (2010)). (And it is “bluster,” we note, for the dissent to say that textual statutes of limitation have no equitable exceptions, as “the dissent ultimately acknowledges.”)

However, “the miscarriage of justice exception” is “a severely confined category,” and a delay in filing is not irrelevant to whether the “gateway” has been passed. **“A federal habeas court faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner’s part not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.”** Moreover, **“tenable actual innocence gateway pleas are rare.”** A petitioner must “persuade the district court that ... **no juror acting reasonably would have voted to find him guilty beyond reasonable doubt.**” “Unexplained delay in presenting new evidence bears on that determination,” and “the timing of a petition” – for example, waiting until after a key witness has died – “should seriously undermine the credibility of [an] actual innocence claim.”

Finally, in “the case at hand, . . . the District Court’s appraisal of Perkins’ petition as insufficient . . . should be dispositive, absent cause which we currently do not see . . .” **[Ed. Note:** The majority thus places an unusually heavy thumb on the scale on remand – perhaps necessary to secure five votes for the more general, petitioner-friendly, holding?]

Scalia dissenting with Roberts and Thomas, and Alito in part: “Until today,” “actual innocence has been an exception only to judge-made, prudential barriers,” not to statutory limitations periods. It is a “gaping hole” for the majority not to explain the “source of this Court’s power” to fashion exceptions to a clear statutory command. It is “too obvious to mention that this Court is duty bound to enforce AEDPA, not amend it.” This is a “flagrant breach of the separation of powers.” **[Ed. Note:** Justice Scalia is clearly exercised in this case; at one point he even analogizes the AEDPA statute to a “Swiss watch,” which seems a bit overwrought. He later concedes that AEDPA is “a statute unloved in the best circles.”] Also, even though we held in *Holland* (2010) that AEDPA’s limitation period is subject to “equitable tolling” – a doctrine that is “centuries old” -- that is not ground to craft a “novel actual innocence exception.” The Court’s “vision of perfect justice” is unrealistic. I reprise my dissent in *Bousley*, as well as Justice Jackson’s in *Brown v. Allen* (1963): “Floods of stale, frivolous, and repetitious petitions inundate the docket ... [and] must prejudice the occasional meritorious applicant.” “Today’s decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints.”

D. INTERESTING MISCELLANEOUS

Constitutional Article III and Standing:

Clapper v. Amnesty Int'l, No. 11-1025 (Feb. 26, 2013), 5-4 (**Alito**; Breyer dissenting), reversing 638 F.3d 118 (2d Cir. 2011).

Facts: The plaintiffs in this civil lawsuit attacking a federal electronic surveillance statute were a group of persons and organizations who alleged that they deal with persons abroad who “the government believes” are associated with terrorist organizations. They sued the Director of National Intelligence (Mr. Clapper) who, by statute (50 U.S.C. § 1881a), is authorized with the Attorney General to acquire “foreign intelligence information” by electronic eavesdropping if approved by the Foreign Intelligence Surveillance Court (“FISC”). Plaintiffs alleged that, because they fear government eavesdropping on their sensitive and in some cases attorney-client privileged communications, they are injured and have to limit their work and in some cases physically travel overseas to avoid it. They claimed that § 1881a “caused” their injuries and is unconstitutional.

Alito (for Roberts, Scalia, Kennedy and Thomas): **The plaintiffs’ “theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending’”** (quoting *Whitmore*, 1990). **Neither is their injury “fairly traceable” to the statute.** And plaintiffs “cannot manufacture standing” out of a future threatened harm by alleging that they have currently chosen to “make expenditures based on hypothetical future harm that is not certainly impending.” Otherwise an “enterprising plaintiff” could secure standing merely by spending money based on a “nonparanoid fear.” [**Ed. Note:** Isn’t “nonparanoid” a great word?] Such injuries are “self-inflicted,” not caused by the FIS statute.

Without detailing the statute, it “does not require the Government to demonstrate probable cause.” Neither does it require “particularization” of where electronic surveillance will occur. But there are some “safeguards”: FI surveillance “must comport with the Fourth Amendment” [**Ed. Note:** whatever that means – this lawsuit alleged that it does not], and is subject to legislative branch and executive branch oversight and review.

