

CHAPTER 2

U.S. SUPREME COURT DECISIONS ON CRIMINAL LAW OCTOBER TERM 2013 (OCT. 2013—JUNE 2014)

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This chapter surveys decisions of the U.S. Supreme Court on criminal law and related topics during the 2013-14 Supreme Court Term. After briefly introducing the cases that will be discussed, the chapter provides detailed summaries of these decisions, grouped by subject matter. It also provides a brief overview of cases for which certiorari was granted for the Supreme Court 2014-15 Term. The chapter concludes with a chart showing which Justices authored which opinions.

OVERVIEW OF THE 2013-14 TERM, CRIMINAL CASES

The October 2013 Term of the U.S. Supreme Court was not a “blockbuster” criminal law Term, but it certainly produced a number of important decisions that will affect the law for many years to come. The constitutional cellphone search case (*Riley*) perhaps overshadowed them all. But the Court also rendered at least 10 other important constitutional law decisions.

For example, in *Hall v. Florida* the Court addressed, for the first time I think, the constitutional details of how States may permissibly define the “categories” of defendants for whom the death penalty is constitutionally prohibited. Not only may the “mentally retarded” not be executed (*Atkins*, 2002 – and the Court announces that the proper term henceforth is “mentally disabled”), but now States cannot use strict guidelines, like an IQ score of 70, to exclude persons from the category unless the test meets accepted contemporary standards.

Under the Fourth Amendment, the Court decided not only that cellphone data may generally not be searched without a warrant even though lawfully seized incident to arrest (*Riley*) – but also that anonymous 911 calls can sometimes provide, without more, reasonable suspicion to search (*Navarette*); and that when police lawfully remove an objecting tenant from the scene, they may then search without a warrant if a co-tenant consents (*Fernandez*). Lower courts will, of course, be working out the details, but these decisions are major points along the 21st century search-and-seizure highway.

The Court also decided three or four First Amendment cases relevant to the criminal law (*Lane v. Franks*; *Wood v. Moss*; *Susan B. Anthony List*; and the abortion buffer zone case *McCullen*). Chief Justice Roberts has made the First Amendment a priority of his Court’s docket, and all these decisions are important.

The Court also decided four cases under the Fifth and Sixth Amendments. Perhaps the most interesting is *Kaley* (holding that no pretrial challenge to a grand jury’s finding of probable cause is constitutionally required, even for asset forfeiture allegations that “freeze” moneys set aside for hiring an attorney). And the most controversial, to me

anyway, is the unanimous decision in *Kansas v. Cheever*, which appears to hold that a previously compelled psychiatric exam can be used against a defendant who subsequently raises *mens rea* issues at trial. Why the “limited rebuttal” use of such a compelled exam makes a difference is simply not clear to me – and the 9-0 nature of the Court’s ruling means -- as is so often the case with unanimous decisions -- that the Court’s analysis went untested by any dissenting Justices. I’d say that Justice Sotomayor was just “asleep at the wheel” – except that she wrote the decision! So it must just be me.

There were also at least 9 cases interpreting federal criminal statutes. *Bond* received much of the attention, mainly because Paul Clement persuaded the Justices to limit “chemical weapons” charges in local poisoning cases, to avoid an otherwise huge constitutional challenge to Congress’s powers to enact criminal offenses that implement a Treaty, offenses that might otherwise be beyond Congress’s Article I reach.

But the federal sentencing cases were fascinating, involving very difficult questions about how to determine restitution damages to victims of child pornography victims (*Paroline*), or how to determine causation in “death results” drug distribution cases (*Burrage*), or property values where real estate is at issue in a declining real estate market (*Roberts*). Difficult *mens rea* issues were addressed in *Rosemond* and *Loughrin*, in which Justices Sotomayor and Alito traded significantly differing views, on this obscure but important battlefield where most of the Justices pay little attention. But the difference between “knowledge” and “purpose” – which Justice Alito stressed but Justice Kagan arguably obscured – is a very important in many criminal law contexts. This will have to play out in future cases.

The Court’s summary reversals, and skirmishing opinions related to mere Orders, are also interesting to those who watch closely. For example, Justice Sotomayor targeted a disturbing practice in Alabama capital cases -- where trial judges can, and in Alabama often do, override jury recommendations against death – in a dissent from denial of *certiorari* in *Woodward*. Inevitably, there appears to be an unsettling disparity impact on minorities in such cases. Watch for a case on this topic in the near future unless Alabama changes its law.

Meanwhile, for the upcoming Term, the Court already has 11 very interesting criminal-law-or-related cases on its docket for next Term. Also, right now it looks like an “Eighth Circuit Term, since 4 of the 11 cases originate there (not from CA9 or 6!). Although a number of new criminal law cases can be expected to be granted at the Courts first post-summer Conference on September 30th.

Finally, in terms of workload, the Court’s overall decision production was very low this year. However, in the criminal law area, the total number of separate opinions written was about the same. (See the “Chart: Who Wrote What?” on the final page of this booklet.) Justice Alito, a former career prosecutor, has clearly taken on the “workhorse” mantle, writing 13 separate opinions. Justice Scalia was his normal irrepressible self (10 opinions). And Justice Sotomayor, a former prosecutor as well as district judge, clearly protects “the left” in most (but not all) of the significant criminal cases. Perhaps most interestingly, both Chief Justice Roberts and Justice Kagan authored 6 majority decisions in the criminal law area – and Justice Kagan wrote no dissents. If the Chief weren’t so young, I’d predict that Justice Kagan is gunning for that position in the future, and trying not to offend her fellow Justices with vitriolic dissents along the way!

The final point on authorship is that Justices Ginsburg and Breyer wrote very little about criminal law this year. Perhaps they were distracted by civil cases; perhaps the assignments simply did not come their way. Or perhaps, now that they are “senior” on the Court, they get to push the criminal law cases “down” to Justices with less time, and perhaps more interest. Justice Ginsburg has honestly had less interest in the criminal law throughout her career; while Justice Breyer has ceased to defend his sentencing views in his anti-*Apprendi*-world, and has perhaps moved on.

EXPLANATORY NOTES FOR THESE MATERIALS

In the pages that follow, detailed summaries of all of the U.S. Supreme Court’s criminal law decisions (and those that the author deems “related”) during the past year are provided, grouped by subject matter. (For a quick assimilation of the Term’s work, the “List of Decisions” above provides a one-sentence description of each decision and the page below where it’s more detailed summary can be found.) Some decisions address more than one subject -- the author has placed them in the category that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which sometimes demonstrates how doctrine developed as the Term progressed.

The goal of these summaries is to be broadly inclusive for the criminal law practitioner. Thus, many of the Court’s civil cases that relate to criminal law topics or fact-areas are also included. We also continue to include immigration law and securities law decisions, because they so often relate to criminal law issues. This became particularly so after *Padilla v. Kentucky* in 2010 ruled that a criminal defense attorney can violate the Sixth Amendment’s effective assistance of counsel requirement if 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 a “**Headline**” description of the holding is immediately provided. Then follow somewhat detailed summaries of the case’s facts, majority opinion(s), and any separate opinions (concurrences as well as dissents). My view is that all the opinions in any one case are necessary to have a sophisticated understanding of what the case does, and does not, hold – as well as to see what issues are reserved, likely to be addressed (and so should now be raised) in future cases.

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

Following the Summaries of Opinions, in both argued and unargued (summary reversal) cases, we provide 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, so you can get a preview of what may be coming.

Finally, a chart showing what Justices wrote which opinions this Term (including separate concurring and dissenting opinions), in criminal and related cases, is included. This can sometimes help develop a picture of which Justices care the most to write in the field of criminal law.

These materials are the product of Professor Little and his research assistant, Allen Dreschel (UC Hastings Class of 2015). Professor Little, and not the ABA or the panelists, bears full responsibility for errors and any opinions expressed. Please be aware that minor changes from the Court's original slip opinions may have been made for ease of reading or understanding -- for example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation, or other non-substantive changes, may have been made. Finally, remember that these are merely summaries; interested readers should of course review the actual opinions in full and arrive at their own interpretations, rather than rely on the authors'. Please send any comments, suggestions or corrections to Professor Little at his contact points below. The materials are copyrighted and are available for purchase from the ABA. Please do not reproduce without permission.

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

I. CONSTITUTIONAL DECISIONS

A. Article I, Section 8, cl. 18 ("Necessary and proper" clause) and Article II, Section 2, cl. 2 (Treaty power)

Bond v. United States, 134 S. Ct. 2077 ((June 2, 2014), 9 (6-1-1-1) to 0 (**Roberts**; *Scalia*, *Thomas Alito* each concur in the judgment), reversing 681 F.3d 149 (3d Cir. 2012).

Headline: "Big case" of the Term that wasn't -- argued by former Solicitor General Paul Clement (for Bond) and current S.G. Don Verrilli. The **Court avoids an important Article I Congressional Power question**, by interpreting the federal criminal "chemical weapons" statute as not reaching a local, mild poisoning case.

So the holding of the case is summarized below at page 24 under "Federal Criminal Statutes."

B. FIRST AMENDMENT

Lane v. Franks, 134 S. Ct. 2369 (Jun. 19, 2014), 9(6-3) to 0 (**Sotomayor**, *Thomas* concurring), affirming in part and reversing in part 523 Fed. Appx. 709, (11th Cir. 2013).

Headline: The **First Amendment protects from workplace discipline a public employee who provides "truthful sworn testimony compelled by subpoena" in a criminal case** "outside ... his ordinary job responsibilities." However, the supervisor who fired him in retaliation for that testimony deserves "qualified immunity" because **it was not "clearly established" at that time** that a public employee's compelled criminal trial testimony was so protected.

Facts: Edward R. Lane, the probationary director of a state Community College program in Alabama, discovered that a state legislator, Suzanne Schmitz, was collecting \$177,000 on his program's payroll while performing virtually no work. Lane ultimately fired Schmitz and, having been subpoenaed by federal authorities, testified before a grand

jury and at two criminal trials of Schmitz. When president of the Community College, Steve Franks, later fired Lane, Lane sued Franks in his individual and official capacities under 42 U.S.C. § 1983, alleging that Franks fired him in retaliation for his testimony, violating his First Amendment rights. The Eleventh Circuit affirmed summary judgment for Franks, relying on *Garcetti* (2006) which held that “when public employees make statements pursuant to their official duties, the[y] are not speaking as citizens for First Amendment purposes.” The Circuit ruled that “[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech ‘owes its existence to [the] employee’s professional responsibilities’” -- and Lane had learned of Schmitz’s fraud through his “professional responsibilities.”

Sotomayor for 6: Although it was not “clearly established” in 2009, we make clear today that **“truthful subpoenaed testimony outside the course of [public employees’] ordinary job responsibilities” is protected by the First Amendment.** Public employee speech made in the course of ordinary job duties, and not as a citizen speaking on a matter of public concern, is generally not entitled to First Amendment protection. But sworn testimony in a criminal proceeding is a “quintessential example of citizen speech” entitled to First Amendment protection -- the speaker is obliged by the court to tell the truth regardless of any obligations the speaker may have to his employer. Such speech may relate to information learned in the course of government employment without losing First Amendment protection. A rule that stripped such speech of all First Amendment protections would “place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”

If an employee speaks as a citizen on a matter of public concern, the next question is whether the government had “an adequate justification for treating the employee differently from any other member of the public.” Given that Lane’s testimony was not false and did not disclose any sensitive information, “respondents ... cannot demonstrate any government interest that tips the balance in their favor.” However, regarding qualified immunity for Franks in his individual capacity, no USSCt or Eleventh Circuit precedent precluded Franks from holding a reasonable belief that Lane was not protected under the First Amendment, so we affirm on the ground of qualified immunity.

Thomas, with Alito and Scalia, concurring: I write to note that the Court does not address the broader question of “whether a public employee speaks ‘as a citizen’ when he testifies in the course of his ordinary job responsibilities.” Police officers, for example, testify as a “routine and critical part of their employment duties.” The Court properly reserves this constitutional question.

Wood v. Moss, 134 S. Ct. 2056 (May 27, 2014); 9 to 0 (**Ginsburg**), reversing 711 F.3d 941 (9th Cir. 2012).

Although the First Amendment condemns “viewpoint discrimination,” our precedent also makes clear that “safeguarding the President is also of overwhelming importance.” So without deciding **whether the First Amendment requires the Secret Service to move pro- and anti-Presidential protestors exactly the same distance away from a restaurant** where the President unexpectedly stops to dine, we hold the agents have **qualified immunity** on this record.

So although the case presents some First Amendment discussion, it is summarized at greater length at page 33 below, under “Civil Cases related to Criminal Law.”

McCullen v. Coakley, 134 S. Ct. 2518 (June 26, 2014), 9 (5-4) to 0 (**Roberts**; *Scalia* concurring in the judgment; *Alito* concurring in the judgment), reversing 708 F.3d 1 (1st Cir. 2013).

Headline: Statute that makes it a crime to knowingly stand on a public sidewalk within a 35-foot “buffer zone” around an abortion clinic entrance violates the First Amendment.

Facts: Without going into the details of this civil attack on a Massachusetts “buffer zone” statute, the law made it a crime to stand anywhere within a 35-foot reproductive health facility (abortion clinic) buffer zone, with the exception of employees of the facility. After two bench trials, the district court upheld the law against a First Amendment challenge brought by individuals who wished to engage in “caring and consensual” person-to-person “sidewalk counselling” within 35 feet of clinic driveways or entrances. The First Circuit affirmed the law as a “reasonable time, place or manner” regulation, in light of Massachusetts’ failed experiences with other abortion protestor controls.

Roberts (joined in full by Ginsburg, Breyer, Sotomayor and Kagan): The law undoubtedly restrains the speech of “sidewalk counsellors.” (The Court says they “are not protestors,” they merely “wish to converse with their fellow citizens”). But we think it is still “content neutral.” It does not “depend on what they say, but simply on where they say it.” Exempting employees does not change this conclusion -- if employees spoke positively about abortion within the zone, that might have violated the statute, but “selective enforcement” is not alleged here. Moreover, we do not overrule our prior precedent on abortion clinic buffer zones (*Hill*, 2000) – but we do find this law invalid under the three requirements of a reasonable time, manner and place First Amendment doctrine: “narrowly tailored,” serving a “significant governmental interest,” and leaving open “ample alternative channels for communication.” The objective of increasing “public safety” is a valid one; this law was a “response to ... crowding, obstruction, and even violence” at abortion clinics. But the law is not “narrowly tailored” enough – because it “substantially burdens” petitioners’ non-violent and non-obstructive speech, and “reasonable alternatives” exist that Massachusetts has not tried. The State “has too readily foregone options that could serve its interests just as well” (although we do not “approve” these options – we say only that they have not been tried). Although fixed buffer zones (which no other state, although some localities, has enacted) may “make [the police’s] job much easier,” “that is not enough to satisfy the First Amendment.”

Scalia, concurring in the judgment, joined by Justices Kennedy and Thomas: Today’s decision continues “this Court’s practice of giving abortion-rights advocates a pass” and leads further to an “abortion-speech-only” jurisprudence. [**Ed. Note:** Justice Scalia’s harsh critique of Chief Justice Roberts’ opinion continues his own practice of rhetorically alienating Justices who might otherwise tend to be Justice Scalia’s allies. Most of the detail of Justice Scalia’s vitriolic dissent (majority opinion is “astonishing,” “fanciful”) are omitted here.] The law is plainly not “content neutral;” and the Court’s discussion of this aspect is “gratuitous ... purest dicta,” because the Court concludes that the law fails even under the lesser analysis. Because it is not “content neutral,” the law fails the rigorous “least restrictive means of achieving a compelling state interest” test. Because I think the law fails this “strict scrutiny” test, I need not examine the further details of the Court’s remaining analysis. The Court assembles only an “apparent but specious unanimity.” [**Ed. Note:** on this point, Justice Scalia is surely correct. The Court is unanimous only as to

result (reversal), not reasoning.] Also, I would overrule *Hill*, in which Justice Kennedy and I dissented.

