

CHAPTER 2

U.S. SUPREME COURT CRIMINAL LAW DECISIONS (2015-2016)

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This chapter surveys decisions of the U.S. Supreme Court on criminal law and related topics during the 2015-16 Supreme Court Term. After briefly introducing the cases that will be discussed, the chapter provides detailed summaries of those decisions, grouped by subject matter. The chapter also provides a brief overview of cases for which certiorari was granted for the 2016-17 Term. The chapter concludes with a chart showing which Justices authored which opinions.

BRIEF OVERVIEW OF THE 2015-16 TERM, CRIMINAL CASES

The signature event for the 2015-16 Term was the unexpected death of Justice Antonin Scalia on February 13, 2016. His absence after that date undeniably altered the Court, in its voting as well as its internal consideration of cases. His colorful style is missed by many, at oral argument, and in opinions. Although his vote may not have publically made the difference in any decision, we can never know whether the force of his reasoning or rhetoric might have changed Justices's minds in Conference or upon writing.

For example, I will venture to say – although it could certainly be argued oppositely – that in *Utah v. Strieff*, easily the most important Fourth Amendment case of this Term and perhaps in many Terms, Justice Scalia would likely have joined the dissents. The majority ruled that even though an officer detained someone with insufficient cause, the evidence should not be suppressed when discovery of a valid arrest warrant intervenes and “attenuates” the discovery of drugs incident to the subsequent arrest. Justice Scalia was no fan of the exclusionary rule, and he wrote the “attenuation” decision that the Court relied most heavily upon (*Hudson*). On the other hand, Justice Scalia expressed great misgivings regarding law enforcement stops base merely on suspicion, let alone on no cause at all. Who knows if he might have persuaded one other Justice and changed the closely-divided, and passionately expressed, outcome in that case? In any case, the relevance of *Strieff* to the ongoing controversies regarding police detentions, stop-and-frisks, and violence, ought not be understated.

A second event this Term, far less momentous but no less noted, was that Justice Thomas asked questions at oral argument for the first time in ten years. This was not unrelated to Justice Scalia's passing. The oral argument in *Voisine*, a gun possession case, happened just two weeks after Justice Scalia's death. In his absence, far less questioning occurs at argument. In addition, Justice Scalia and Thomas had dissented from denial of certiorari in a Second Amendment case earlier in the Term (*Caetano*). So when the government's lawyer tried to sit down early, Justice Thomas asked questions about the Second Amendment implications of the case (a question that had affirmatively been

presented and not granted at the *cert* stage). Some saw this as Justice Thomas's public "tribute" to the memory of one of his best friends on the Court for decades.

Virtually all decisions of the U.S. Supreme Court are important. A few notables this Term:

- *Foster v. Chatman* is the first case to find the "third prong" of *Batson* proven: purposeful race discrimination in jury selection despite "race-neutral" reasons proffered by the prosecutors. The facts are stunning (and some fear this may reduce the usefulness of the precedent).
- The Sixth Amendment decision in *Luis*, prohibiting the pretrial restraint of "untainted" assets when needed to retain counsel of choice, raises a number of fascinating issues for the future.
- In the federal statutory context, the Hobbs Act received an unusual amount of attention in three separate cases (*Ocasio*, *Taylor*, and *McDonnell*). The *McDonnell* case, vacating the conviction of the former Governor of Virginia for what some might call "pay to play" conduct, was widely noted, and controversial. Some viewed it as a vindication for federal prosecutorial discretion gone too far; others viewed it as authorizing political corruption.
- *Montgomery* and *Welch* may portend a sea-change in the law of "retroactivity:" when can a defendant obtain relief collaterally from a new Supreme Court decision issued after his conviction has become "final"?
- The constitutional judicial recusal case of *Williams* may open a whole new field of state judge judicial recusals being federal questions.
- The five fractured opinions in *Mathis* suggest that unless the "categorical approach" to evaluating prior state convictions for enhanced federal sentencing is not changed by Congress, the Justices may finally reconsider (after 25 years) their commitment to the concept.
- Finally, Justice Alito's *Mathis* dissent wins the award for the most entertaining opinion of the Term.