Meanwhile, Article III’s “cases or controversies” requirement is [what follows is debatable] “built on separation of powers principles,” to “prevent the judicial process from being used to usurp the powers of the political branches.” And we are “especially rigorous” when asked to invalidate the actions of “the other two branches.” Thus we have said that injury must be “concrete, particularized, and actual or imminent” (*Monsanto*, 2010), and imminence “cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative” (*Defenders of Wildlife*, 1992). The Second Circuit’s standard of “objectively reasonable likelihood” is “inconsistent” with out “certainly impending” standard (*Whitmore*) (and even a “substantial risk” standard is not met here). The plaintiffs here have a “highly speculative fear” which is based on a “highly attenuated chain of possibilities.” In sum, they (1) don’t know if they will be targeted; (2) don’t know if the FISC authority will be used to target them; (3) don’t know whether the FIS Court will approve a government request; and (4) & (5) don’t know if their own communications would actually be seized. “Respondents have no actual knowledge of the Government’s 1881a targeting practices.” [**Ed. Note:** the irony of this is unremarked upon: of course they don’t, that is why they have sued and asked for discovery. As the court notes, without irony, plaintiffs’ allegations are

“necessarily conjectural.”] Because they bear the burden to show standing, this is insufficient. And this does not mean FISC surveillance will never be judicially reviewed – it will be if the Government intends to “use or disclose” information obtained “in judicial or administrative proceedings.” Service providers asked to assist may also challenge a FISC order.

Breyer dissenting with Ginsburg, Sotomayor and Kagan: The plaintiffs’ harm is not speculative. “It is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tells us will happen.” We have recognized that “the precise boundaries of the ‘case or controversy’ requirement are . . . not discernible by any precise test,” so we have “developed a subsidiary set of legal rules.” Here, “no one denies that the Government’s interception of private telephone or e-mail conversation amounts to a[concrete] injury.” **[Ed. Sidenote:** Justice Breyer’s use of the hyphenated “e-mail”!] The facts plus “commonsense inferences convince me that there is a very high likelihood that Government, . . . under . . . 1881a, will intercept” some such conversations. The majority’s desire for “certainty” “is not and has never been” the test for standing; and “certainly impending” has never been used “to *deny* standing.” “Federal courts frequently entertain actions for injunctions and declaratory relief aimed at preventing future activities that are ... not absolutely certain to take place.” (Justice Breyer then examines “a few, fairly typical, cases.”)

Federal Securities Law:

Gabelli v. Securities and Exchange Commission (“SEC”), 133 S. Ct. 1216 (Feb. 27, 2013) 9-0 (**Roberts**), reversing 653 F.3d 49 (2d Cir. 2011).

Facts: In 2008, the SEC filed a civil action against Gabelli, alleging that from 1999 to 2002 he and a partner had allowed one of their favored investors to engage in “market timing,” a “trading strategy that exploits time delay in mutual funds’ daily valuation system” (*Janus*, 2011). The district court dismissed the suit as barred by the five-year statute of limitations, 28 U.S.C. § 2462. The Second Circuit reversed, ruling that because the lawsuit “sounded in fraud,” the limitations period does not begin “until the claim is discovered, or could have been discovered with reasonable diligence.”

Roberts (for unanimous Court): First, note that this five-year limitations statute dates back to 1839 and “governs many penalty provisions throughout the U.S. Code,” not just securities actions. Moreover, statutes of limitation are “vital to the welfare of society;” “even wrongdoers are entitled to assume that their sins may be forgotten” (quoting *Wood* (1895) and *Wilson* (1985)).

Here, “**the most natural reading of th[is] statute**” is that it begins “**when ... [the] conduct occurs,**” and not later. Although private parties may sometimes invoke a later “discovery rule,” “we have never applied the discovery rule ... where the plaintiff is not a defrauded victim,” and the SEC cites no case doing so, for it, prior to 2008. There are “good reasons” for not so applying the discovery exception. Unlike private parties, who “do not live in a state of constant investigation,” the SEC’s “very purpose is” investigation, and “it has many tools” to discover fraud. Moreover, while private parties seek merely compensation for injuries, the SEC seeks to impose penalties, for punishment. In addition, determining when “the Government” knew or should have known about a fraud, is more difficult than regarding a human being. The government has “hundreds of employees” and “different

agencies.” And finally, evaluating “reasonable diligence” for the government is different than for private plaintiffs. Thus “applying a discovery rule to Government penalty actions is far more challenging ..., and we have no mandate from Congress to undertake that challenge here.” The “lack of textual, historical, or equitable reasons” counsels rejection of the SEC’s position.

Amgen Inc. v. Connecticut Retirement Plans, No. 11-1085 (Feb. 27, 2013), 6 (5/1) to 3 (**Ginsburg**; *Alito* concurring; Scalia dissenting), affirming 660 F.3d 1170 (9th Cir. 2011).

Facts: Avoiding too much detail, the Connecticut plans sued Amgen (in which they had invested by buying stock) for allegedly false and misleading public statements about two drugs that Amgen sold, which led to a stock price decline when exposed. The lawsuit was based on the “fraud-on-the-market” theory endorsed in *Basic* (1988). The district court granted a motion to certify the lawsuit as a class action against Amgen, and in an interlocutory appeal the Second Circuit affirmed. Both courts rejected Amgen’s argument that the plaintiff must prove “materiality” of the alleged misstatements, in order to obtain class certification, because otherwise (Amgen argued) the “issues common to the class predominate” requirement of F.R.Civ.P. 23 (the class action rule) is not met. Cert was granted because the Circuits are split on whether “materiality” is a necessary issue to resolve before certifying a securities class action.