Alito, concurring in the judgment: [Ed. Note: Justice Alito quietly does not join Justice Scalia’s separate concurrence.] Because I think the law “discriminates on the basis of viewpoint, it is unconstitutional.” While sidewalk protestors were silenced, the record shows that clinic employees were allowed to speak positively about the work of the abortion clinic, within the buffer zone, as they escorted patients inside. This is “blatant viewpoint discrimination.”

C. FOURTH AMENDMENT

Fernandez v. California, 134 S. Ct. 1126 (Feb. 25, 2014), 6 (4-1-1) to 3 (**Alito**; *Scalia* concur; *Thomas* concur; Ginsburg dissenting), affirming 145 Cal.Rptr.3d 51 (Cal. App. 2012).

Headline: Although police must honor the objection of one occupant of a residence to a search consented to by a co-occupant (*Georgia v. Randolph*, 2006), **the objecting occupant must be “physically present.” If the objector is lawfully removed by police, then police may later search based on the other occupant’s consent.** *Randolph* is not “extended” to a physically-absent co-occupant.

Facts: Fernandez participated in a gang robbery-beating. When police responded to an alley known as the gang’s hang-out, they saw a man run into an apartment there and soon heard “sounds of screaming and fighting coming from” the apartment. When officers knocked on the apartment door, Roxanne Rojas answered, holding a baby and appearing to be crying and facially injured. When the police moved to conduct a “protective sweep” of the apartment, Fernandez appeared and said “You don’t have any right to come in here, I know my rights.” [Ed. Note: Not well enough, it turns out.] The officers, “suspecting that [Fernandez] had assaulted Rojas, removed him from the apartment and then placed him under arrest.” An hour later the police returned and “received both oral and written consent from Rojas” to search the apartment. (Rojas later testified that Fernandez had not assaulted her and that her consent was coerced by threats to take her children, but the trial court found the consent voluntary and the jury rejected Rojas’s testimony.) Evidence later used to convict Fernandez was found during the apartment search. The California appellate court found that *Randolph*’s rule requires a “physically present” objecting co-tenant and should not be extended to reject the consent of an occupant when an objecting co-occupant has been lawfully removed. This was contrary to a 2008 Ninth Circuit ruling that a co-tenant’s objection “remains effective” even if removed.

Alito, joined by Roberts, Kennedy, Scalia, Thomas and Breyer: Although “a warrant is generally required for the search of a home,” “consent searches” are a “firmly” and “long” established exception to that rule. It would be “absurd” not to allow consent searches where there is a “sole-owner” of the premises; and *Matlock* (1974) extended this concept to consent given by a lawful co-occupant. *Randolph* (2006) created a “narrow exception” to this rule, ruling that police must honor the objection of a co-occupant on the doorstep, but that majority “went to great lengths to make clear that **its holding was limited to**” when **“the objecting occupant is present”** (as Justice Breyer’s separate concurrence made “unambiguous[ly]” clear).

We now adopt that narrow reading of *Randolph*. **So long as the removal of an objector is “objectively reasonable,”** the “physically present” limitation of *Randolph*

controls. We reject any inquiry into “subjective motives” of officers, as we generally do in the Fourth Amendment context.

We also think that an “objection remains effective” rule is (1) inconsistent with “customary social usage” expectations; and (2) unreasonable because of arguments about “duration.” “There may be cases” where the meaning of “physically present” is “disputed,” but we think the rule is “workable” (cf. *Bailey v. U.S.*, 2013, stating a “near the premises” rule for detaining persons during execution of a search). The search “warrant procedure imposes burdens on ... officers,” and an occupant should have the “right” to consent. Co-occupants may in fact want the police to search, without delay. A contrary ruling here would “show disrespect for [Rojas’s] independence.” Fernandez, “having beaten Rojas,” cannot “bar her from controlling access to her own home.”

Scalia concurring: I agree with Justice Thomas that *Randolph* was wrongly decided. But I reject the Department of Justice’s suggestion that Fourth Amendment rights do not depend on property rights. Here, there is no showing that property law has endorsed a “trespass” if someone enters a joint residence over the objection on one co-tenant.

Thomas concurring: I would overrule *Randolph*, because I agree (quoting Robert’s dissent in *Randolph*) that “co-occupants have assumed the risk” that one will allow police to search.

Ginsburg dissenting, with Sotomayor and Kagan: Warrantless searches are disfavored, and exceptions should be “few ... and carefully delineated” (*U.S. Dist. Ct.* 1972). Today’s decision allows police to “dodge” the requirement, and “shrinks [*Randolph*] to petite size.” The Court ought not “disparage” the warrant requirement as “inconvenient and burdensome.” “The formality of a warrant” protects “all of us ... from unchecked police activity.” *Randolph* says a co-tenant’s objection must be honored, and the police here knew of it and could easily have sought a warrant – there was no danger that evidence would be lost or destroyed. **[Ed. Note:** this seems to ignore Rojas’s presence and apparent loyalty to Fernandez. On the other hand, police took an hour before returning for her consent, suggesting perhaps a lack of urgency.] There is a big difference between a social visitor who enters over a co-tenant’s objection, and police who then “rummage through the dwelling.” And the majority does not grapple with the “administrative difficulties” of its rule: e.g., what if a physically present objector leaves briefly to use the bathroom? Finally, Rojas’s “independence” is not furthered by (1) ignoring the evidence that would cause us to doubt her “consent” as an “unpressured exercise of self-determination”; or by (2) diminution of Fourth Amendment rights” – there are better ways to protect against domestic abuse, and the police may always enter immediately where a true exigency exists.

Navarett v. California, 134 S. Ct. 1683 (April 22, 2014), 5-4 (**Thomas**; Scalia dissenting), affirming 2012 WL 4842651 (Cal. App. 2014).

Headline: **An anonymous 911 call reporting an allegedly reckless driver can, without more, provide reasonable suspicion** for a traffic stop.

Facts: Around 3:30 pm, police received a radio dispatcher’s summary of a 911 call that described a truck, gave its license plate, and said it “ran the reporting party off the roadway.” The dispatch did not provide the name or identity of the caller (although the caller did apparently give a name, the Court treats the call as an anonymous one, as did the lower courts). Thirteen minutes later, a California Highway Patrol officer passed the identified vehicle and pulled it over within five minutes (not observing any illegal conduct

himself). Quickly smelling marijuana, the police found 30 pounds in the truck and arrested the Navarettes (driver and passenger). The lower courts denied a motion to suppress, finding that the identification of the truck and its location and direction made the tip reliable enough for reasonable suspicion, and the alleged conduct was dangerous enough to justify a stop without observing any illegal conduct by the truck.

Thomas (joined by Roberts, Thomas, Kennedy and Breyer): We have previously held that “under appropriate circumstances,” **an anonymous tip can have “sufficient indicia of reliability to provide reasonable suspicion [for] an investigatory stop.”** *White* (1990). Here the 911 call was “sufficiently reliable” for police to “credit” the claim of running off the road; and running off the road is sufficiently indicative of very dangerous conduct, drunk driving, to support a stop for that ongoing conduct. (We don’t address what is needed to investigate “completed criminal activity”.) The basis was “eyewitness knowledge;” the call gave very specific details and the police corroborated them; and 911 calls are often traceable and recorded so that a “false tipster would think twice” before making one. Given the reasonableness of crediting the report as reliable, it reported a “driving behavior” that is a “sound indicia of drunk driving.” Because drunk driving is so dangerous, a stop was justified (unlike, perhaps, a report only of speeding or not wearing a seatbelt). And the police themselves not observing any bad driving does not, by itself, justify “allowing a drunk driver a second chance.” This is a “close case” but we uphold it.

Scalia dissenting, with Ginsburg, Sotomayor and Kagan: [Ed Note: The Court continues its recent pattern of having Justice Scalia join the Fourth Amendment “liberals” while Justice Breyer joins the more “conservative” Justices.] The Court provides a “freedom-destroying cocktail” of factors of “patent falsity.” Anonymous 911 calls are not sufficiently reliable, without independent police corroboration; and a “single instance of careless or reckless driving” does not provide a “reasonable” suspicion of drunk driving. [The details of his analysis are omitted here.] “I am sure [this] would not be the Framers’” conception “of a people secure from unreasonable searches and seizures.” **While “drunk driving is a serious matter, ... so is the loss of our freedom to come and go as we please without police interference.”**

Plumhoff v. Rickard, 134 S. Ct. 2012 (May 27, 2014); 9 (7-1-1) to 0 (**Alito**; *Ginsburg & Breyer* concurring without opinion only in parts), reversing 509 F. App’x 388 (6th Cir. 2012).

Headline: There was no Fourth Amendment violation in using deadly force to end a continuing, dangerous, reckless car chase. And in any case there was no “clearly established law” to the contrary.

Facts: In July 2004, six police cars pursued Rickard, a driver who fled during a routine traffic stop, in a high-speed chase that reached speeds in excess of 100 miles per hour on a busy highway. A passenger, Allen, was also in the fleeing car. After Rickard finally spun out in a parking lot and collided with two police cars, one officer fired three shots. But Rickard managed to briefly still drive away, at which point officers fired 12 more shots at the car, which then crashed to a halt. Rickard and passenger Allen were both killed.

Rickard’s daughter sued in federal court under 42 U.S.C. §1983, alleging “excessive force” under the Fourth Amendment. The district court denied summary judgment on the officers’ claim of qualified immunity, and on interlocutory appeal the Sixth Circuit affirmed.

Alito (for all 9, although Justices Ginsburg and Breyer, without opinions, silently do not join all parts): **First, an interlocutory appeal is proper when qualified immunity is denied pretrial, when the basis for denial presents “legal issues” as opposed to purely factual issues.”**

Second, on the merits, although denial of qualified immunity requires a violation of “clearly established law,” we have ruled that an appellate court may first decide whether any substantive violation at all occurred, if so deciding “promotes the development of constitutional precedent” in cases that typically recur. (*Pearson*, 2009; Justice Ginsburg does not join this procedural part). So first, **we hold (in another part that both Justices Ginsburg and Breyer do not join) that there was no Fourth Amendment violation here. Law enforcement officers act reasonably under the Fourth Amendment to use lethal force to end a high-speed chase that posed a “grave danger to public safety.”** Here, firing 15 shots into the suspect vehicle was not excessive because **the driver’s flight had not yet ended** “during the 10-second span when all the shots were fired.” Finally, the presence of a passenger in the front seat of the car has no bearing on whether the officers violated Rickard’s Fourth Amendment rights – Rickard was the fleeing driver, and we do not answer the question whether the passenger may recover in such a case.

Finally, there was no “clearly established law” on this point when these officers acted in 2004. In fact, we held as much in a 2004 *per curiam* (*Brosseau*) on indistinguishable facts. So qualified immunity was required in any case.

Riley v. California (together with **United States v. Wurie**, 134 S. Ct. 2473 (Nos. 13-132 & 212, June 25, 2014), 9 (8-1) to 0 (**Roberts**; *Alito* concurring in part and in judgment), reversing unpub. (Cal.App. 2013) and affirming 728 F.3d 1 (1st Cir. 2013).

Headline: Absent exigency, **police may not search data on a cellphone without a warrant even when the phone is properly seized from an arrestee “incident to arrest.”**

Facts: Riley was stopped and his car impounded and searched for expired tags and driving on a suspended license. When loaded handguns were found under the car’s hood, Riley was arrested and his “smart” cellphone was seized incident to arrest. In addition to other items associated the “Bloods” gang, an officer at the scene accessed information on Riley’s “smart” cellphone that also supported gang association. Two hours later back at the station, another officer “went through” Riley’s phone and saw “a lot of stuff” including videos and photos used to support a later sentence for other crimes that was enhanced due to Riley’s gang membership. The state appellate court affirmed, relying on a prior California Supreme Court decision holding that a warrantless cellphone search is permitted “incident to arrest” so long as the phone was “immediately associated” with the arrestee’s person.

In a second case, combined for argument at the Supreme Court with *Riley*, *Wurie* was arrested for drug sales and at the station officers seized a “flip phone” from his person. The phone coincidentally began to receive calls indicated as from “my house” on the screen, and when officers flipped open the phone a photo of a woman with a baby was the “wallpaper” on the screen. The officers pressed one button to show the call log, and another button to reveal the “my house” number. That number was traced to an apartment, which was then searched pursuant to a warrant and yielded various drug and weapons evidence. *Wurie* was convicted but on appeal the First Circuit reversed, ruling that cellphones are

different than other physical evidence seized incident to arrest, due to the amount of information they contain, and so a warrantless search of the phone is not permitted absent exigency.

Roberts (for all Justices except Alito in part): “Reasonableness” is “the ultimate touchstone of the Fourth Amendment,” and “reasonableness generally requires ... a judicial warrant,” absent a “specific exception.” “Search incident to a lawful arrest” is such an exception (and “occur[s] with far greater frequency than [warranted] searches”). And we held in *Robinson* (1973) that “no additional justification” other than lawful arrest was needed to seize objects from the arrestee and open them (a “crumpled cigarette packet” there). However, **cellphones are different, and the large amount of “vast quantities of personal ... digital data” on them generally requires a warrant – we won’t extend *Robinson* to cellphones.** We have a preference for “clear guidance to law enforcement through categorical rules” rather than options requiring “difficult line-drawing expeditions” on the scene or after. “Privacy comes at a cost.” But the Framers opposed “general” searches, and “exigencies” will often avoid the “extreme” hypotheticals. **Otherwise, the answer “is ... simple – get a warrant.”** [Ed. Note: the Court closes with a favorable citation to *Boyd* (1886), a case that prior Court opinions had largely consigned to the dust heap.]

“Modern cell phones” are such a “pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy.” And saying that the “privacy interests” are no different than those in a purse or address book “is like saying a ride on horseback is materially indistinguishable from a flight to the moon.” [Ed. Note: With these two statements, Chief justice Roberts easily wins this year’s award for “best lines of the year.”] There is also the complication of cellphones providing access to private information “in the cloud.” Moreover, “digital data ... cannot itself be used as a weapon,” and “once an officer has secured a phone and eliminated any potential physical threats,” a safety rationale disappears. No “actual experiences” support the government’s hypothetical danger suggestions; “case-specific exceptions” may be appropriate in the future. As for destruction of evidence, we think that “remote wiping and data encryption” do not appear to be “prevalent” problems, and there are “specific means” available to counter these threats – “at least for now they provide a reasonable response.” Finally, government self-restraint is not an answer: **“The Founders did not fight a revolution to gain the right to government agency protocols.”**

Finally, any exigent circumstances in a particular case can provide a separate exception to the warrant requirement. [Ed. Note: NSA cases on the horizon? In the first of only two footnotes in the 28-page opinion, the Court carefully reserves the question “whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.”]

Alito concurring in part and in the judgment: “I agree ... that law enforcement .. must generally obtain a warrant before searching ... a cell phone,” even though some “anomalies” are created. “Law enforcement officers need clear rules.” But two points: First, it is not just safety and avoiding destruction of evidence that justifies the search-incident-to-arrest exception, but also a general “need to obtain probative evidence.” Otherwise the expansive “scope” of our search incident cases, extending to non-dangerous and already-seized items, makes no sense. [Ed. Note: Justice Alito has a good point here.] Second, legislatures are better positioned than courts to make “reasonable distinctions based on categories of information or perhaps other variables.” I hope that “privacy protection in the 21st century” is not “left primarily to the federal courts using the blunt

instrument of the Fourth Amendment,” particularly in light of “changes that ... almost certainly will take place in the future.”