In terms of workload, the Court's overall docket matched earlier low totals (69 total argued decisions), and the criminal law percentage, 27 cases of the 69, or about 40%, is perhaps a little higher than average (again, it depends what one counts as "related" to criminal law). Justice Thomas wrote more than usual (17 writings), and more dissents (9) than usual – this may indicate his commitment to taking up the "slack" in Justice Scalia's absence.

Regarding criminal cases in which certiorari has been granted for next Term, perhaps the most interesting point is that all five cases argued in the first week of October 2016 (and seven of the eight cases set for argument during both weeks of the October sitting) are criminal cases. Those seven cases appear to be the only criminal cases in which review had granted (of 31 total) for the 2016-17 Term.

EXPLANATORY NOTES FOR THIS CHAPTER

In the pages that follow, detailed summaries of all of the U.S. Supreme Court's criminal law decisions (and civil cases that the chapter author deems "related") issued during the past official Term of the Court are provided, grouped by subject matter. Some decisions address more than one subject – the author has placed them in the category that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which can sometimes help demonstrate how doctrine and the Justices' thinking developed as the Term progressed.

The goal of these summaries is to be broadly inclusive for the criminal law practitioner. Thus, the Court's civil cases that relate to criminal law topics or fact-areas are also included. For example, we include securities fraud cases and immigration decisions, because they often relate to criminal law issues (if not immediately, then in the future). This became particularly so for immigration after *Padilla v. Kentucky* (2010), held that a criminal defense attorney can violate the Sixth Amendment's effective assistance of counsel requirement if he or she does not provide reasonable advice regarding immigration consequences.

Each summary begins with the case name, its date and publication cite, the Justices' votes and who wrote what, and citation to the lower court's opinion. Then a "**Headline**" description of the holding is immediately provided. Then 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 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 or are likely to be addressed in future cases.

The name of the majority writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. Providing an accurate and somewhat comprehensive representation of each opinion's content is the goal, rather than "sound-bite" brevity. All separate opinions are summarized – but to aid "skim" reading, we sometimes **bold certain important phrases** in the decisions. Also, we use quotes from the decisions (not paraphrases) wherever possible. Finally, comments that appear in [brackets] are the Chapter Editor's own thoughts, not the Court's. I attempt to signal these with a bolded "[Ed. note...]" unless it interferes too much with the "flow" of the summary.

Following the Summaries of Opinions in argued cases, we also describe decisions issued in un-argued cases (summary reversals). We also provide summaries of interesting dissents or concurrences regarding Orders issued this Term – most often these are dissents from denials of *certiorari*.

Finally we provide a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, so that you can get a preview of what may be coming. And the last page of this chapter has a chart showing what Justices wrote which opinions this Term (including separate concurring and dissenting opinions) in criminal and related cases. This can provide a useful "snapshot" of which Justices are writing what, and how much, in the field of criminal law.

These materials are the product of Professor Little alone (with drafting assistance from his research assistant, Danielle Fagan). Professor Little bears full responsibility for any

errors and opinions expressed. Please be aware that minor changes from the Court's original slip opinions may have been made for ease of reading or understanding. For example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation and verb tenses or singular-plurals, as well as other non-substantive changes, may have been made. Finally, remember that these are merely summaries. Readers should always review the actual opinions in full and arrive at their own interpretations, rather than rely on the descriptions in this chapter.

DETAILED SUMMARIES OF THE U.S. SUPREME COURT'S CRIMINAL LAW (AND RELATED) OCTOBER TERM 2015 OPINIONS

I. CONSTITUTIONAL DECISIONS

A. *Fourth Amendment*

Utah v. Strieff, 136 S. Ct. 2056 (June 20, 2016), 5-3 (**Thomas**; Kagan dissenting with Ginsburg; Sotomayor dissenting with Ginsburg joining in part), reversing 357 P.3d 532 (Utah 2015).