Ginsburg, joined by Roberts, Breyer, Alito, Sotomayor and Kagan: “Materiality” is an “essential element” of plaintiffs’ case on the merits; thus it need not be determined in advance of the merits determination, and requiring it to be proved at the class certification stage is “putting the cart before the horse.” **“While [the plaintiff in a securities fraud action] certainly must prove materiality to prevail on the merits,” materiality is “not a prerequisite to class certification” of a securities fraud action.** [Further detail regarding this very detailed 26-page opinion, is omitted in this Criminal Law Summaries memo.]

Alito concurring: I join with the understanding that parties did not ask us to revisit the “fraud-on-the-market” presumption that we endorsed in *Basic* (1988). As the dissent points out, this theory may “rest on a faulty economic premise,” and “reconsideration” of *Basic* “may be appropriate.”

Scalia (dissenting with Thomas except for one part of Thomas’s dissent): The fraud-on-the-market theory “invented by the Court” in *Basic* (1988) “envision[ed] a demonstration of materiality not just for substantive recovery but for certification.” The record of the *Basic* case shows that.

Thomas dissenting with Scalia (in part) and Kennedy: “Fraud-on-the-market is a condition precedent to class certification,” and proof of materiality is essential to showing fraud-on-the-market. Without requiring proof of this at the certification stage, the majority is allowing certification without meeting Rule 23’s “common questions predominate” requirement. [As with the majority opinion, further details of Justice Thomas’s 17 page opinion are omitted here.]

Constitutional Privileges & Immunities, and State FOIA:

McBurney v. Young, 133 S. Ct. 1709 (April 29, 2013), 9 (8/1) to 0 (**Alito**; *Thomas* concurring), affirming 667 F.3d 454 (4th Cir. 2011).

Facts: Virginia’s Freedom of Information Act (state “FOIA”) provides that “all public records shall be open to inspection and copying by any citizens of the Commonwealth. McBurney, a citizen of Rhode Island, asked for copies of various records related to his child support issues with his ex-wife, who lives in Virginia. Roger Hulbert, a citizen of California, ran a business of providing real estate tax records and asked for some about a Virginia property. Both men received some documents they wanted, but not all, and were denied FOIA because they are not Virginia citizens. **[Ed. Note:** the Court does not discuss a question that occurred to me, but apparently not to the Court: how does one prove, or disprove, state “citizenship,” as opposed to residency?] They sued in federal court alleging that the Virginia statute violated their civil rights. The district court granted summary judgment against them and the Fourth Circuit affirmed.

Alito (for a unanimous Court, although Thomas also concurs): **Virginia’s decision to limit its Freedom of Information statute to citizens of Virginia “does not abridge any constitutionally protected privilege or immunity.” It also does not violate the Dormant Commerce Clause.** The constitution’s P&I Clause (Article IV sec. 2 cl.1) “protects only those privileges and immunities that are ‘fundamental;” thus we have noted that it “does not mean ... that ‘state citizenship or residency may never be used by a State to distinguish among persons.... Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident” (quoting *Baldwin*, 1978). (Justice Alito considers in some detail four claimed P&Is, finding that the first three are not “abridged” and the fourth is not even a protected “privilege.”) When a law is enacted “for the protectionist purpose of burdening out-of-state citizens” we have struck it down (*Hicklin*, 1978), but that is not the case here. “Incidental effects” on “out-of-state tradesmen” do not invalidate an otherwise proper state law. Moreover, many of the records requested here are available from other sources, including “a few minutes of Internet research,” and the doors of Virginia’s courts and other agencies remain open to all. Finally, there simply is no broad right to “access public information on equal terms.” In fact, we have held that there is no constitutional right to FOIA information at all (*Houchins*, 1978) **[Ed. Note:** It would seem that 1978 was clearly a big P&I year, from the Court’s citation to three different 1978 decisions.] And “no such right was recognized at common law.” “Nor is such a sweeping right basic to the maintenance or well-being of the Union.”

As for dormant commerce clause, the Virginia statute “does not regulate commerce in any meaningful sense, but instead provides a service that is related to state citizenship.” Indeed, the Commerce Clause itself places no express limitation on the States, and some Justices have said that they don’t believe in any such “dormant” meaning. There is no “economic protectionism” here, and we have ruled that limiting some state programs to the taxpaying base that funds them is not a problem (*Reeves*, 1980).

Thomas concurring: I just want to note my continuing view that “the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.” **[Ed. Note:** the only surprise is that Justice Scalia does not join this opinion, since he has voiced similar views.]