D. FIFTH AND SIXTH AMENDMENTS

1. Use of Previously-Compelled Confessions

Kansas v. Cheever, 134 S. Ct. 596 (Dec. 11, 2013), 9-0 (**Sotomayor**), reversing 284 P.3d 1007 (Kan. 2012):

Headline: When a defendant introduces psychiatric evidence about his mental state, **the government may introduce evidence from a prior compelled psychiatric exam of the defendant** for “limited rebuttal purposes.”

Facts: Cheever shot and killed a sheriff, after having cooked and smoked methamphetamine. In an initial federal capital prosecution, Cheever was ordered to submit to a psychiatric examination after he announced that he would seek to introduce expert testimony regarding methamphetamine intoxication. That exam lasted 5½ hours, but then was not used when the federal prosecution was dismissed without prejudice. Kansas then reinitiated a state capital prosecution (which had been suspended while the state capital statute was under review). Cheever then introduced expert testimony [**Ed. Note:** from an expert in “psychiatric pharmacy”] that long-term meth use had damaged Cheever’s brain, and that his actions on the day of the killing were influenced by his voluntary meth intoxication, which prevented premeditation.

In rebuttal, Kansas offered testimony from the expert who had examined Cheever by order of the federal court. Cheever argued that because he had not agreed to that exam, its use would violate the Fifth Amendment. Kansas argued that the testimony was necessary to rebut Cheever’s voluntary intoxication defense, and that it was admissible under *Buchanan v. Ky* (1987). The trial court agreed, in part because Cheever’s own expert had relied on the prior federal examination [**Ed. Note:** perhaps this fact is the real key to this odd decision?] The jury convicted and sentenced Cheever to death. On appeal, the Kansas Supreme Court ruled that using the court-ordered exam against Cheever violated the Fifth Amendment, and that *Buchanan* was limited to cases involving a defense of “mental disease or defect,” which this was not.

Sotomayor (for a unanimous Court): Although we ruled in *Estelle* (1981) that a compelled psychiatric exam may not be used against a defendant who has neither initiated a psychiatric evaluation nor introduced any psychiatric evidence, we ruled in *Buchanan* (1987) that such an exam may be used for a “limited rebuttal purpose” when a defendant has introduced psychiatric evidence. *Buchanan* is not limited to cases involving mental disease or defect, but rather can be used to rebut any claim that a defendant “lacked the requisite mental state.” “Any other rule would undermine the adversarial process.... [It is] the only effective means of challenging that evidence,” and the State “permissibly followed where the defense led.” [**Ed. Note:** this holding seems undoubtedly broader than *Buchanan’s*, and it is mildly surprising that the Court is unanimous here.] However, we do not address questions regarding whether the State’s use here exceeded *Buchanan’s* constitutional “limited rebuttal purpose” or the bounds of Kansas state law. Remanded.

2. Effective Assistance of Counsel:

Burt (Warden) v. Titlow, 134 S. Ct. 10 (Nov. 5, 2014), 9 (7-10-1) to 0 (**Alito**; *Sotomayor* concurring; *Ginsburg* concurring in the judgment), reversing 680 F.3d 577 (6th Cir. 2012).

Headline: A federal court applying AEDPA’s “doubly deferential” review standard must credit state court’s factual findings and **may not presume ineffective assistance of counsel where the record of counsel’s assistance is simply silent.**

Facts: [Ed. Note: The facts are convoluted, unique, and bizarre.] Titlow and her [the state uses “him;” Titlow is transgender, and the Court diplomatically uses “respondent” throughout] her Aunt Billie killed the aunt’s husband by smothering him with a pillow. Titlow reached a plea agreement via his first lawyer, pleading guilty to manslaughter, receiving a 7-15 year sentence, and agreeing to testify against Billie. A deputy sheriff told Titlow, however, that if he was innocent he should not plead guilty. Three days before Billie’s trial, Titlow retained a new lawyer (Toca), and withdrew his plea after the prosecutor refused to give him a three-year sentence that Toca demanded. So the State tried Billie without Titlow’s testimony, and she was acquitted (and later died). The state then tried Titlow, who testified that he was innocent, but was convicted of murder and received a 20-40 year sentence. On appeal, Titlow argued that Toca had been ineffective by advising him to withdraw his plea after little or no review of the facts or evidence in the case. The Michigan Court of Appeals found that Toca had acted reasonably given that Titlow proclaimed his innocence, and on federal habeas, the district court found the Michigan state ruling “completely reasonable.” But the Sixth Circuit reversed (2-1), finding that the Michigan court’s factual premise for why the plea had been withdrawn was wrong, and that because “the record contained no evidence” that Toca had fully informed Titlow of the possible consequences of plea withdrawal, his assistance was constitutionally ineffective. As remedy, the Circuit ordered the state to reoffer the original plea bargain, and the state court could then “fashion” an appropriate remedy. (That part of the case is still pending in the state courts, but the State sought *certiorari* regarding whether there was any ineffective assistance at all, and whether the remedy of re-offering the original plea bargain was proper.)

Alito (joined by all but Ginsburg): On federal collateral review under the 1996 AEDPA statute, “the prisoner bears the burden” of disproving “factual findings by clear and convincing evidence,” as well as showing a constitutional error “so lacking in justification” so that it is “beyond any possibility for fairminded disagreement.” *Harrington* (2012) and 28 U.S.C. 2254(e)(1).

Here, the “record readily supports” the state court’s finding that Titlow withdrew her plea because she professed innocence. Although Toca did not mention this when later testifying, the Michigan court’s assessment of the entire record was “reasonable” while the Sixth Circuit’s was “debatable” at best. Once that finding is “accept[ed] as true,” the record of Toca’s assistance was not “clearly unreasonable.” **“Although a defendant’s proclamation of innocence does not relieve counsel of his normal responsibilities,” withdrawing a plea in the face of such a fact is not ineffective.** And the Sixth Circuit “turned the presumption of effectiveness on its head” by presuming that Toca did not fully advise Titlow merely because the record was “silent” as to what Toca did, or did not, advise. “We note that Toca’s conduct in this litigation was far from exemplary,” and “he may well have violated” more than one ethical rule. But **“a lawyer’s violation of ethical norms does not make the lawyer per se ineffective”** (*Mickens*, 2002). The state court’s determination that Titlow was adequately advised by Toca was

“reasonable,” so the Sixth Circuit is reversed. We need not reach the question of remedy under *Lafler* (2012).

Sotomayor, concurring: I concur “only because respondent failed to present enough evidence” of what his lawyer advised him. The Court’s opinion, in which I concur fully, is of “limited scope” based on the facts of this case. I want to emphasize that a client’s profession of innocence does not relieve counsel of the professional responsibility to “make an independent examination of the facts, circumstances, pleadings and law involved and then ... offer his informed opinion” (*Von Moltke*, 1948). Second, the court’s opinion does not mean that “an attorney performs effectively” if he advises the client to withdraw a plea “whenever the client asserts her innocence.” If Titlow “had made a better factual record,... she could well have prevailed.”

Ginsburg, concurring in the judgment only: I think the Michigan state court’s conclusion was “dubious” – even the prosecutor said that Titlow was the “victim of some bad advice.” However it is “crystal clear” that once Titlow reneged on her bargain and Billie was acquitted, Titlow could no longer perform by testifying against Billie, so there was no “bargain” that the state could be ordered to renew. Titlow was then convicted in a “trial free from reversible error.” So I would rule that the remedy was improper, rather than on ineffectiveness, and I therefore concur only in the judgment reversing the Sixth Circuit.

Hinton v. Alabama, 134 S. Ct. 1081 (Feb. 24, 2014), 9-0 (**per curiam**), summarily reversing 2013 WL 598122 (Alabama Crim. App. 2013):

[This was a non-argued case, summarily reversed on the *cert* petition only, and so is summarized below at page 36 under “Opinions Without Argument.

But a “summary reversal” is still precedential. So here is the Constitutional holding: It is **constitutionally ineffective assistance for lawyer to fail to seek funding for a better forensic expert** than the (weak) one he has, **where the lawyer’s decision is based on legal error that funding was not available.**

3. Right to Due Process and Counsel in Pretrial Asset Forfeiture Proceedings

Kaley v. United States, 134 S. Ct. 1090 (Feb. 25, 2014), 6 to 3 (**Kagan, Roberts** dissenting), affirming 677 F.3d 1316 (11th Cir. 2012).

Headline: A defendant whose assets are “frozen” pretrial based on a grand jury’s allegation of forfeiture has **no constitutional right to a pretrial hearing to “relitigate” the probable cause finding regarding commission of the offense that the grand jury’s indictment necessarily represents** (even where the defendant wants to use the assets to hire effective counsel and the facts undermining probable cause appear strong).

Facts: A federal grand jury indictment charged the Kaleys with a scheme to steal medical devices, resell them, and launder the proceeds. The Kaleys have contended throughout that the devices were “unwanted, excess hospital inventory which they could lawfully take and [sell] to others” – thus they contest whether their conduct is a crime at all. During the government’s investigation, the Kaley’s put \$500,000 into a certificate of deposit to be used to hire counsel if indicted. But along with the Kaleys’ indictment, the United States obtained a restraining order against the Kaleys’ assets, including the CD to be used to hire counsel. (They wanted to hire a lawyer that had already successfully

defended their co-defendant against the same charges.) The Kaleys challenged the pretrial asset-freezing order as violating of their Fifth and Sixth Amendment rights, and sought a pretrial hearing to challenge the legality of the seizure. The district court ruled that they could not challenge “the very validity of the underlying indictment” other than at trial on the merits, and the Eleventh Circuit affirmed.

Kagan, joined by Scalia, Kennedy, Thomas, Ginsburg and Alito: We have previously ruled that assets may be seized pretrial, even if they would be used to hire counsel, in *Monsanto* (1989). **A federal grand jury’s probable cause findings are “conclusive,” and “a challenge to the reliability or competence of the evidence supporting that finding will not be heard.”** Just as a grand jury’s probable cause finding is sufficient to effect a pre-trial restraint on a defendant’s liberty (*i.e.*, deny bail), such a finding is also constitutionally sufficient to support a pre-trial restraint of a defendant’s property. Permitting a pretrial evidentiary challenge to this finding would create “incongruity” and “dissonance” by asking a judge to decide anew what the grand jury has already determined, and potentially resulting in a judge who found probable cause lacking then having to preside over a trial premised on its existence. **“A judicial redetermination of the conclusion the grand jury already reached” is not constitutionally required.** “A fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries.” “The grand jury gets to say, without any review, oversight, or second-guessing.” The Kaleys cannot “demand a do-over, except with a different referee.”

Even if the Due Process balancing test of *Matthews v. Eldridge* (1976) were applicable here – and we do not decide that it is – it weighs against the Kaleys. First, a pretrial hearing would presumably give a defendant pretrial discovery “well before the rules ... or principles of due process ... require.” But because both the government’s and the private interests are substantial, so the inquiry “boils down to the probable value, if any, or a judicial hearing in uncovering mistaken grand jury findings.” We think a “full-dress hearing will provide little benefit.” Our precedents have “repeatedly” noted that a finding of probable cause to believe that a person has committed a crime “can be made reliably without an adversary hearing.” The value of imposing additional “formalities and safeguards” would “in most cases ... be too slight” (*Gerstein*, 1975). In fact, although some lower courts have been doing pretrial hearings for some two decades, there is not “a single case in which a judge found an absence of probable cause....” Congress has the power to change this, but the Constitution does not require it.

Roberts dissenting with Breyer and Sotomayor: We have recently called the “right to select counsel of one’s choice ... the root meaning of the constitutional guarantee,” and a violation of that right is one of the very few errors that “undermine the fairness of a criminal proceeding as a whole” (*Gonzalez-Lopez*, 2006). **[Ed Note:** Interestingly, Justice Scalia, the author of *Gonzalez-Lopez*, does not join this dissent.] Although the right to counsel of choice is not absolute, limitations should not be imposed “at the unreviewable discretion of a prosecutor—the party who wants the defendant to lose at trial.” Few things would “do more to ‘undermine the criminal justice system’s integrity’ than to allow the Government to initiate a prosecution and then ... disarm its presumptively innocent opponent by depriving him of his counsel of choice—without even an opportunity to be heard.” The majority gives “short shrift” to the importance of the Kaleys’ interests in the *Matthews v. Eldridge* balance.

The government and the majority do not deny that a defendant is permitted to contest, pretrial, the grand jury’s allegation that forfeitable assets are connected to the alleged criminal conduct. Yet they do not give “any reason why the District Court may

reconsider the grand jury’s probable cause finding as to traceability—and in fact constitutionally *must*, if asked—but may not do so as to the underlying charged offenses.” We properly reserved this question in *Monsanto*. The hearing the Kaleys seek would not be a relitigation of whether they may be tried, only whether there is probable cause to believe that their assets are forfeitable. This is similar to other pretrial challenges courts routinely permit to the government’s evidence. District judges can manage these hearings so they don’t go too far. **Prosecutors represent the people of the United States, “but so do defense lawyers – one at a time.” “The Court’s opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching.”** [Ed. Note: In a relatively obscure federal case, this is one of the strongest dissents Chief Justice Roberts has ever written.]

E. EIGHTH AMENDMENT

Hall v. Florida, 134 S. Ct. 1986 (May 27, 2014), 5-4 (**Kennedy**; Alito dissenting), reversing 109 So.3d 704 Fla. 2012).

Headline: It is unconstitutional to execute an intellectually disabled (mentally retarded) person, and because setting a **strict numerical IQ limit of 70 or below “creates an unacceptable risk” of so doing, such a “rigid” line is also unconstitutional.**

Facts: Hall received the death penalty for killing a sheriff’s deputy. At the time of his original sentencing, the Court had not yet ruled that it was unconstitutional to execute the intellectually disabled (the Court now abandons the prior term “mental retardation” because experts including the DSM-5 have done so). So Florida did not recognize intellectual disability as a mitigating factor; but at a later resentencing, Hall introduced much evidence of intellectual disability. The resentencing trial court found “substantial evidence” that Hall was “mentally retarded” but still ruled that this could not “excuse his moral culpability.” But then the Supreme Court ruled that the intellectually disabled may not constitutionally be executed, under the Eighth Amendment. *Atkins* (2002). Florida held a new hearing, and allowed evidence of Hall’s IQ scores ranging from 71 to 80. The Florida Supreme Court ruled that an IQ score above 70 always means the person is not mentally disabled, so Hall’s death sentence was affirmed.

Kennedy, joined by Ginsburg, Breyer, Sotomayor and Kagan: “The Eighth Amendment “acquires meaning as public opinion becomes enlightened justice” (quoting *Weems*, 1910). Thus it is unsurprising that we consult medical expertise [this appears to be in response to the dissent]. **A “strict IQ test score cutoff of 70” is not consistent with our current Eighth Amendment principles.** It “disregards established medical practice” by preventing consideration of any of the evidence that medical professionals agree is relevant to assessing intellectual disability. Moreover, an IQ score “should be read not as a single fixed number but as a range,” with a “standard error of measurement” (SEM). Thus a score of 71 can actually reflect a score of between 66 and 76 with 95% confidence. Determining an accurate IQ score with multiple test results is even more complicated. **[Ed. interpretation:** So even if an IQ above 70 is not intellectually disabled, the SEM makes a 70 cutoff invalid; but a cutoff of 75 or higher might be okay.] Only two states employ a fixed-score cutoff like Florida (or “at most nine states,” depending how you count). And 11 states since *Atkins* have either abolished the death penalty or moved in Hall’s direction; this direction of change is also relevant. “The rejection of the strict 70 cutoff in the vast majority of states ... provide[s] strong evidence of consensus that our

society does not regard this strict cutoff as proper or humane.” States do not have “unfettered discretion” to define “the full scope of constitutional protection.” The Eighth Amendment assures “protection of human dignity.”

This is also our own “independent judgment,” which is our “judicial duty.” “Intellectual disability is a condition, not a number,” and a strict numerical cutoff “risks executing a person who suffers from intellectual disability.” So we “agree with the medical experts, that **when a ... IQ score falls within the ... acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability**” (emphasis added). Hall may or may not be intellectually disabled, but the Constitution requires that he have a “fair opportunity to show” it.

Alito dissenting, with Roberts, Scalia and Thomas: We said in *Atkins* that no method of determining intellectual disability is mandated; today the Court “overrules th[at] holding. And it’s new rule is “conceptually unsound and [is] likely to result in confusion.” Under a “fair analysis of current state laws,” there is no “consensus” on this topic. 10 states do not require consideration of SEM; 12 do; and 9 don’t take a position (states without a death penalty should not be counted). And it should be the “standards of the American people” – not of just a “small professional elite” – that count. And professional standards can change; what then? Must the judiciary follow every small change, and judge them? This “calls for legislative judgments, not judicial resolution.” Other problems abound. What “other evidence” must states now admit? And “adaptive behavior” is malleable, relies “on subjective judgments” [**Ed. Note:** but so does IQ testing, some would say], and will result in “inequities.” [Further statistical arguments are omitted here.]

II. FEDERAL CRIMINAL STATUTES

A. Sentencing, Including Restitution

Burrage v. United States, 134 S. Ct. 881 (Jan. 27, 2014), 9(7-2) to 0 (**Scalia**; *Ginsburg* concurring), reversing 687 F.3d 1015 (8th Cir. 2012).

Headline: Proof beyond a reasonable doubt of “**but-for**” **causation is required to convict of distribution of a controlled substance where “death results,”** under 21 U.S.C. 841(b)(1)(C). A “contributing” or “substantial” cause is not enough.

Facts: Joshua Banka died after a day-long “extended drug binge.” In his system was some heroin he had purchased (one gram) from Burrage, along with other controlled substances. Burrage was charged with distributing heroin with “death resulting,” 21 U.S.C. 841(b)(1)(C), thereby triggering a 20-year mandatory minimum. At trial, two doctors testified that the heroin Burrage had sold to Banka was a “contributing factor” in Banka’s death, but they could not say Banka would have live “but for” Burrage’s heroin; he might have died anyway. However (they said) Banka’s death would have been “less likely.” Under *Apprendi* (2000) and *Alleyne* (2013), the “death results” element of the crime had to be found by the jury beyond reasonable doubt. The district court instructed that a “contributing cause” was enough, and rejected “but-for,” “proximate” and “substantial” cause instructions. Burrage’s conviction and 20-year sentence was affirmed by the Eighth Circuit.

Scalia joined by Robert, Kennedy, Thomas, Breyer, Kagan and (in most parts) Alito: The statute does not define “results from,” so the phrase should be given its ordinary meaning. We read it to **require “actual causation,” proof “that the harm would not**

have occurred ... absen[t] ... the defendant's conduct." This is "but-for" causation, a "background principle of the law" which we presume Congress intends when it legislates. Whether adopting but-for causation raises policy concerns is beside the point -- "the Court's role is to apply the statute as written." Moreover (Justice Alito silently does not join this Part), "we doubt" the decision to require but-for causation "will prove a policy disaster." A "contributing" or "substantial" cause requirement would be difficult and inconsistent to administer.

Ginsburg, with Sotomayor, dissenting: "In the context of antidiscrimination law," the phrase "because of" does not mean "solely because of." See my dissent in *Nassar* (2013). However, in interpreting a criminal statute, the rule of lenity favors the Court's ruling today.

Paroline v. United States, 134 S. Ct. 1710 (Apr. 23, 2014), 5 to 4(3-1) (**Kennedy, Roberts** dissenting, *Sotomayor* dissenting), reversing 701 F.3d 749 (5th Cir. 2012).

Headline: Restitution to a victim in a possession of child pornography case is proper only for "proximately caused" damages; district courts must "do their best" to fairly apportion losses, imposing restitution awards in individual cases that are "proportionate" and neither severe nor trivial.

Facts: Paroline pled guilty to possessing 150-300 images of child pornography, two of which were of the respondent victim "Amy." On the one count that Paroline pled guilty to, Amy sought over \$3 million in restitution for a lifetime of lost and future income and treatment. She invoked a federal statute which says a court "shall order" restitution of "the full amount of the victim's losses as determined by the court" (18 U.S.C. 2259). But the district court denied any restitution, ruling that the government had not proved any losses to Amy "directly" or "proximately caused" by Paroline's possession of the two images. The Fifth Circuit reversed, ruling that all possessors of Amy's images should be "jointly and severally liable" for all the damages the victim suffered from multiple (worldwide) possession of the images by "thousands," without any "proximate causation" tied to an individual possessor.

Kennedy joined by Ginsburg, Breyer, Alito and Kagan: The damage to a victim of photographed child abuse is huge, and is "compounded by the distribution of images of her abuser's horrific acts." Possession of the images "harms children in part because it drives production." Possession of the images causes the victim "the trauma of knowing that images of her abuse are being viewed over and over." "Every viewing of child pornography is a repetition of the child's abuse." It is not a "victimless crime." As the victim here testified, "it's like I'm being abused over and over and over again."

The government bears the statutory burden of proving damages sustained "as a result of the offense." This plainly requires that some causation be proved. [After a long discussion, we hold that] "restitution is proper under §2259 **only to the extent the defendant's offense proximately caused a victim's losses.**"

There remains the "difficult question" how to apply the standard of proximate cause to the "atypical causal process underlying the losses the victim claims here." [Ed. Note: the remainder of the Court's opinion sounds like an extended trip back to first-year torts class. One of the hardest opinions of the Term to fully understand. Lower courts will struggle with it for years, unless Congress intervenes.] "But-for" causation can't be proved here, because "thousands of anonymous possessors exist," so tying Amy's damages to Paroline's possession of just two images is "not possible." But "where the combined conduct

of multiple wrongdoers produces a bad outcome,” but-for causation may be “departed from.” **“It would be anomalous” and “nonsensical” for the victim to recover nothing because there are so “many wrongdoers.”** At the same time, we won’t apply “aggregate causation in an incautious manner” because just as surely Paroline’s “minor” contribution did not “cause” the entire \$3.4 million of claimed damages. “Congress gave no indication that it [so] intended.” Nor is there a clear federal right to “contribution,” which also would present “severe practical problems” that might even raise constitutional problems under the Eighth Amendment’s Excessive Fines Clause.

So.... **“a court applying 2259 should order restitution in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses.”** In a case like this it **“would not be [a] severe” amount, but neither should it be “token or nominal.”** “Trivial restitution orders” should be avoided. **There must be “a reasonable and circumscribed award ... in recognition of the [offender’s] indisputable role.”** We recognize this is not a “precise algorithm;” “a court must assess as best it can;” the district court’s “discretion and sound judgment” must be used, and trusted. This is normal in federal sentencing. This might result in somewhat “piecemeal restitution,” requiring victims to reappear in many cases over years. But **we “can only do our best”** to effectuate Congress’s will and the many purposes of criminal sentencing.

Roberts, with Scalia and Thomas, dissenting: The statute here imposes an actual causation requirement, and “no one suggests Paroline’s crime actually caused Amy to suffer millions of dollars in losses.” As a result, a court may not award millions of dollars in restitution. Amy’s injury is “indivisible, which means that Paroline’s particular share of her losses is unknowable.” Because the statute requires proof of Paroline’s particular share, it allows no recovery in this case. “We ought to say so, and give Congress a chance to fix it.” Congress could write a specific statute “tailor[ed] ... to the unique harms caused by child pornography.”

Sotomayor dissenting: “I appreciate the Court’s effort to achieve what it perceives to be a just result.” But “Congress mandated restitution for the ‘full amount of the victim’s losses.’” This describes an approach well within a framework of accepted tort principles like joint and several liability for injuries that are indivisible in nature. So I would affirm the Fifth Circuit’s ruling that Paroline be ordered to pay “the full amount,” and then ask the district court “to consider a periodic payment schedule on remand” under §§ 3664 and 3572.

Robers v. United States, 134 S. Ct. 1854 (May 5, 2014), 9(7-2) to 0 (**Breyer**; *Sotomayor* concurring), affirming 698 F.3d 937 (7th Cir. 2012).

Headline: In a **fraudulent loan application case, restitution of “the property lost ... less the value ... of any part of the property returned,” refers to the money** obtained by fraud, not the houses purchased with the loan; and **banks may have a “reasonable time” to sell repossessed homes.** The homes are not valued on the day they are returned, in a falling market, to the bank.

Facts: Robers was convicted for submitting fraudulent mortgage loan applications to two banks. The Mandatory Victims Restitution Act (MVRA), 18 USC §3663A, requires property crime offenders to pay “an amount equal to ... the value of the property” less “the value (as of the date the property is returned) of any part of the property that is returned.” The bank foreclosed on two houses that Robers had purchased with the fraudulent loans and, because it was a “falling market” in 2007-08, subsequently sold them for less than they

were worth at the time they were repossessed. The district court calculated Robers' restitution obligation by subtracting the proceeds from the foreclosure sale of the houses, from the value of the original loans provided by the banks. The lower courts rejected Robers' argument that the statute requires restitution to be determined based on the value of the houses on the day the banks obtained title to them since that is the "date the property is returned."

Breyer for a unanimous Court: The statutory phrase "any part of the property ... returned" refers to money the banks lent to Robers, and not to the collateral real estate the banks later received, because it was money, not real estate, that Robers obtained from the banks. Any "awkwardness or redundancy" that comes from substituting an amount of money for the words "the property" in the statute "is the linguistic price paid for having a single statutory provision that covers property of many kinds." This also facilitates administration of the statute, because valuing money is easier than valuing property. The rule of lenity has no application because there is no "ambiguity or uncertainty" here.

Sotomayor, joined by Ginsburg, concurring: I join the Court's opinion but note that the analysis should apply "only in cases where a victim intends to sell collateral but encounters a reasonable delay in doing so." If a victim chooses to hold collateral rather than to reduce it to cash reasonably quickly, then we may presume that the victim chose to hold the collateral as an investment, must accept the risk of a decline in the value. At that point, the defendant is no longer the "proximate cause" of further decline in value. "I would place on the defendant the burden to show ... that a victim delayed unreasonably in selling collateral."

B. Mens Rea in Federal Criminal Statutes

Rosemond v. United States, 134 S. Ct. 1240 (March 5, 2014), 7-2 (**Kagan**; Alito dissenting in part), vacating 695 F.3d 1151 (10th Cir. 2012).

Headline: **Aiding and abetting a gun-carrying crime requires proof that the defendant knew "in advance" that one of his cohorts "would be armed,"** such that the defendant has a "realistic opportunity to quit the crime."

Facts: Rosemond and two confederates drove to a park to sell a pound of marijuana to others, a plan that all three knew about. A buyer climbed into the car, but unexpectedly punched the seller, took the drugs, and ran from the car. One of the two male sellers (witnesses disputed whether it was Rosemond or his confederate) jumped out and fired shots at the drug thieves. Then they were all arrested as they drove to give chase. Rosemond was charged with , inter alia, "using or carrying" a firearm "during and in relation to any ... drug trafficking crime" (18 U.S.C. 924(c)). Because the identity of the shooter was disputed, the government pursued alternative theories, including that Rosemond had "aided or abetted" the offense (18 U.S.C. 2). While the parties agreed that "knowledge" was required, Rosemond disclaimed knowledge that anyone was armed, but his proffered jury instructions requiring more were rejected. Instead, the prosecutor argued that if Rosemond "actively participated" in the drug crime, he was guilty, because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." Rosemond was convicted and the Tenth Circuit affirmed.

Kagan: Section "2 reflects [the] centuries-old view of culpability" that a person can be responsible for a crime if he knowingly "helps another" to commit it. Judge Learned

Hand's 1938 statement (in *Peoni*) of the principle is still used today, and all agree that "two components" are required: an affirmative act in furtherance of the crime, and an intent to facilitate the crime's commission. [Ed. Note: Justice Kagan proceeds to write a treatise on aiding and abetting law.] The defendant need not participate in every element or provide "substantial" aid; rather, "every little bit helps." This is an unusual "double-barrelled" crime, and Rosemond need not facilitate the gun carrying, so long as he facilitated the drug deal.

However, the law does require "a state of mind extending to the entire crime." Thus **proof that Rosemond knew a gun would be used or carried was required; and this knowledge must be present "in advance" so that an aider and abetter has some "realistic opportunity to quit the crime."** In some cases this would be present if a defendant "continued to participate in a crime after a gun was displayed." But the instructions here did not state this requirement, so Rosemond's conviction is reversed.

Alito, dissenting in part, joined by Thomas: "I largely agree with the ... first 12 pages" of the Court's opinion, but I "strongly disagree" with the requirement of a "realistic opportunity to quit the crime, which is an "important and unprecedented alteration of the law of aiding and abetting. [Ed. Note: there is something to this assertion of Justice Alito's.] This transforms what previously was considered an "affirmative defense" into an element of the crime. This has "very important conceptual and practical consequences." I think it also confuses the difference between intent and motive. Normally, if a defendant claims he was unable to avoid committing a crime, he must prove an affirmative defense of necessity or duress. "The Court's rule breaks with the common law tradition and common sense."

Loughrin v. United States, 134 U.S. 2259 (June 23, 2014), 9 (6-2-1) to 0 (**Kagan; Scalia** concurring in part; *Alito* concurring in part), affirming 710 F.3d 1111 (10th Cir. 2013).

Headline: Clause (2) of **the federal bank fraud statute does not require proof of intent to defraud a bank**, as opposed to obtaining moneys within the control of a bank, **nor of a real "risk of loss" to a bank.**

Facts: Loughrin executed a simple scheme in which he stole checks from mailboxes, changed the payee names to his, and took them to retailers such as Target for amounts of \$250 or less. He would use them to buy merchandise, and then "return" the goods for cash. The checks were drawn on federally insured banks; some were submitted to the banks for payment, and some of those were actually paid. Loughrin was charged with bank fraud under 18 U.S.C. 1344, which criminalizes "whoever knowingly executes ... a scheme or artifice (1) to defraud a financial institution, or (2) to obtain any of the moneys ... under the custody or control of a financial institution, by means of fals[ity]." The case was submitted to the jury only under Clause (2), and the court rejected Loughrin's proffered instruction that Loughrin needed to have intent to defraud "a financial institution," as opposed to a retailer like Target. The jury convicted, and on appeal the Tenth Circuit affirmed, ruling that Clause (2), unlike Clause (1), does not require intent to defraud a bank.

Kagan, joined in full by Roberts, Kennedy, Ginsburg, Breyer and Sotomayor: Although Clause (2) requires intent to obtain moneys under a bank's control, by means of falsity, **a defendant need not intend to defraud the bank as opposed to a retailer.** "The text precludes Loughrin's argument," which "disregards what 'or' ordinarily means." The "counter-textual reading" given to a similar portion of the federal mail fraud statute does not control here, where the legislative history is opposite. And while we agree that we ought not assume the statute reaches every "bad-check" transaction, we think the statutory

phrase “by means of” limits the reach of Clause (2) to only “forged or altered” checks. The Clause is limited “to frauds that have some real connection to a federally insured bank.” We reject Justice Scalia’s broader view of the text; “language like ‘by means of’ is inherently elastic,” and courts can address specific cases in the future, as opposed to Justice Scalia’s hypotheticals that can “take us down an endless rabbit hole.” (Footnote 9: **we also reject Loughrin’s argument that Clause (2) requires the government to prove a real “risk of loss” to the bank.**)

Scalia, concurring in part with Thomas: I agree with the Court’s holdings, but “I am *dubitante*” regarding its discussion of the limitation created by the phrase “by means of.” We should leave the precise limits of Clause (2) “for another day.”