Treaties and Mootness:

Chafin v. Chafin, 133 S. Ct. 1017 (Feb. 19, 2013), 9 (6/3) to 0 (**Roberts**; *Ginsburg* concurring), vacating unpublished Order (11th Cir. 2011).

Facts: [Ed. Note: This case is a sad mess addressing international child custody disputes.] Jeffrey Chafin is a U.S. citizen (and, for good measure, “a sergeant first class in the U.S. Army”). He married Lynne (now also Chafin), a U.K. (Scottish) citizen. In 2007 Lynne took their child “E.C.”, born that year, to Scotland when Jeffrey was deployed to Afghanistan. When he came back in 2010 Lynne and EC came to Alabama where he was stationed, but Lynne soon filed for divorce and custody. In 2011, Lynne was deported because her visa expired, and EC stayed in the US with Jeffrey. Lynne then sued in federal court in Alabama in 2011, under the Hague Convention on Civil Aspects of International Child Abduction and the federal International Child Abduction Remedies Act (“ICARA”). The district court found that Scotland was EC’s “country of habitual residence” and granted Lynne’s “petition for return.” Jeffrey’s request for a stay was denied, and “within hours” Lynne left for Scotland with EC. [Ed. Note: Poor EC – apparently five international moves in her brief four-year life.] A Scottish court then granted interim custody to Lynne, while Jeffrey sued for custody in Alabama, and meanwhile Jeffrey appealed the ICARA ruling to the Eleventh Circuit. In February 2012, the Eleventh Circuit dismissed Jeffrey’s appeal as moot in a one paragraph Order citing its prior decision (*Bekier*, 2001) which had held that the return of a child under the Hague Convention “mooted” the case because the court became “powerless” to grant relief. The Eleventh Circuit thus ordered the district court to vacate its order, which that court did, but not until it had also directed Jeffrey to pay \$94,000 in costs and fees.

Roberts (for unanimous Court although Ginsburg also concurs for 3): “This dispute is still very much alive,” and the appeal should not have been dismissed. An **appeal of an Order to return a child to his/her “country of habitual residence,” under the Hague Convention on the Civil Aspects of International Child Abduction, is not “moot” even though the child has been so returned** by the time of appeal. Whether a federal Order directing that EC be returned to the US would be “effective” is an open question, but it “confuses mootness with the merits.” “No law of physics prevents EC’s return” and Jeffrey’s arguments cannot be dismissed as “implausible.” There is also the question of the \$94,000 payment Order.

One purpose of the Hague Convention and the ICARA was “promptness;” we are also “mindful of the concern that shuttling children back and forth ... may be detrimental.” But if we ruled that return mooted all appeals, then district courts would be likely to issue stays “as a matter of course,” which is not overall a good policy – stays should be individualized. A mootness ruling here might also encourage flight rather than lawful processes. So good policy, as well as legal principles of contention and “adversity” that preclude mootness, support our ruling.

Ginsburg concurring with Scalia and Breyer: There is a “need for speed and certainty in Convention decisionmaking,” and federal courts should adopt procedures to encourage this. The Federal Judicial Center has issued a “Guide” about this, and courts, rulemakers and legislators should “pay sustained attention.” In this case, the Eleventh Circuit and district court “should decide the case as expeditiously as possible.”

VI. OPINIONS WITHOUT ARGUMENT (Summary Reversals)

Marshall (Warden) v. Rodgers, No., 12-382 (Apr. 1, 2013), 9-0 (*per curiam*), reversing 678 F.3d 1149 (9th Cir. 2013):

Rodgers sought habeas corpus from his state court conviction on the ground that the state court violated the constitution by denying him an appointed lawyer to file a new trial motion, even though he had waived the right to counsel on three times previously in the case. The Ninth Circuit granted habeas relief (after the district court denied it), finding a violation of “clearly established Federal law as determined by the Supreme Court” (28 U.S.C. § 2254(d)(1)). The Ninth Circuit “correctly” noted that the Supreme Court “has never explicitly addressed a criminal defendant’s ability to re-assert his right to counsel” after a valid waiver. But without resolving that question, there is no “clearly established” Supreme Court law on point, even if one accepts the view that a “general principle” can lead to established law. The Ninth Circuit’s “subtle, yet substantial,” error was its “mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence” (citing *Parker* (2012, *per curiam*) [a similar summary reversal]). Nor may a Circuit “canvass [other] circuit decisions to determine whether a particular rule of law is . . . widely accepted.” The bottom line is, until we say it, it is not “clearly established” Supreme Court law under AEDPA.

Nevada v. Jackson, No. 12-694 (June 3, 2013), 9-0 (*per curiam*), reversing 688 F.3d 1091 (9th Cir. 2012):

Jackson’s Nevada trial court ruled, in Jackson’s rape trial, that Jackson could not introduce police reports and other evidence that the victim (his ex-girlfriend) had previously made reports of rape by Jackson that the police could not substantiate and were “skeptical” of. A 2-1 Ninth Circuit panel granted habeas relief (after the district court denied it) on the ground that this violated the defendant’s constitutional right “to present a complete defense” (quoting *Crane*, 1986). However, “we have also recognized that state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” Here, Jackson failed to comply with a state rule requiring pretrial notice of evidence directed to show “fabricated charges.” “There are good reasons for limiting the use of extrinsic evidence (*Clark*, 2006), and “the constitutional propriety of [such rules] cannot be seriously disputed.” And “no decision of this Court clearly established that” a pretrial “notice requirement is unconstitutional.” **“No fairminded jurist could think ... that the enforcement of the Nevada rule in this case is inconsistent with the Constitution.”** We do have precedents saying that a denial of cross-examination can be unconstitutional; “But this Court has never held” that it is unconstitutional to deny extrinsic evidence for impeachment purposes. “The Ninth Circuit elided th[is] distinction By framing our precedents at such a high level of generality” that almost any evidentiary claim could become a violation of “clearly established” law. We have previously indicated that this is error, and its endorsement “would defeat the substantial deference that AEDPA requires.”

Ryan (Director of Arizona Dept. of Corrections) v. Schad, No. 12-1084 (June 24, 2013), 9-0 (*per curiam*), summarily reversing unpublished Ninth Circuit 2012-2013 Orders; dissents from denial of rehearing *en banc* published at 709 F.3d 855 (9th Cir. 2013).

Facts: Shortening the lengthy history of this death penalty case, in which Schad was first convicted and sentenced to death in 1979, a panel of the Ninth Circuit denied Schad’s final appellate motions and petitions in 2011, 2012, and early 2013. But after the Supreme Court denied Schad’s petitions for *certiorari* and then rehearing, the Ninth Circuit did not issue a mandate. Instead, the panel (Judges Reinhardt and Schroeder; Graber dissenting) *sua sponte* revived a motion “that it had denied six months earlier,” “issued a stay a few days before [Schad’s] scheduled execution,” and ultimately ordered a remand to the district court for further proceedings. Arizona filed an application with the Supreme

Court to vacate the stay of execution, which was denied. The Court now considers Arizona's petition for *certiorari* and summarily reverses.

Per Curiam (9-0): Because there are no “extraordinary circumstances,” the Ninth Circuit’s failure to immediately issue its mandate in this capital case after our denial of *certiorari*, as Fed. R. App. Proc. 41(d)(2)(D) requires, was an abuse of discretion. “The case is **remanded with instructions to issue the mandate immediately and without any further proceedings.**” FRAP 41 sets a “default rule” that after a copy of the Supreme Court’s order denying *certiorari* is filed, “the court of appeals must issue the mandate immediately.” In *Bell v. Thompson* (2005), we assumed that “extraordinary circumstances” might excuse noncompliance with this rule; but finding no such circumstances there we vacated a stay of execution in *Bell* as an abuse of discretion. That stay, like the one here, was issued “in reliance on a previously rejected argument.” “Finality and comity concerns” in habeas proceedings require “respect [for] state court judgments by allowing them to be enforced when federal proceedings conclude” (*Bell*, 545 U.S. at 812-13).

“The Ninth Circuit similarly abused its discretion” here. “We presume that the Ninth Circuit carefully considers each motion a capital defendant presents.” So reviving a previously-rejected motion after we have denied *cert* [at least without some change in circumstances] is not an “extraordinary circumstance” that permits a court of appeals to withhold its mandate. Although the Ninth Circuit relied on a prior decision asserting an “inherent authority to withhold a mandate,” that decision was issued six months before *Bell* and relied on the Sixth Circuit opinion reversed in *Bell*, and “thus provides no support” today. Reversed and remanded to issue the mandate “immediately and without any further proceedings.” **[Ed. Note:** This last instruction is reminiscent of the Ninth Circuit’s 1992 battle with the Supreme Court in the Robert Alton Harris case, in which the Court finally ordered, in the middle of the night, that the Ninth Circuit could not enter any further stays of execution, and Harris was executed – the first execution in California since 1967.]

E. OPINIONS RELATING TO ORDERS

Hayes v. Thaler, No. 12-6760 (Nov. 13, 2012):

Sotomayor respecting the stay of execution, with Ginsburg: Whether our recently decided *Martinez* (2012) applies to habeas cases will be addressed in our forthcoming case of *Trevino v. Thaler* [as it indeed was, in favor of the habeas petitioner, see above.] Because the law is unsettled and currently under our review, a stay of execution is appropriate. I disagree with Justice Scalia that Haynes’ ineffective assistance claims have already been resolved on the merits, because the district court’s decision stands “unreviewed.” Indeed, “the only appellate judge to consider the merits of Hayes’ claim would have granted Haynes a certificate of appealability.”