Alito, concurring in part: I agree with the Court’s holdings, but its further suggestions that a mens rea of “purpose” is required is “unnecessary to its conclusion.” [Ed. Note: Here, Justice Alito seems to be reprising thoughts expressed in his dissenting opinion earlier in the Term in *Rosemond*.] The statute expressly requires only “knowing” that bank moneys would be obtained, not a “purpose” to do so. Thus the fact that Loughrin may have been “indifferent” as to whether the false checks were ultimately submitted to banks for payment, is irrelevant to his conviction. This may not make a difference in this case, but in future cases “the Court’s statements must be regarded as dicta.”

C. Debarment from a “Military Installation”

United States v. Apel, 134 S. Ct. 1144 (Feb. 26, 2014), 9(6-2-1) to 0 (**Roberts, Ginsburg** concurring, *Alito* concurring), reversing 676 F.3d 1202 (9th Cir. 2012).

Headline: For purposes of the military debarment statute, 18 U.S.C. §1382, a “**military installation**” includes property within the “**defined border**” of an Air Force base, even if it includes an “easement for a public road” and a “designated protest area” open to the public.

Facts: Apel was barred from Vandenberg Air Force base after multiple violations of trespass and vandalism for which he was convicted, and was then convicted for violating the “debarment” orders, under §1382 which **makes it a crime to re-enter a “military installation”** after having been officially ordered not to do so. The Ninth Circuit reversed his conviction, ruling that the statute does not apply to the particular area of Vandenberg Air Force Base where Apel was detained because it was on a public easement next to a public highway and outside the base’s fence, in a small area which had been designated as a public protest zone.

Roberts for a unanimous Court: An Air Force base is generally a “military installation,” and the “lawful boundaries” of this particular base are well defined, although the Air Force has granted an easement for various public purposes and a fence stands within the borders. “There is no statutory requirement that the military have exclusive possession and control” of a part of the installation before it may eject vandals and trespassers. Although some Executive Branch documents have said that the statute requires exclusive possession, such opinions are non-binding and can’t change the meaning of a criminal statute. The Air Force’s choice to secure a portion of the base with a fence does not alter the actual boundaries of the base, nor does it diminish the base commander’s jurisdiction on the installation outside the fence. The easement granting public access to the roadways on the base expressly reserves authority for the base commander to restrict

access to the base. Finally, we don't address "whether the statute is unconstitutional as applied" to Apel because the lower courts never reached that argument.

Ginsburg, with Sotomayor, concurring: I join the Court's opinion but note that, on remand, the specific characteristics of the public protest area here might "alter the First Amendment calculus" regarding "Apel's ouster from the Base."

Alito concurring: Our decision not to address the constitutionality of the action here, or of the statute, "should not be interpreted to signify either agreement or disagreement with the arguments outlined" by Justice Ginsburg.

D. Gun Crimes

United States v. Castleman, 134 S. Ct. 1405 (Mar. 26, 2014), 9(6-2-1) to 0 (**Sotomayor**; *Scalia* concurring in part; *Alito* concurring in the judgment), reversing 695 F.3d 582 (6th Cir. 2012).

Headline: Castleman's conviction for misdemeanor domestic assault, even if only "offensive touching, qualifies as a "misdemeanor crime of domestic violence" under the Armed Career Criminal Act.

Facts: Castleman was indicted under a federal statute prohibiting anyone from possessing a firearm if they have been convicted of a "misdemeanor crime of domestic violence," which is further defined to require "the use ... of physical force" (18 U.S.C. §921(a)(33)). Castleman argued that his prior conviction under a Tennessee law prohibiting "causing bodily injury to" the mother of his child did not qualify, because one can "cause bodily injury" without "violent physical contact." The district court agreed, and the Sixth Circuit affirmed, but on a different theory. That court applied the definition this Court gave to "violent felony" in *Johnson* (2010), requiring "violent force," which the Tennessee misdemeanor statute does not require.

Sotomayor joined by Roberts, Kennedy, Ginsburg, Breyer and Kagan: Congress enacted §922(g)(9) "to close a dangerous loophole in the gun control laws." "More than a million acts of domestic violence, and hundreds of deaths," happen each year; yet "many perpetrators of domestic violence are convicted only of misdemeanors." Finding no contrary indication, we find that **Congress intended to "incorporate the common-law meaning of 'force' – namely offensive touching" – into this prior misdemeanor statute.** Under our "modified categorical approach" to examining state law convictions under the ACCA, Castleman's crime as described in the indictment he pled to – "intentionally or knowingly causing bodily injury to the mother of his child" -- "necessarily involves the use of physical force." Accordingly, his crime constitutes a "misdemeanor crime of domestic violence" for purposes of the gun control statute. Our prior definition of "violent felony" in *Johnson* does not control here. "Minor uses of force may not constitute 'violence,'" but they can "eas[ily]" describe the pattern of acts that can constitute "domestic violence." Castleman's reliance on legislative history is "unpersuasive," and "the rule of lenity" does not apply after our analysis.

Scalia, concurring in part and concurring in the judgment: "I agree with the Court that intentionally or knowingly causing bodily injury to a family member 'has, as an element, the use ... of physical force.'" But "reach that conclusion on narrower grounds:" I would "require force capable of causing physical pain or bodily injury" and then remand for

consideration of that stricter standard. The Court's "much broader, expansive" standard, of "any offensive touching no matter how slight," contravenes our precedent in *Johnson* as well as the statutory text. The adoption of "social science definitions" of "domestic violence" to encompass "even non-physical conduct" "not only distort[s] the law [but] impoverish[es] language."

Alito, with Thomas, concurring in the judgment: I dissented in *Johnson* and said that the "common-law definition of battery, which does not require violent force," should apply. The Court now adopts the definition I advocated in *Johnson*, and I agree we ought not extend the erroneous *Johnson* definition to the question presented here.

Abramski v. U.S., 134 S. Ct. 2259 (Jun. 16, 2014), 5 to 4 (**Kagan; Scalia** dissenting), affirming 706 F.3d 307 (4th Cir. 2013).

Headline: A "straw buyer" – a person who buys a gun on someone else's behalf while falsely claiming that it is for himself – **violates the federal statute prohibiting false statements in firearms sales**, 18 U.S.C. § 922(a)(6), even if the ultimate owner could have legally purchased the gun himself. The false statement of intended ownership is "material."

Facts: Abramski, as a former police officer, thought he could get a discount price on a Glock 19 handgun, so he offered to purchase one for his uncle. His uncle sent him the money (\$400) for the gun. Federal law requires licensed dealers to gather background information on purchasers (who must pass a background check), and in response to questions on a form; Abramski falsely stated that he was the "actual buyer," not his uncle. Abramski then transferred the gun to his uncle and got back a receipt, and federal agents found the receipt while executing a search warrant after Abramski became a suspect in a separate crime. Abramski pled guilty conditionally to two federal crimes under the Gun Control Act of 1968: making a false statement that was "material to the lawfulness of the sale" of a firearm, and making a false statement "with respect to information required by [the Act] to be kept" by the gun dealer. On appeal, Abramski argued that because his uncle would have been able to buy the same gun lawfully himself, Abramski's misrepresentation was not "material" to the lawfulness of the sale, and that his answer was not "required by the Act to be kept" by the dealer. In the Supreme Court, Abramski further argued that he could lie about the "actual buyer" on the form regardless of his uncle's legal eligibility to purchase the gun lawfully.

Kagan joined by Kennedy, Ginsburg, Breyer and Sotomayor: Federal gun laws establish a sophisticated system of mandatory background checks, recordkeeping requirements, and in-person identification to ensure that guns are kept out of the hands of felons and other prohibited purchasers. **These statutes would mean little if a would-be purchaser could evade them simply by enlisting an intermediary to buy a firearm on his behalf.** Regarding materiality, if Abramski had revealed that he was purchasing the gun on his uncle's behalf, "the sale could not have proceeded under the law," because the "actual buyer" must be present. **Abramski's false statement prevented the dealer from conducting the statutorily-required identity verification and background checks of the true buyer.** Nothing in the statute suggests that these requirements may be relaxed upon an after-the-fact discovery that the true buyer would have been eligible to buy the gun. On the second count, a provision in the federal gun regulations requires a dealer to maintain records of every sale. Thus Abramski's false statement was part of the "information a dealer is statutorily required to maintain."

Scalia dissenting, joined by Roberts, Alito, and Thomas: Abramski’s false statement was not material to the lawfulness of the sale “since the truth—that Abramski was buying the gun for his uncle with his uncle’s money—would not have made the sale unlawful.” No provision of the statute “prohibits one person who is eligible to receive and possess firearms (e.g., Abramski) from buying a gun for another person who is eligible to receive and possess firearms (e.g., Abramski’s uncle), even at the other’s request and with the other’s money.” Only the federal form declares this to be wrong. **[Ed. Note:** Justice Scalia appears to question the entire premise that “straw buyers” are prohibited under federal law.] Further, the majority’s interpretation of the statute is inconsistent with ordinary English usage; for example, “if I give my son \$10 and tell him to pick up milk and eggs at the store, no English speaker would say that the store ‘sells’ the milk and eggs to me” rather than to my son who picks them up.

E. Federalism Limitation on federal “Chemical Weapon” charges

Bond v. United States, 134 S. Ct. 2077 ((June 2, 2014), 9 (6-1-1-1) to 0 (**Roberts**; *Scalia*, *Thomas*, and *Alito* each concurring separately in the judgment), reversing 681 F.3d 149 (3d Cir. 2012).

Headline: “Big case” of the Term that wasn’t. Court avoids the constitutional Congressional Power question, by **interpreting the federal criminal “chemical weapons” statute as not reaching a local, mild poisoning case.**

Facts: Carol Bond discovered that her best friend Haynes was pregnant by Bond’s husband. Bond, a microbiologist, stole an arsenic-based chemical from her employer and obtained another chemical from Amazon.com, and then “spread the chemicals on [Haynes’s] car door, mailbox, and door knob.” On one occasion, Haynes suffered a “minor chemical burn on her thumb, which she treated by rinsing with water.” The local police took no action and finally told Haynes to call the post office. Postal inspectors placed surveillance cameras around Haynes’ home and caught Bond stealing mail from Haynes’ mailbox and placing chemical on Haynes’ car.

The feds “naturally” charged Bond with mail theft, but “more surprising[ly]” also with “possessing and using a chemical weapon,” 18 U.S.C. §229(a). That statute was enacted in 1998, to give effect to the 1997 U.S. ratification of a treaty called the “Convention on Chemical Weapons” that 190 nations have agreed to. When the district court denied Bond’s challenge to the criminal statute, and its application to her, she conditionally pled guilty. The Third Circuit initially rejected her appeal, holding that individuals have no “standing” to challenge Congress’s enactment of a statute under the Tenth Amendment. The Supreme Court reversed that decision in 2011 (after the U.S. conceded error). On remand, the Third Circuit affirmed Bond’s conviction on the merits, ruling that the statute clearly reached her conduct, and that Congress has authority to enact “necessary and proper” statutes to carry Treaties into effect, citing a one-sentence ruling to that effect in *Missouri v. Holland* (1920).

Roberts joined by Kennedy, Ginsburg, Breyer, Kagan, and Sotomayor: First, after laying out the constitutional question and arguments, the Court invokes the “well-established principle” that “normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” So, on to whether §229 “covers Bond’s conduct.” We hold that it need not be so interpreted.

We employ **the settled presumption that, absent clear congressional intention, a federal criminal statute will not be read to “significantly change the federal-state balance.”** This is the sort of crime that state law certainly can reach, and normally is handled by state authorities. If they choose not to prosecute, a federal prosecution actually intrudes on the state’s normal discretionary sovereignty over “local” crimes. Here, the statute is not “utterly clear” as Justice Scalia contends. It has “ambiguity” that derives from the “improbably broad reach” of its definitions, the “deeply serious consequences” of such a broad reading, and a “lack of any need to do so in light of its context” to address “chemical warfare and terrorism.” Applying these principles, a **“fair reading”** [this phrase is repeated three times] of the statute means that it does not reach so broadly as to “make it a federal offense to poison goldfish.” **It is not a “realistic assessment of congressional intent” (quoting Scalia’s concurrence) to make every use of a toxic chemical a “chemical weapons offense”** – the statute need not be interpreted to reach this “curious case,” described as a “feud-driven act of spreading irritating chemicals,” “an act of revenge born of romantic jealousy ... that produced nothing more than a minor thumb burn.” **The “ordinary person” (“educated user of English,” “speaker in natural parlance”) would not see this as “chemical warfare” or “combat.”** “There is dissonance between the ordinary meaning and the reach of [the statute’s] definition[s],” so it is “fully appropriate to apply the background assumption” that Congress did not intend §229 to reach all local crimes involving toxic chemicals. “This case is unusual,” and its “exceptional convergence of factors” allows us to limit the statute as employed here, without endangering future prosecutions that better meet the concept of “chemical weapons.” So, reversed.

Scalia, concurring in the judgment; joined by Thomas; and by Alito in the statutory part: “The Court shirks its job and performs Congress’s.” The plain language of the statute and its definitions reaches Bonds conduct and “there is no way around it.” The Court employs “result-driven antitextualism” to find ambiguity from context rather than plain language, and that is a dangerous “judge-empowering” doctrine for the future. Moreover, there is no clarity at all in the “line” the Court draws between “local” and federal crime; in fact, “the *new* §229 ... denies due process” because it now gives no fair warning.

Because the statute plainly applies to Bond, I must answer the Constitutional question. Here, Congress exceeded its authority. While Congress can enact laws that are “necessary and proper” to carry into execution the President’s constitutional authority to “make” treaties, there is no additional power to “implement” treaties extending beyond the powers enumerated in Article II. The “seismic” change to constitutional structure that *Holland’s* brief sentence embodies, was a “vast expansion of congressional power” that we ought not endorse. Imagine the President entering into treaties endorsing plainly unconstitutional, or non-federal, conduct. Congress has no power to “implement” such a treaty, unless the power is already found enumerated in the Constitution. “Necessary and proper” does not create an additional “great substantive and independent power” (*McCullough*, 1819). We said as much in *Reid v. Covert* (1957), ruling that treaties could not permit wives of American soldiers to be tried by court-martial. We should today “repudiate” the “*ipse dixit*” of *Missouri v. Holland*.

Thomas, concurring in the judgment; joined by Scalia and almost entirely by Alito: Agreeing with Justice Scalia, I want to also “suggest” that the Treaty Power itself is “a limited” power. [A lengthy historical exegesis, typical of Justice Thomas, then follows.] It is limited to topics of “international intercourse” and not for “matters of purely domestic regulation.”

Alito concurring in the judgment: I agree with Justice Scalia that the statute here reaches Bond's conduct, and I agree with Justice Thomas that this statute as so implemented "exceeds the scope of the [constitutional] treaty power. "The treaty power is limited to agreements that address matters of legitimate international concern," and the statute as applied here is not such a matter.

III. HABEAS CASES

White v. Woodall, 134 S. Ct. 1697 (Apr. 23, 2014), 6 to 3 (Scalia; Breyer dissenting), reversing 685 F.3d 574 (6th Cir. 2012).

Headline: The Kentucky Supreme Court's conclusion that a no-adverse-inference jury instruction is not required for defendants who do not testify at the penalty phase was neither objectively unreasonable nor contrary to clearly established law, so no habeas relief.

Facts: "Faced with overwhelming evidence of his guilt," Woodall pled guilty to capital murder for the brutal kidnapping, rape and murder of a 16 year-old girl. Woodall did not testify at the subsequent sentencing trial, and the judge declined to instruct the jury not to draw adverse inferences from Woodall's decision not to testify. The Kentucky Supreme Court affirmed the subsequent death sentence, holding that although a "no-adverse-inference" instruction is required at the guilt stage (*Carter*, 1981), no case required such an instruction at the penalty phase. On federal habeas, the district court granted relief, ruling that a refusal to give a no-adverse-inference instruction at a capital sentencing trial violates the Fifth Amendment privilege. The Sixth Circuit affirmed.

Scalia joined by Roberts, Kennedy, Thomas, Alito, and Kagan: 28 U.S.C. § 2254(d) permits federal habeas relief in a state criminal matter only where the state's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." "Clearly established law" includes only the holdings (not *dicta*) of this Court, and an "unreasonable application of law" must be so plain that there is no "possibility for fairminded disagreement" (*Harrington*, 2011). The Kentucky Supreme Court's conclusion was not contrary to, or an unreasonable application of, this Court's holding in *Carter* that a no-adverse-inference instruction is required at the *guilt* phase. **Other of our precedents (Mitchell, 1999, in particular) leave open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence. We do not resolve the constitutional question here**, because we don't think the Sixth Circuit's conclusion was "beyond the possibility of fairminded disagreement." "Perhaps" it would be "the next logical step," or "perhaps not." But we have never endorsed an "unreasonable refusal to extend precedent" rule as permitting relief in federal habeas cases, and we think the text of AEDPA prohibits it. The appropriate time to consider whether the Fifth Amendment requires a no-adverse-inference instruction in a capital sentencing phase would be on direct review.

Breyer dissenting, with Ginsburg and Sotomayor: We think this Court's decisions "clearly establish that a criminal defendant is entitled to a requested no-adverse-inference instruction in the penalty phase of a capital trial." In *Carter* we held that "the Fifth Amendment requires a trial judge to give a requested no-adverse-inference instruction during the guilt phase of a trial." In *Estelle v. Smith*, we held "that 'so far as the protection of the Fifth Amendment privilege is concerned,' [we] could 'discern no basis to distinguish

between the guilt and penalty phases' of a defendant's 'capital murder trial.'" The rule found by the Sixth circuit follows this logic syllogistically. The majority simply reads *Estelle* too narrowly. And I "do not understand the majority to suggest that reading two legal principles together would necessarily 'extend' the law." Reading *Mitchell* to have opened up this previously clear conclusion "would be an unreasonable retraction of clearly established law.

IV. IMMIGRATION LAW

Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (Jun. 9, 2014), 5(3-2) to 4(3-1) (**Kagan**; *Roberts* concurring in the judgment; *Alito* dissenting; *Sotomayor* dissenting), reversing 695 F.3d 1003 (9th Cir. 2012).

Headline: Agency interpretation of "minor child" as not applying to immigrants who were minors when application was filed, but "age out" (without bureaucratic delay) before relief is granted, is not an unreasonable construction of the statute and is thus upheld.

Facts: By statute, a lawful permanent resident may petition for visas for specified family members. In turn, the minor child of such a family member is statutorily "entitled to the same status" as the sponsored parent, so that minor children of sponsored family members can get a visa when the family member does. However, as in this case, the wait for visas (due to quotas, not counting any governmental form-processing delay) of sponsored family members sometimes takes so long that people who were minors when the process started, are no longer minors by the time an application is granted. Congress has addressed delay in some cases in the Child Status Protection Act (CPSA), which provides that "bureaucratic delay" should not be counted as to when "an alien is determined ... to be 21 years of age or older," and "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." But this provision does not encompass "the time – months or more likely years – the alien spends simply waiting for a visa to become available," due to limited quotas, which is not bureaucratic delay. In a prior case, the Board of Immigration Appeals (BIA) decided applicants who "age out" due to the waiting period for visas, lose their derivative eligibility under the statute and go to the "back of the line" as adult applicants.

Kagan, joined only by *Kennedy* and *Ginsburg*, announcing "the judgment of the Court": The CPSA is ambiguous -- "Janus-faced" – so that the BIA interpretation is not unreasonable. The first half of the CPSA "looks in one direction, toward . . . sweeping relief," but "the second half looks another way, toward a remedy that can apply to only a subset of . . . beneficiaries . . . not including the respondents' offspring." We must defer to any reasonable interpretation reached by the Board of Immigration Appeals' (BIA), even if it is not one we would independently reach. Perhaps the BIA's interpretation is "too restrictive," but respondents have not shown it to be unreasonable. "Judicial deference to the Executive Branch is particularly appropriate in the immigration context," where decisions about a complex statutory scheme tend to implicate foreign relations. [**Ed. Note:** the lack of a majority view and the complexity of the various opinions here seems to self-demonstrate the Court's point that the statute is reasonably ambiguous.]

Roberts, joined by *Scalia*, concurring in the judgment: The BIA's interpretation of the statute is reasonable because the statute is ambiguous -- there is no conflict or internal

tension in the provision in question. “To the extent the plurality's opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong.” Conflict is not the same as ambiguity, and “*Chevron* is not a license for an agency to repair a statute that does not make sense.” But this one does make sense.

Alito dissenting: The critical interpretive issue is whether there is an “appropriate category” to which the children’s petitions may be converted. Since all of children in question qualified for a certain immigration status applicable to adult unmarried children of lawful permanent residents— an “appropriate category” under the law in question—their petitions should have triggered the statute’s automatic conversion provision and preserved the children’s original priority date.

Sotomayor, joined by Breyer and by Thomas except for footnote 3, dissenting: This case should not fit into the *Chevron* category of statutory conflicts, because the majority “ignore[s] obvious ways in which the provision can operate as a coherent whole.” The statute clearly provides that “aged-out children may retain their priority dates so long as they meet a single condition—they must be ‘determined ... to be 21 years of age or older.’” Because all of Respondents’ children meet this condition, they should be entitled to relief.

V. SECURITIES LAW

Chadbourne & Parke LLP v. Troice, No. 12-79 (Feb. 26, 2014), 7(6-1) to 2 (Breyer; Thomas concurring; *Kennedy* dissenting), affirming 675 F.3d 503 (5th Cir. 2012).

Headline: Allegations regarding covered securities, made in connection with a scheme to sell uncovered securities, are insufficient to require dismissal of a federal securities lawsuit under the SLUSA.

Facts: A large number of private investors bought certificates of deposit (“CDs”) from Allen Stanford and his companies, including Stanford International Bank. The CDs promised a high rate of return and were purportedly backed by a portfolio of valuable investments, including securities listed on a national exchange (“covered” securities). In actuality, Stanford and his associates never bought any “covered” securities, but instead used the investors' money to speculate in real estate, repay old investors, and finance a lavish lifestyle -- essentially a multibillion-dollar Ponzi scheme. Stanford was convicted of crimes related to the fraud and sentenced to 110 years in prison.

Private investors (including Troice) who bought the Bank's CDs filed federal class action lawsuits against third parties affiliated with Stanford (including Charborne & Park), alleging that they had aided and abetted the fraud in violation of state law by falsely representing that the CDs were backed by by covered securities. The defendants argued that the class action should be dismissed under the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), which provides that securities class actions brought under state law are barred when a misrepresentation is made “in connection with the purchase or sale of a covered security.” They argued that the false promise of covered securities was enough for the lawsuit to be “in connection with” such a sale or purchase. The district court agreed and dismissed. But the Fifth Circuit ordered that the lawsuit be permitted to proceed, ruling that the misrepresentations about covered securities were too tangential to the fraud to trigger preclusion under the SLUSA.

Breyer, joined by Roberts, Scalia, Thomas, Ginsburg, Breyer, Sotomayor and Kagan: SLUSA does not preclude a state securities-law class action, when

alleged misrepresentations concern the purchase of uncovered securities allegedly backed by covered securities. These plaintiffs did not purchase or sell any covered securities; they allege only that they were falsely told that the CDs they purchased, which are uncovered securities, would be backed by covered securities. To satisfy the "in connection with" language of the SLUSA, a "connection" to covered securities must materially influence the plaintiff's decision to buy a covered security. Here, only the fraudsters, and not the plaintiff-investors, would allegedly purchase covered securities. "These sales constituted no relevant part of the fraud but were rather incidental to it." Thus SLUSA has no preclusive effect here.

Thomas, concurring: The statutory phrase "in connection with" is "essentially indeterminate" and "provides little guidance without a limiting principle." The Court now provides a limiting principle that is consistent with the Court's precedents and the statutory framework of the SLUSA.

Kennedy dissenting (with Alito): The defendants' promise to purchase covered securities induced the investors to buy the CDs. Thus the covered securities were integral to the fraud. Such alleged misrepresentations are best understood as having been made "in connection with the purchase of a covered security" within the meaning of SLUSA, and state law claims concerning such alleged misrepresentations should be precluded. The fraudulent scheme here was "of a type, and perhaps sophistication, that has not yet been addressed in [our] precedents," and our result ought not "come out differently" from our "earlier ... simpler cases." The majority opinion will unduly restrict the SEC's enforcement powers, weaken public confidence in the securities markets, and it "narrows and constricts essential protections for our national securities markets."

Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398 (June 23, 2014), 9 (6[3 and 3] - 3) to 0 (**Roberts**; *Ginsburg* concurring; *Thomas* concurring in the judgment), vacating 718 F.3d 423 (5th Cir. 2013).

Headline: The Court **declines to overrule *Basic*** (1988), but holds that its "presumption of reliance" regarding material misstatements requires that **defendants have an opportunity to rebut it before class certification**, with evidence of no "price impact,"

Facts: The Erica John Fund filed a class against lawsuit against Halliburton, alleging that it had traded in Halliburton stock during a period when Halliburton made various misrepresentations that affected the price. Halliburton argued that its evidence showed that "none of its alleged misrepresentations had actually affected its stock price." The district court ruled that this did not matter because in *Basic* (1988), the Court had allowed a "presumption that the price of a stock traded in an efficient market reflects all public material information, including material misstatements." Halliburton now asks that the *Basic* presumption be overruled or modified.

Roberts, joined by Kennedy, Ginsburg, Breyer, Sotomayor and Kagan: **We will not overrule the *Basic* presumption** – Halliburton has not met the requirements for disturbing *stare decisis*. [The details of securities law and economic analysis are omitted here.] The "serious and harmful consequences" that Halliburton says flow from the "discredited" theory of *Basic* "are more appropriately addressed to Congress." However, while the *Basic* presumption allows plaintiffs to not prove "price impact" (at least until after class certification), *Basic* does say, and **we hold today, that securities defendants must**

be allowed “an opportunity to rebut the presumption at the class certification stage,” i.e., before the expensive certification decision is made. [Ed. Note: This case is really all about class certification: knocking out a securities suit prior to certification is tantamount to dismissal; allowing certification is tantamount to forcing an expensive settlement. There are many critics of this entire structure – here the Court seems to say that while a few cases may be “picked off” prior to certification, Congress is the branch that must solve the larger problems.]

Ginsburg concurring, with Breyer and Sotomayor: [one paragraph:] I join the Court’s opinion on the “understanding” that while today’s ruling “may broaden the scope of discovery ... at certification,” it “should impose no heavy toll on ... plaintiffs with tenable claims.”

Thomas concurring in the judgment with Scalia and Alito: The entire implied cause of action under 10b-5 is a “relic” of now-disfavored days when the Court “assumed common-law powers to create causes of action.” *Basic* is just one aspect of the problem of defining litigation rules for 10b-5 securities actions, “without a statute to interpret for guidance.” I think *Basic* should be overruled; because since the Court vacates the judgment of the Fifth Circuit, I concur.

V. CIVIL CASES RELATED TO CRIMINAL TOPICS

1. Immunity for Reports of Security Concerns to the TSA

Air Wisconsin v. Hoepfer, 134 S. Ct. 852 (Jan. 27, 2014), 9 (6-3) to 0 (Sotomayor; Scalia concurring in part and dissenting in part), affirming 697 F.3d 41 (2d Cir. 2012).

Headline: Statutory immunity for airlines and their employees for statements that report suspicious behavior cannot be denied unless the statements were “materially false.”

Facts: Hoepfer, an Air Wisconsin pilot, undisputedly became angry, raising his voice and swearing, when he failed his fourth training simulation which he knew would lead to losing his job. He accused the tester of sabotaging his results. At the time he was fired, Hoepfer was permitted to carry a firearm and had one issued to him, and the airline was unsure whether he was carrying it. So, after they booked Hoepfer a plane-ride home, Air Wisconsin employees contacted the Transportation Security Administration (“TSA”), saying Hoepfer could be armed, had been terminated that day (he was not actually terminated until the next day), and expressing concern about Hoepfer’s “mental stability.” As a result, Hoepfer was removed from his flight home by TSA, searched, and detained for questioning. TSA obtained his gun from his home in Denver, and released Hoepfer.

Hoepfer sued Air Wisconsin in Colorado state court for defamation. [Ed. Note: Thereby proving the unspoken rule that when people sue the government, they usually lose if the Supreme Court reviews their case.] Air Wisconsin argued that it qualified for immunity as provided in the 2001 Aviation and Transportation Security Act (“ATSA”). But the Colorado Supreme Court ultimately affirmed a \$1.2 million jury award to Hoepfer, saying that under the statute it did not have to decide “whether the statements were true or false,” because the statute did not grant immunity for statements that are “made with reckless disregard for the truth,” 49 U.S.C. 4491(b). The Colorado court opined that the Air Wisconsin statements to TSA “overstated the[] events” and “went well beyond” the facts. But the Court did not find that they were “false.”

Sotomayor, joined by Roberts, Kennedy, Ginsburg, Breyer, and Alito: “Congress patterned the exception to ATSA immunity after the actual malice standard of *NY Times v. Sullivan* (1964), and we have long held that actual malice requires material falsity.” “We presume that Congress ... incorporate[d]” that standard. So **a court may not deny ATSA immunity absent a finding that statements were (1) false and (2) material**. Thus reports of safety suspicions or concern to the TSA that are (1) reckless but true, or (2) false but immaterial, are still entitled to ATSA immunity. And the “objective” **standard for materiality is whether there is a “substantial likelihood that a reasonable security officer would consider [the statement] important in determining a response to a supposed threat.”** (That is, whether the statement would cause a reasonable security agent to respond differently than he would have responded to a perfectly true statement.) “Minor imprecision” does not amount to material falsity, when the substance of the allegedly defamatory charge is basically accurate and justified. This furthers the purpose of ATSA to encourage airlines to err on the side of reporting such concerns.

We now apply these standards to the facts of this case. (This is where the dissent departs, but the majority says it’s important to provide “clear guidance on a novel but important question of federal law.”) Also, we do not decide, today, whether the questions are legal issues for a court, or fact questions to be left to a jury.) As a matter of law, immunity should have been granted here. The statement that Hoper “may be armed” was accurate, even if not chosen “with exacting care” “in the heat of a potential threat.” The error that he had already been terminated was immaterial since Hoper knew that he would immediately be terminated upon failing that fourth test. And the concern about “mental stability” was not a materially inaccurate description of what had happened with Hoper losing his temper (and job) that day.

Scalia, with Thomas and Kagan, concurring in part and dissenting in part: I agree with the standards the Court articulates. But we should not go beyond the questions we granted *certiorari* to decide. And then, the Court “gives the wrong answer” when it applies the standard to these facts. “A reasonable jury” could have found for Hoper, and “it is simply implausible” to say that a jury “would *have to find*” against him. The Court’s contrary holding “demonstrates the wisdom of preserving the jury’s role in this inquiry, designed to inject a practical sense that judges sometimes lack.” **[Ed. Note:** This is a good example of Justice Scalia’s rhetorical excesses sounding personally insulting. But note that Justice Kagan joined this dissent!]

2. Personal Jurisdiction over Tortious Asset Forfeiture Allegations

Walden v. Fiore, 134 S. Ct. 1115 (Feb. 25, 2014), 9 to 0 (**Thomas**), reversing 688 F.3d 558 (9th Cir. 2012, amended panel opinion and *en banc* denial dissents).