Scalia dissenting from stay of execution, with Thomas and Alito: Fourteen years ago, Haynes committed a “series of armed robberies” and then shot a police officer in the head. He confessed and was sentenced to death. He now seeks a stay of execution because he believes his counsel was ineffective during sentencing. He argues that *Martinez v. Ryan* (2012) should afford him relief from the procedural default that barred his claim in district court. The Fifth Circuit found that *Martinez* did not grant Haynes the relief he sought because it only applies to the narrow category of cases where the defendant’s claim was barred on direct appeal.

Even if *Martinez* did apply, it could only excuse the procedural default, allowing Haynes to have his case for ineffective assistance of counsel reviewed on the merits. But this gets Haynes no further because his ineffective-assistance claims have already been tried and rejected in the district court's habeas review. Thus I agree with the district court that it is irrelevant whether or not procedural relief is available under *Martinez*, and I "cannot join the Court's further postponement of the State's execution of its lawful judgment."

Delling v. Idaho, No. 11-1515 (Nov. 26, 2012):

Breyer, joined by Ginsburg and Sotomayor, dissenting from denial of *certiorari* [Ed. Note: Note that Justice Kagan does not join this dissent. While that might reflect her views on the merits, it might also reflect the fact that under the Court's "rule of Four," her vote added to the three dissenters would result in a grant of *certiorari* – and the current "strategic" thinking is that Justices should not vote to review unless they believe they have five votes to win – in other words, let the law be bad in Idaho, rather than risk a nationwide negative ruling. And as usual with such tea-leaf speculation, I could be entirely wrong here.]:

Idaho has statutorily eliminated the insanity defense, and says "mental condition shall not be a defense to any charge of criminal conduct." This alters what has been a long-standing principle of common criminal law, dating back before Blackstone (who is quoted). It also runs counter to the law in "nearly every State." Idaho law does, however, allow expert testimony to inform the court on the state of mind of the defendant as it may relate to the intent element of any crime. "I would grant the petition . . . to consider whether Idaho's modification of the insanity defense is consistent with the . . . Due Process Clause." [Ed. Note: It is not irrelevant that Delling was represented in his cert petition by Jeffrey Fisher of the Stanford Supreme Court clinic, and more importantly, the lawyering engineer of the *Apprendi* (2000) and *Crawford* (2004) decisions and thus a Supreme Court practitioner of estimable note.]

Hodge v. Kentucky, No. 11-10974 (Dec. 3, 2012):

Sotomayor dissenting from denial of writ of *certiorari*: Hodge was convicted of murder and sentenced to death for the stabbing killing of the daughter of a doctor whose home they were robbing. In the penalty phase, Hodge's counsel failed to present any evidence of mitigating factors. On review in Kentucky, Hodge persuaded the state courts that he had "suffered what the Kentucky Supreme Court called a 'most severe and unimaginable level of physical and mental abuse'" as a youth. But although that court agreed that Hodge's lawyer had been constitutionally deficient, the Kentucky Supreme Court "felt compelled to reach the conclusion that there exists no reasonable probability that the jury would not have sentenced Hodge to death' anyway." That court noted that in addition to the mitigation evidence, a resentencing jury would also have to consider aggravating factors such as the cold-heartedness of the murder and Hodge's "brazen[]" conduct after the murder. Although Hodge's PTSD might have caused him to commit a crime in a "fit of rage," it "offers virtually no rationale for the cold-blooded murder and attempted murder of two innocent victims who were complete strangers to Hodge."

I would grant *certiorari* and vacate the judgment, because "mitigation evidence need not, and rarely could 'explain' a heinous crime," and there is no such requirement as suggested by the court below. Rather "mitigation evidence allows a jury to make a reasoned moral decision whether the individual defendant deserves to be executed, or to be shown mercy instead." Mitigation evidence need not "explain" the crime, but emphasizes the individuality of the offender. This "ensures that 'the sentence imposed at the penalty stage.

. . . [r]eflects a reasoned *moral* response to the defendant's background, character, and crime." *Abdul-Kabir* (2007).

Calhoun v. United States, No. 12-6142 (Feb. 25, 2013):

Sotomayor, joined by Breyer, respecting the denial of writ of *certiorari*: Calhoun was convicted of conspiracy to sell drugs when his alleged co-conspirators purchased cocaine from DEA agents. Calhoun claimed that he "didn't know" what was happening, and left the hotel room when he saw a bag of money, stating that it "made [me] think . . . [t]hat I didn't want to be in the hotel room." During trial, the federal prosecutor said to the jury, "**you've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you - a light bulb doesn't go off in your head and say, this is a drug deal?**" Calhoun's lawyer did not object to the question, Calhoun did not argue the point on appeal to the Fifth Circuit, and in his cert petition Calhoun did not attempt to show that the remark constituted "plain error." In light of these procedural inadequacies, I do not disagree with the decision *certiorari* here. But I write to make clear that the racially charged remarks made by the prosecution were improper and likely in violation of the Constitution. Attempts to "cultivate bias ... offend[] the defendant's right to an impartial jury." *McCleskey v. Kemp* (1987) makes clear that "the constitution prohibits racially-biased prosecutorial arguments." While there may have been a time when such racially-charged remarks were commonplace, it is "deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century."