Headline: A Nevada federal court **cannot exercise personal jurisdiction** over a Georgia airport police officer who allegedly seized assets wrongfully and then filed a false seizure affidavit, **when all his acts were done in a Georgia (Atlanta) airport**, even though he knew the owners were from, and were merely transferring onto planes to, Nevada.

Facts: Fiore was flying home from Puerto Rico to Nevada, changing planes in Atlanta’s international airport. Puerto Rican authorities had radioed ahead that Fiore and her companion were carrying \$97,000 in cash; Fiore had told the Puerto Rican authorities

that they were professional gamblers and that the money was legitimate, so they had been allowed to fly on to Atlanta. Walden, a local Georgia police officer, was assisting the Atlanta airport DEA “drug interdiction program,” and he ultimately seized the cash after interviewing Fiore and using a dog sniff (the results of which were allegedly “inconclusive”). Fiore and her companion flew on to Nevada. They immediately requested their cash back and provided evidence of its legitimacy, but Officer Walden assisted others in drafting an allegedly false forfeiture warrant which was forwarded to the Georgia U.S. Attorney’s office. But no forfeiture complaint was ever filed and the money was returned to Fiore after seven months.

Fiore filed suit against Walden and others in U.S. District Court in Nevada, alleging various constitutional violations, including seizure without probable cause and the intentional filing of a false affidavit. The district court dismissed the complaint, agreeing with Walden that the Nevada federal court lacked personal jurisdiction over Walden. A divided Ninth Circuit panel reversed, but the denial of *en banc* review attracted dissenting opinions from eight Ninth Circuit judges.

***Thomas* (for 9): Constitutional** due process does not permit Nevada to exercise personal jurisdiction over Georgia resident Walden on the facts of this case, even if he knew and it was foreseeable that his alleged tortious conduct in Georgia would injure airline passengers bound for Nevada. The Ninth Circuit’s error was in focusing on the plaintiff’s injuries and connections to Nevada; **the constitutional “minimum contacts” doctrine requires a focus on the defendant’s conduct and contacts with the forum state.** Moreover, due process requires that a defendant may be summoned to court in a foreign state only if based on a substantial relationship of his own creation with that state, and not because of “random, attenuated, or fortuitous” interactions with persons in the forum state. This basic calculus does not change with respect to intentional torts.

In *Calder* (1984), the Court upheld the exercise of jurisdiction over an out-of-state intentional tortfeasor largely based on the unique nature of the tort of libel. Publication of an article in a nationally-circulated publication that third persons may read in the forum state and that causes reputational injuries in that state, creates a substantial connection between an out-of-state defendant's conduct and the forum state. By contrast, **no part of Walden's conduct occurred in Nevada, and Walden never traveled to, contacted anyone in, or sent anything to Nevada.** Accordingly, Walden has no jurisdictionally-relevant contacts with Nevada.

3. International Child Abduction

Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (Mar. 5, 2014); 9(6-3) to 0 (**Thomas**; *Alito* concurring), affirming 697 F.3d 41 (2d Cir. 2012).

Headline: There is **no “equitable tolling” of the one year limit for return requests, under the International Child Abduction Convention and statute**, even if the abducting parent has “concealed the child’s whereabouts during that year.”

Facts: In 2009, Diana Montoya Alvarez left London with her three-year-old daughter, to escape what she claimed was a domestic violence relationship with the child’s father, Lozano. Alvarez and the daughter lived in a women’s shelter in London, then in France, and finally in New York. Lozano quickly contacted British authorities and the Alvarez family in an effort to find his daughter, but was unsuccessful. Finally, sixteen

months after Alvarez's departure, Lozano located his daughter and filed a petition in New York federal court for return of her to the UK. But although the district court found that Lozano had stated a "prima facie case of wrongful removal," the court denied the petition because it was filed beyond the one-year filing period required by the "Hague Convention on ... International Child Abduction" and its implementing federal statute. The Convention provides that if return proceedings are commenced within one year, return to the country of prior residence is generally automatic (with a few exceptions); but if commenced more than one year after an abduction, return need not be ordered if it is shown that the child is "settled" in its new environment. The district court found that Lozano's daughter was "settled" in New York and that removal would be "extremely disruptive" to her. The district court rejected the argument that, because Lozano made immediate and continuous efforts to locate his child and Alvarez had concealed her whereabouts, the one-year period should be "equitably tolled."

Thomas (for 9): The Convention's one-year limitations period is not subject to equitable tolling, even when the abducting parent conceals the whereabouts of the child. Equitable tolling is a well-established part of American law, and there is generally a presumption that it will apply to federal statutes. However, **there is no presumption that equitable tolling is applicable to treaties**, which are not American statutes but compacts between independent nations. This international status is not altered by the fact that there is a federal implementing statute.

In addition, a statute of limitations generally establishes a discrete time period after which a plaintiff forfeits opportunity for relief. By contrast, the Convention still provides some opportunities for relief even after the one-year "automatic return" period has expired; it just shifts the burden of proof. This "functional analysis" means that the Convention's one-year period is not really a "statute of limitations" that would normally imply equitable tolling. And nothing else in the Convention demonstrates an intent to delay the one-year period for equitable reasons (concealment being the one most obviously applicable). Concealment may still be relevant to a finding of not "settled," thus supporting return under the Convention even after the one-year period. But the Convention's drafting history indicates that its signatories struck a delicate balance between discouraging child abduction and protecting a child's interest in a stable environment. This Court should not modify that balance. We have no independent authority to consider the "fairness" of the Convention, but only to implement the intentions of the drafters.

Alito concurring, joined by Breyer and Sotomayor: While "fully concurring in the opinion of the Court," I want to "explain why courts have equitable discretion under the ... Convention to order a child's return even after the child has become settled, and how that discretion prevents abuses...." Even if a child is "settled" in a new environment, the court may consider other factors that militate in favor of return, including the child's interest in contact with the non-abducting parent; attachments to his prior country; and the need to discourage inequitable conduct (including concealment). Our State Department has so stated, and I think that equitable discretion is actually a better tool to discourage concealment than equitable tolling.

4. Qualified Immunity

Plumhoff v. Rickard, 134 S. Ct. 2012 (May 27, 2014); 9 (7-1-1) to 0 (**Alito**; *Ginsburg & Breyer* concurring without opinion only in parts), reversing 509 F. App'x 388 (6th Cir. 2012).

[An interlocutory appeal of a denial of qualified immunity is proper if a “purely legal issue” is presented. Here, in a case addressing **deadly force used at the end of a reckless car chase**, the Court rules that not only was there no Fourth Amendment violation at all, but also that **qualified immunity was required** in any case.

The substantive Fourth Amendment ruling is summarized above starting on page 9 under “Constitutional Cases, Fourth Amendment”.]

Wood v. Moss, 134 S. Ct. 2056 (May 27, 2014); 9 to 0 (**Ginsburg**), reversing 711 F.3d 941 (9th Cir. 2012).

Headline: Qualified immunity is appropriate for Secret Service agents who moved protestor groups when the President unexpectedly decided to dine nearby, because it is **not “clearly established” that groups with different viewpoints must be moved to “comparable” positions.**

Facts: When President George W. Bush made an impromptu stop for dinner at a restaurant’s open-air patio in Oregon, two groups – one supporters and one protestors -- gathered nearby, having previously been positioned along the street of the President’s announced motorcade route. When the President stopped to dine, the protestor group moved to an area directly in front of the patio, while the supporters clustered near their original location where a two-story building blocked their line of sight to the President. Secret Service agents quickly instructed the protestors to move two blocks away, out of sight and “weapons reach” from the President. When the President left the restaurant, his motorcade passed the supporters along the original route, but the protestors were now beyond his sight and hearing. The protestors sued the Secret Services agents under *Bivens* (1971), claiming First Amendment viewpoint discrimination. The district court denied qualified immunity, and the Ninth Circuit ultimately affirmed on an interlocutory appeal.

Ginsburg for a unanimous Court: Secret Service agents had valid security reasons to order protestors away from the patio where the President was dining, and **no precedent “clearly established” that they needed to take care to make the new position “comparable” to the supporters’ in this fast-breaking situation.** The record does not support the allegation of “bad motive.” So the agents are entitled to qualified immunity. We are not aware of any decision that would alert Secret Service agents engaged in crowd control of an obligation to ensure that groups with conflicting views are at all times in equivalent positions with respect to the President.

U.S. v. Clarke, 134 S. Ct. 2361 (Jun. 9, 2014), 9 to 0 (**Kagan**), reversing 517 Fed. Appx. 689 (11th Cir. 2013).

Headline: The IRS has authority to summon taxpayers to testify or give documents, and a **“bare allegation of improper purpose” is insufficient for a taxpayer to “examine IRS officials”** without “specific facts or circumstances plausibly raising an inference of bad faith.”

Facts: Congress has authorized the IRS to summons taxpayers to provide sworn testimony or documents in tax investigations (26 U.S.C. §6201), and may seek judicial enforcement upon a showing of good faith (*Stuart*, 1989; *Powell*, 1964). Here the IRS sought enforcement of summons issued to four persons in a limited partnership tax investigation. Clarke and friends challenged the summons, alleging that the IRS improperly sought to “punish” them for not agreeing to an extension of the statutory

limitations period. The district court denied a request “to question the agents about their motives,” saying that Clarke “had made no meaningful allegations of improper purpose” and offered “mere conjecture.” The Eleventh Circuit reversed, relying on its own precedent that held a “simple allegation of improper purpose, ... even if lacking any factual support,” was sufficient.

Kagan for a unanimous Court: We reverse. The IRS’s broad authority to summon a taxpayer is a crucial investigative tool in a tax system based on self-reporting. **“Naked allegations of improper purpose are not enough” to question IRS agents; “the taxpayer must offer some credible evidence supporting his charge, specific facts that can give rise to a plausible inference of improper motive.** This standard “ensures inquiry where appropriate without turning every summons dispute into a fishing expedition for official wrongdoing.” A district court’s assessment should be given deference, with the caveat that no deference is due on “legal issues” of “what counts as an illicit motive.”

Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (Jun. 16, 2014); 9 to 0 (**Thomas**); reversing 525 F. App’x 415 (6th Cir. 2013).

Headline: Petitioners, who filed a pre-enforcement challenge to statute that makes it a crime to make a false or reckless statement about a political candidate, **have “standing” to pursue such a challenge when there is a “credible threat of enforcement” against them** based on their announced future conduct that is “arguably proscribed by the statute.

Facts: [Ed. Note: This case wins this year’s award for “dumbest appellate opinion below.”] Ohio has a statute that makes it a crime to “make a false statement,” or one with “reckless disregard “ for the truth, about any political candidate or public official. In 2010, the “pro-life” advocacy group Susan B. Anthony List (SAL”) issued a press release in Ohio claiming that Congressman Steve Driehaus, running for re-election, had “voted for taxpayer-subsidized abortion” because he had supported the Affordable Care Act. Driehaus filed a complaint with the state election commission alleging a violation the statute, and the commission found probable cause that a violation had been committed. Driehaus lost the election, but SAL and another group announced that they planned to make similar claims against other ACA-supporters, and both groups filed a federal court First Amendment challenge to the state’s “truth in politics” statute.

The district court dismissed the suit as “non-justiciable,” finding no sufficiently concrete injury for purposes of “standing” or “ripeness.” The Sixth Circuit affirmed on “ripeness” grounds, finding that there was no likelihood that SAL would make statements against Driehaus again because Driehaus had lost and joined the Peace Corps; and that SAL did not allege that it would, in the future, “lie or recklessly disregard” the truth in the future because SAL claimed its statements about the ACA and taxpayer-funded abortions were true.

Thomas (for 9): [Ed. Note: Hopefully the silliness of CA6’s ruling speaks for itself.] The constitutional Article III limitation to “Cases or controversies” requires an “injury in fact.” (And here, the “standing” inquiry on this point is the same as any “ripeness” injury.) **To challenge a criminal statute, only “threatened enforcement” against the challenger is required – “an actual arrest, prosecution, or other enforcement action is not a prerequisite.” A future course of conduct “arguably proscribed” by the statute is all that must be alleged, with reason to think there**

is a “credible threat of enforcement.” These are obviously present here (Driehaus’s non-election is irrelevant), and “the Sixth Circuit misses the point” when it required a threatened future course of lying; even if its statements were true, the Ohio Commission found probable cause that they violated the law. “There is every reason to think that similar speech in the future will result in similar proceedings.” We do not answer whether administrative enforcement alone is sufficient; and although there is “some tension” between a doctrine of “prudential” [non-constitutional] standing, “we need not resolve the continuing vitality” of other factors relating to “prudential ripeness doctrine” since they are easily satisfied here. Reversed and remanded for further proceedings.

VI. OPINIONS WITHOUT ARGUMENT (Summary Reversals)

Stanton v. Sims, 134 S. Ct. 3 (Nov. 4, 2013), 9-0 (**per curiam**), summarily reversing 706 F.3d 954 (9th Cir. 2013). Like the first Robin of spring, the first opinion issued by the Supreme Court this Term summarily reversed the Ninth Circuit.

Qualified immunity on a Fourth Amendment claim: At 1 am in a known gang-violence neighborhood, Officer Stanton responded to an “unknown disturbance involving a man with a baseball bat” call. The officers saw three men “walking in the street” and saw Patrick “run or quickly walk” toward a residence. Stanton testified that he considered Patrick’s behavior suspicious, so he called out in a loud voice something like “Police, stop.” Patrick did not stop, but rather “looked directly at [Officer] Stanton, ignored his lawful orders, and quickly went through the front gate of a [six-foot] fence” that enclosed the yard of what, it turns out, was the home of Ms. Drendolyn Sims. Stanton then kicked open the gate, which unfortunately struck and injured Ms. Sims. In Sims’ later civil suit against Stanton, Stanton testified that he believed Patrick had committed a jailable misdemeanor offense by disobeying a police order, and that he had “feared for his safety.” The district court dismissed the lawsuit, finding the officer’s entry “justified” and that, in any case, the officer was entitled to qualified immunity. The Ninth Circuit reversed, finding that Stanton’s entry violated the Fourth Amendment and that the law was “clearly established” under *Welsh v. Wisconsin* (1984) that officers may not enter a residence, even if in “hot pursuit,” to warrantlessly arrest for only a misdemeanor offense.

Ruling (9-0, *per curiam*): Without deciding whether Stanton’s entry was constitutional, he was entitled to qualified immunity because no “clearly established law” on the point exists. “Reasonable but mistaken judgments” are allowed and the doctrine “protects all but the plainly incompetent or those who knowingly violate the law.” Here, **“the federal and state courts nationwide are sharply divided” on whether a warrantless entry into a home is permitted if in “hot pursuit” with probable cause to arrest for a misdemeanor.** The Ninth Circuit ignored these cases and provided only a “one-paragraph analysis.” *Welsh* did not state a “categorical rule” but only an “equivocal” ruling, specific to the facts of that case, and it is not really a “hot pursuit” case at all. [Ed. Note: This will be news to some Criminal Procedure law professors.] CA9 read *Welsh* “far too broadly;” even district courts within the Ninth Circuit have read *Welsh* as “equivocal” since it was decided. Because this officer was not “plainly incompetent,” the Circuit was wrong about immunity.