Gallow v. Cooper, No. 12-7516 (June 27, 2013):

Breyer joined by Sotomayor, respecting the denial of writ of *certiorari*: Gallow alleged ineffective assistance of counsel at his trial and his post-conviction hearing. His trial counsel had allegedly encouraged Gallow to plead guilty despite having, but not disclosing, evidence to impeach the victim's testimony; and the trial attorney testified that "he was unable to effectively cross-examine the victim because he was suffering from panic attacks, and more importantly, is related to the victim." Gallow's trial counsel was subsequently disbarred. At his post-conviction hearing, a different attorney failed to provide "any admissible evidence" that Gallow had received ineffective assistance at trial. The new attorney did not even subpoena the trial counsel, which led the state to reject the trial counsel's affidavit.

Gallow's case is similar to *Trevino v. Thaler* (2013): in both cases the petitioner did not get a hearing on the merits of their ineffective-assistance claim because their habeas counsel did not effectively present their claim in state court. I believe this in itself constitutes ineffective assistance of counsel. Such a failure of counsel should excuse the claim from procedural default and the state court should consider the claim, even without admissible testimony. I recognize that no court has ever granted relief based on a claim for which there is no evidentiary support, and I therefore agree with the denial of *certiorari*, but I emphasize that this denial does not speak to the merits of Gallow's claim.

Marrero v. United States, No. 12-6355 (June 27, 2013), "GVR" (granting, vacating and remanding) 677 F.3d 155 (3d Cir. 2012):

Alito, joined by Kennedy, dissenting: The Court's GVR here for consideration under *Descamps* [supra] "shows that the Court's elaboration of its 'modified categorical approach' has completely lost touch with reality." [See Justice Alito's dissent in *Descamps*.] Here the defendant admitted at the time of his plea that he "grabbed" the victim "by the neck" and "attempt[ed] to drag her upstairs." But because Pennsylvania's assault statute is "divisible"

and might theoretically reach a “reckless” assault (and therefore not qualify defendant as a federal “career offender”), the Court remands. “The Court may be entertaining the possibility that what petitioner meant was that he grabbed what he believed to be some inanimate object with a neck—perhaps a mannequin named Mrs. Marrero – and attempted to drag that object up the steps.” “In that event, his conduct might simply have been merely reckless.” “The remand in this case is pointless.”

F. Criminal Law *Certiorari* Grants for the October 2013 Term

1. *Chadbourne & Parke LLP v. Troice*, No. 12-79, from 675 F.3d 303 (5th Cir. 2012);
2. *Proskauer Rose LLP v. Troice*, No. 12-88, from 675 F.3d 503 (5th Cir. 2012);
3. *Willis of Colorado Inc. v. Troice*, No. 12-86, from 675 F.3d 503 (5th Cir. 2012), oral argument held Monday October 7, 2013:
These three securities law cases were linked for argument on the opening day of the Term (the “First Monday in October”). They involve various complicated questions regarding the interaction of state-law securities actions and the Securities Litigation Uniform Standards Act (“SLUSA”).
4. *Burt v. Titlow*, No. 12-7515, from 687 F.3d 1015 (Cir. 2012), oral argument held Oct. 8, 2013: If the Court is able to get past the first two questions (was there ineffective assistance in plea bargaining here, see *Lafler* and *Frye* (2012), and is more than the defendant’s bare allegations required to show it?), the third question involves remedy, perhaps the most tangled “*Lafler/Frye*” issue of all.
5. *Kaley v. United States*, No. 12-464, from 677 F.3d 1316 (11th Cir. 2012), oral argument held Oct. 16, 2013: When a post-indictment, *ex parte* order is used to freeze assets needed by a criminal defendant to retain counsel, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the support for the underlying charges?
6. *Kansas v. Cheever*, No. 12-609, from 284 P.3d 1007 (Kan. 2012), oral argument held Oct. 16, 2013: Does the Fifth Amendment permit the State to use a court-ordered mental evaluation of a capital defendant, to rebut the defendant’s evidence that he lacked the requisite mental state to commit capital murder of a law enforcement officer?
7. *United States v. Apel*, No. 12-1038, from 676 F.3d 1202 (9th Cir. 2012), oral argument held Dec. 4, 2013: May 18 U.S.C. § 1382, prohibiting reentry of a military installation after ordered not to reenter, be enforced on a “public roadway easement” of a military installation?
8. *Bond v. United States*, No. 12-158 (from 681 F.3d 149 (3^d Cir. 2012), oral argument heard Nov. 5, 2013: [**Perhaps the most interesting cert grant of the Term:**]
 - (1) Does the Constitution’s limit on federal authority constrain Congress’ authority to enact legislation that implements a valid treaty, where the federal statute (allegedly) goes beyond the scope of the treaty, intrudes on traditional state prerogatives, and is unnecessary to satisfy the government’s treaty obligations?
 - (2) Can or should the Chemical Weapons Convention Implementation Act (18 U.S.C. § 229) be interpreted to not reach ordinary poisoning cases, which have been adequately handled by state authorities since the Framing, in order to avoid the

constitutional questions surrounding the continuing vitality of *Missouri v. Holland* (1920)?

9. *Burrage v. United States*, No. 12-7515, from 687 F.3d 1015 (8th Cir. 2012), oral argument heard Nov. 12, 2013: How should the federal crime of “distributing drugs causing death” (21 U.S.C. § 841) be construed? *E.g.*, is it a “strict liability” crime without a foreseeability or proximate cause requirement? Does the statute allow conviction if the heroin “contributed to” death by “mixed drug intoxication,” but was not the sole cause of death?
10. *Fernandez v. California*, No. 12-7822, from 208 Cal. App. 4th 100 (Cal. App. 2012), oral argument heard Nov. 13, 2013: Under *Georgia v. Randolph* (2006), must an objecting tenant be personally present when police officers ask a co-tenant for consent to search, or is the tenant’s previously-stated in-person objection sufficient to block the co-tenant’s consent?
11. *Lozano v. Alvarez*, No. 12-820, from 697 F.3d 41 (2d Cir. 2012), oral argument heard Dec. 11, 2013: May a federal court considering a petition under the Hague Convention for return of an abducted child equitably toll the one-year filing period, when the abducting parent has concealed the child from the left-behind parent?
12. *Mayorkas v. Cuellar de Osorio*, No. 12-609, from 695 F.3d 1003 (9th Cir. 2012): Immigration law: Does 8 U.S.C. § 1153(h)(3) plainly grant relief to aliens who qualify as “child” derivative beneficiaries at the time a visa petition is filed, but age out of qualification by the time the visa becomes available; and is the contrary statutory interpretation of the Board of Immigration Appeals unreasonable?
13. *McCullen v. Coakley*, No. 12-1168, from 708 F.3d 1 (1st Cir. 2013), oral argument heard Jan. 15, 2014: Does the First Amendment require invalidation of a state law making it a crime to violate a 35-foot “buffer zone” around abortion clinics, as applied to persons on a “public way or sidewalk” who are there to “offer support, information, and practical assistance to women who feel pressured, alone, unloved, and out of options”? Should *Hill v. Colorado* (2000) be limited or overruled?
14. *Rosemond v. United States*, No. 12-895, from 695 F.3d 1151 (10th Cir. 2012), oral argument heard Nov. 12, 2013: Does the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime (18 U.S.C. §§ 924(c)(1)) require proof of (i) intentional facilitation or encouragement of the use of the firearm, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated?

WHO WROTE WHAT in the 2012-13 Term

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

ROBERTS
Kebodeaux
McNeely
Alleyne
Trevino

SCALIA
Jardines
Sekhar
Smith
Bailey
Johnson
Davila
King
Henderson
Kebodeaux
McQuiggen
Trevino

KENNEDY
King
Bailey
McNeely
Descamps

THOMAS
Alleyne
Ryan
Chaidez
Salinas
Descamps
Peugh
McNeely
Moncrieffe
Kebodeaux

GINSBURG
Davila
Metrish
McQuiggen

BREYER
Henderson
Kebodeaux
Trevino
Alleyne
Bailey
Salinas

ALITO
Salinas
Johnson
Kebodeaux
Sekhar
Boyer
Peugh
Jardines
Evans
Alleyne
Moncreiffe
Descamps

SOTOMAYOR
Evans
McNeely
Moncrieffe
Peugh
Alleyne
Chaidez
Boyer

KAGAN
Fla. v. Harris
Descamps
Chaidez
Jardines

Total Authored Criminal-Law Opinions: 59

Per Curiam Opinions (Summary Reversals)

Jackson
Marshall
Ryan

Non-Criminal (But Related) Opinions

Chafin (**Roberts**; *Ginsburg*)
Clapper (**Alito**; Breyer)
Gabelli (**Roberts**)
Amgen (**Ginsburg**; *Alito*; Thomas; Scalia)
McBurney (**Alito**; *Thomas*)

Total Opinions: 67 (last year 86)