Hinton v. Alabama, 134 S. Ct. 1081 (Feb. 24, 2014), 9-0 (**per curiam**), summarily reversing 2013 WL 598122 (Alabama Crim. App. 2013):

Sixth Amendment Ineffective Assistance of Counsel. Hinton was charged with two capital murders and one attempted murder committed in three separate restaurant

robberies. The surviving manager identified Hinton, and a .38 gun was found in his home. The State produced expert witnesses who testified that based on “toolmark” comparisons, the same gun had fired the six bullets found overall in the robberies (two bullets per robbery). Hinton’s appointed lawyer was granted \$1,000 to hire his own expert; both the lawyer and the trial judge erroneously believed that that was the limit on funding; in fact the statute had been amended over a year earlier to allow “any expenses reasonably incurred.” The only “expert” Hinton could find for \$1,000 was poorly qualified (if at all) and was “badly discredited” by the prosecution at trial. (*E.g.* “Do you have some problem with your vision? Why yes. How many eyes do you have? One.”). The jury convicted and sentenced Hinton to death (by a 10-2 vote). In a post-conviction proceeding, Hinton (with new counsel) produced three experts who said they could not identify any of the six bullets as coming from Hinton’s gun (and the State’s expert “refused” to discuss the basis for his contrary conclusion). Hinton’s trial counsel admitted that he knew his own expert had been lousy and that he had made a legal error about funding.

Ruling (*per curiam*, 9-0): This is a “straightforward” case for applying *Strickland’s* (1984) two-part constitutional ineffective assistance of counsel test. And this was ineffective. The “only reasonable defense strategy require[d]” a competent expert, and counsel made a clear legal error in concluding that adequate funding was unavailable. His **ignorance of a “fundamental” point of law “combined with his failure to perform basic research ... is a quintessential example of unreasonable performance under *Strickland*.”** (“We wish to be clear,” however, that we are not holding that hiring an expert who is “not qualified enough” is ineffective assistance. The “inexcusable mistake of law” is “the only” constitutional error here.) We remand to determine if this ineffective assistance “prejudiced” Hinton. On this point, the proper prejudice inquiry is not whether the expert actually hired provided exculpatory testimony (which he in fact did do), because the jury plainly did not believe that expert. So, on remand **the proper prejudice inquiry under *Strickland* is whether “there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt, had the attorney known that the statutory funding limit” did not apply.**

Tolan v. Cotton, 134 S. Ct. 1861 (May 5, 2014), 9 (7-2) to 0 (*per curiam*; *Scalia* concurring), vacating 713 F.3d 299 (5th Cir. 2013):

Summary judgment on a Fourth Amendment qualified immunity claim requires accepting the plaintiffs allegations as true: On a relatively outrageous set of facts, the Court vacates an affirmance of summary judgment in an excessive force case. The Court explains that, **even when applying only the “clearly established law” prong of the qualified immunity analysis, a court evaluating summary judgment “may not resolve genuine disputes of fact** in favor of the party seeking summary judgment.” The Court finds four such fact disputes present here, so it vacates a summary judgment in favor of a police officer who shot a young man on the front porch of his parents’ house after mistakenly entering the wrong license plate number and then accusing the young man of having stolen the car he had just exited (which was, in fact, his and his parents’). When the officer made the young man lie down on the front porch and then grabbed his mother’s arm, the young man said “get your fucking hands off my mom” and rose to his knees. The officer immediately shot the young man three times, causing “a life-altering injury.” The officer was indicted for aggravated assault but was acquitted. Apparently the officer was white and the young man black, in Texas, but any race-based claims “are not before this Court.”

Alito concurring, joined by Scalia: Normally we don't dissent from a decision to grant review, but cases that dispute the sufficiency of the evidence used to grant or deny summary judgment are "utterly routine." Still, "on the merits" I agree with the Court's evaluation that there are genuinely disputed issues of material fact here. **[Ed. Note:** Justices Alito and Scalia apparently feel strongly that many cases present a "sufficiency of the evidence to support relief" type of claim. On the same day as *Tolan*, they dissented from the denial of *certiorari* in *Beard v. Aguilar*, 725 F.3d 970 (9th Cir. 2013), where the Ninth Circuit granted a federal habeas corpus relief after evaluating the evidence in a state murder case. They did not give reasons for their dissent, other than giving a citation to "see" *Tolan*.]

Martinez v. Illinois, 134 S. Ct. 2070 (May 27, 2014), 9-0 (**per curiam**), reversing 990 N.E.2d 215 (Ill. 2013):

Double Jeopardy: Martinez was charged in 2006 with aggravated battery and "mob action." Over the course of some 10 months in 2009-2010, the State requested continuances because the alleged victims allegedly could not be located. Finally on the fifth continued trial date, the trial court announced that it would not grant further continuances. The prosecution participated in jury selection but then asked for a further continuance. The trial judge refused and announced that he would swear in the jury, at which point the prosecution announced that "the State will not be participating in the trial." The jury was sworn in and the defense then moved for judgment of acquittal. The prosecution respectfully declined to participate, and the judge granted the defense motion and dismissed the charges. The State appealed and the Illinois Supreme Court ruled that Martinez still could be tried because he had not been subjected to "jeopardy" and that the judge's dismissal was not an "acquittal."

Ruling (*per curiam*, 9-0): **The Constitution's Double Jeopardy Clause prohibits further prosecution** against Martinez on these charges, **where the government has refused to participate after a jury is sworn and the trial judge dismisses the charges.** (1) First, **the constitutional bright-line rule is that "jeopardy attaches when the jury is empaneled and sworn"** (quoting *Crist*, 1978). And second (2), this was a "textbook acquittal" that prevents reprosecution: **a constitutional acquittal "encompasses any ruling that the prosecution's proof is insufficient"** (quoting *Evans*, 2013) **[Ed. Note:** *Evans* was written by Justice Sotomayor, and this *per curiam* opinion sounds a lot like her]. This is so even though the trial judge did not use the word "acquittal" (citing, *inter alia*, *Martin Linen Supply*, 1977) ("what constitutes an acquittal is not to be controlled by the form of a judge's action"). **[Ed. Note:** there is also a significant footnote 4 in which this unanimous Court says that even if the trial judge had declared a mistrial rather than dismissing the charges, double jeopardy "probably" would still bar his retrial.]

OPINIONS RELATING TO ORDERS

Unger v. Young, No. 13-95 (Nov. 12, 2013) (2nd Circuit):

Alito, joined by Scalia, dissenting from denial of certiorari: The district court's and Second Circuit's decision to grant habeas relief -- finding that New York's highest court "unreasonably" applied *Wade* (1967) in deciding that "a witness's prolonged observation of a burglar in a well-lighted area of her own home provided an independent source for her in-court identification of" Young – **violates the deferential standards for federal habeas relief.** The court relied on "several social science studies" that were not before the state courts, and on its own precedents rather than ours (*contra Pinholster* (2011)), all of which is

not permitted under AEDPA. Because “the Second Circuit’s decision creates loopholes in both *Pinholster* and *Wade*,” and is “importan[t],” I dissent from denial of review.

Rapelje v. McClellan, No. 12-1480 (Nov. 18, 2013) (6th Circuit):

Alito, joined by Scalia, dissenting from denial of certiorari: The grant of **federal habeas here evinces a “serious misreading of our decision in *Harrington*”** (2011). The Michigan Supreme Court denied leave to appeal from the appellate affirmance of Rapelje’s first-degree murder conviction, which that state court said was “for lack of merit on the grounds presented.” The Sixth Circuit ruled that there had been no “adjudication on the merits” by the state courts, so the federal district court decision to hold a new federal evidentiary hearing -- rather than limiting its review to the record before the state court -- was not error. But it is “persuasive” that the Michigan court’s order was an adjudication of the merits; it is “clear” rather than uncertain that it was on the merits (uncertainty would possibly allow rebuttal of “the *Harrington* presumption”). “The Sixth Circuit has gone astray” and its “error may derail many Michigan habeas cases.”

Woodward v. Alabama, No. 13-5380 (Nov. 18, 2013) (Alabama Crim. App.):

Sotomayor, joined by Breyer in part, dissenting from denial of certiorari: Woodward’s jury voted 8-4 against imposing a death penalty, **but the trial judge “overrode” the jury’s “advisory verdict” as Alabama law allows the judge to do, and imposed death.** Although three States allow this, “in the last decade, Alabama has been the only state” to actually impose death penalties after a judge overrides a contrary jury verdict. 43 persons are now on Alabama death row for the same reason; 95 total have been so sentenced to death since 1982 (an Appendix lists each one.) By contrast, Alabama judges have overridden jury death recommendations to impose life “only nine times.” “I have deep concerns about whether this practice offends the Sixth and Eighth Amendments.”

First, this seems arbitrary; “there is no evidence that criminal activity is more heinous in Alabama than in other states, or that Alabama juries are particularly lenient.” Rather, “Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.” This does “not seem to square with our Eighth Amendment jurisprudence” under *Furman* (1972), and is “worthy of this Court’s review.”

Second, it seems “constitutionally suspect” under “evolved” *Apprendi* (2000) principles (under which the Court has ruled that the Constitution requires jury determination of some aggravating facts).. (Justice Breyer [**Ed. Note:** long a dissenter from *Apprendi*’s constitutional analysis,] does not join this part.) It has been 18 years since we last examined Alabama’s capital system (in *Harris*, 1995). “Much has changed” and “today, Alabama stands alone.” A “fresh look” is appropriate and I “respectfully dissent.”

Criminal Law Certiorari Grants for the Oct. 2014 Term

As of August 1, 2014, the Court has granted *certiorari* (or review, in one “original jurisdiction” case, *Kansas v. Nebraska and Colorado*) in 40 cases for the coming Term. One may expect a number of other cases to be added, after the Court’s “opening conference” on September 30, 2014.

Eleven of the cases set for argument next Term so far are criminal-law-or-related (under my generous standards). Interestingly, four cases are from the Eighth Circuit (not the Ninth or the Sixth!), an unusually high percentage. Here are brief descriptions of the Questions presented:

1. **Heien v. North Carolina**, No. 13-604, set for argument Oct. 6, 2014: Whether a police officer's "reasonable mistake of law" can support reasonable suspicion for an investigatory traffic stop under the Fourth Amendment. Here the North Carolina Supreme Court ruled that a single malfunctioning brake light was not an offense under state law, but that a reasonable mistake that it was an offense, sufficed for the stop.
2. **Holt v. Hobbs**, No. 13-6827, set for argument October 7, 2014: Does a prison policy that prohibits growing a half-inch beard violate the Religious Land Use and Institutionalized Persons Act of 2000, where petitioner wanted to grow such a beard for religious reasons? (Eighth Circuit).
3. **Warger v. Shauers**, No. 13-517, set for argument Oct. 8, 2014: Whether Federal Rule of Evidence 606(b) permits introduction of post-trial juror testimony about statements made during deliberations, where a defendant moves for new trial based on juror dishonesty. (Civil case; Eighth Circuit).
4. **Jennings v. Stephens**, No. 13-7211, set for argument Oct. 15, 2014 (Capital case, federal habeas): When a federal habeas petitioner wins in the district court and the state appeals, must the appellee-petitioner file a separate notice of cross-appeal and request a certificate of appealability, to raise issues that defend the judgment but were denied by the district court? (Fifth Circuit).

Cases Not Yet Set For Argument as of August 2014

5. **Elonis v. U.S.**, No. 13-983 (First Amendment): Does the federal "interstate threats" statute, 18 U.S.C. 875(c), require proof of a subjective intent to threaten, or is it sufficient to prove that a "reasonable person" would have foreseen that a person would feel threatened? The case involves statements made on Facebook by an estranged husband about his wife, co-workers, and others, statements that any reasonable person would perceive as threatening. (Third Circuit).
6. **Johnson v. U.S.**, No. 13-7120: Whether simple possession of a short-barreled shotgun should be counted as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). (Eighth Circuit).
7. **Kellogg Brown & Root Services v. U.S. ex rel. Carter**, No. 12-1497 (civil case, *Qui Tam*):
(1) Whether the Wartime Suspension of Limitations Act – a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. § 3287 – applies without a formal declaration of war, to claims of civil qui tam fraud; and (2) whether the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), prohibits a new *qui tam* lawsuit after a prior similar suit has been dismissed. (Fourth Circuit).
8. **Mellouli v. Holder**, No. 13-1034 (immigration law, deportability for criminal conviction): Whether conviction under a Kansas law prohibiting possession of drug paraphernalia counts as "conviction of a violation of any law or regulation of a state relating to a controlled substance" (8 U.S.C. 1227(a)(2)(B)(i), triggering deportation. (Eighth Circuit). Petitioner was found with Adderall, a federally and Kansas controlled

substance, in his sock, and pled guilty to a lesser state offense of “drug paraphernalia” – the sock used to carry the Adderall.

9. **Omnicare v. Laborers District Council**, No. 13-435 (civil case, securities law): Whether a plaintiff may plead that a securities registration statement was “untrue” by alleging merely that it was wrong, or must the plaintiff plead some kind of *mens rea* or intention to be false on the speaker’s part. (Sixth Circuit).

10. **Whitfield v. U.S.**, No. 13-9026: Whether the federal bank robbery statute, 18 U.S.C. § 2113(e), providing for a sentence of ten years to life imprisonment for a robber who forces another person “to accompany him” during the robbery or while in flight, requires proof of more than a *de minimis* movement of the victim. Petitioner fled into the home of a 79-year-old woman and compelled her to move from one room to another, but then left the home and was captured later. The 79-year-old woman was later found in the room she had been moved to, dead of a heart attack. The defendant received a life sentence. (Fourth Circuit).

11. **Yates v. U.S.**, No. 13-7451 (Constitutional due process. Silliest case of the Term? But potentially large implications regarding the proliferation of federal criminal offenses -- the much-criticized “over-federalization” of crime): Whether Mr. Yates was deprived of fair notice that throwing undersized grouper back into the ocean to avoid civil fines would fall within 18 U.S.C. § 1519, which makes it a crime to “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with the intent to impede or obstruct an investigation, where the term “tangible object” is ambiguous and undefined in the statute. (Eleventh Circuit).

WHO WROTE WHAT in the 2013-14 Term
(All written opinions in argued cases are included, not just majorities)

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

<u>ROBERTS</u>	<u>SCALIA</u>	<u>KENNEDY</u>	<u>THOMAS</u>	
Bond	Burrage	Hall	Navarette	
McCullen	White v. Woodall	Paroline	Walden	
Riley	<i>Fernandez</i>	<u>Chadborne</u>	Lozano	
Apel	<i>Bond</i>		Susan B. Anthony List	
Halliburton	<i>McCullen</i>		<i>Fernandez</i>	
<i>Scialababa</i>	<i>Castleman</i>		<i>Bond</i>	
<u>Kaley</u>	<i>Air Wisconsin</i>		<i>Lane</i>	
<u>Paroline</u>	<i>Loughrin</i>		<i>Chadborne</i>	
	<u>Abramski</u>		<i>Halliburton</i>	
	<u>Navarette</u>			
<u>GINSBURG</u>	<u>BREYER</u>	<u>ALITO</u>	<u>SOTOMAYOR</u>	<u>KAGAN</u>
Wood v. Moss	Chadbourne	Fernandez	Lane	Kaley
	<u>White</u>	Burt v. Titlow	Kansas v. Cheever	Rosemond
		Plumhof	Castleman	Abramski
		<i>Bond</i>	Air Wisconsin	
Loughrin		<i>McCullen</i>	<i>Burt v. Titlow</i>	Scialabba
		<i>Riley</i>	<u>Paroline</u>	Clarke
		<i>Apel</i>	<u>Scialabba</u>	
		<i>Castleman</i>		
		<i>Loughrin</i>		
		<i>Lozano</i>		
		<u>Hall</u>		
		<u>Rosemond</u>		
		<u>Scialabba</u>		

Total Authored Criminal Law-and-Related argued Cases: 28 (out of 67 total argued Court decisions); (plus 4 *per curiam* Summary Reversals).

Total Writings in Criminal Law-and-Related argued cases: 58.

Criminal Law Workhorse(s): **Justice Alito** (most total writings; former US Attorney); **Justice Scalia**; and **Justice Kagan** (most majority opinions (6), with no other separate writings).

Per Curiam Opinions (Summary Reversals)

Stanton v. Sims

Hinton v. Alabama

Tolan v. Cotton

Martinez v. Illinois