Headline: No suppression of evidence from arrest on a valid warrant, where warrant was discovered after an unlawful stop without reasonable suspicion; evidence was “attenuated” from the violation. (With an unusually strong and personal dissent from Justice Sotomayor).

Facts: In 2006, Salt Lake City narcotics detective Fackrell investigated an anonymous “tip” to a drug-tip line that “narcotics activity” was happening at a specific house. Over a week of “intermittent surveillance” Fackrell saw a number of visitors leave “a few minutes after arriving at the house,” so that he became suspicious “that the occupants were dealing drugs.” Frackell later testified that he decided to stop the next person who emerged from the house; that was Strieff. This stop was concededly without sufficient “reasonable suspicion” about Strieff to justify his detention under the Fourth Amendment.

When Fackrell ran Strieff's ID through his dispatcher, he learned that Strieff “had an outstanding arrest warrant for a traffic violation.” Fackrell arrested Strieff pursuant to that warrant. A search incident to that arrest turned up “drug paraphernalia” and “a baggie of methamphetamine.” When Strieff was prosecuted for the meth, he moved to suppress it, arguing that it was the “fruit” of his unlawful detention.

The prosecutor countered that although the stop was bad, the meth was “attenuated” from it due to the intervening discovery of a valid arrest warrant, and it was that valid arrest that led to the drugs. The trial judge agreed, calling the warrant an “extraordinary intervening circumstance” and finding that Detective Fackrell's conduct was not “flagrant.” Strieff pled guilty conditionally. On appeal, the Utah Supreme Court reversed and ordered suppression, finding that only a “voluntary act of the defendant's free will” was sufficient to “break the chain” that flowed from the unlawful stop. Utah's petition for certiorari was then granted.

Thomas (for 5): No suppression, because “**the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized.**” The “significant costs of” exclusion of evidence make it “applicable only where its deterrence benefits outweigh its substantial social costs. ... Suppression ... has always been our last resort....” (quoting *Hudson*, 2006). [**Ed. note:** Justice Thomas's invocation mainly of

precedents in the last 10 years demonstrates how much the law has shifted – and how large Justice Scalia’s influence was – since many of us took Criminal Procedure in law school.] The “attenuation doctrine” is one of three “exceptions” to the “exclusionary rule” that involve the “causal relationship.”

First, the Utah Supreme Court’s rationale – that only a voluntary act of a defendant can “attenuate” the relationship – is not defended here, and is not required by “the logic of our prior attenuation cases.” Instead, the three-factors expressed in *Brown v. Illinois* (1975), “guide our analysis”: (1) “temporal proximity”; (2) any “intervening circumstances”; and (3) “particularly significant, . . . the purpose and flagrancy of the official misconduct.”

Here, a “short time interval” between the Fourth Amendment violation and the discovery of the evidence “favors suppressing.” However, the intervening discovery of a valid arrest warrant “strongly favors the State.” *Segura* (1984) shows that “the existence of a valid warrant” favors finding attenuation. **[Ed. note:** the dissents vigorously demonstrate that *Segura* involved a different exception, “independent source” so that there was “no connection” between the violation and the discovery of evidence. In a paragraph that, to me, seems transparently inserted into Justice Thomas’s opinion after seeing the dissents, he notes that “*Segura*, of course, applied the independent source doctrine.”]

Finally, “Officer Fackrell was at most negligent,” so the “flagrancy” factor “strongly favors the State.” He made only “two good-faith mistakes.” First, he “lacked sufficient basis” for the stop. **[Ed. Note:** This, of course, is the Fourth Amendment violation itself.] Second, he should have “asked” Strieff to speak with him, instead of “demanding” (because officers are always allowed to ask to speak with people on the street). “But these errors in judgment hardly rise to a purposeful or flagrant violation.” “More severe [police] misconduct is required than the mere absence of probable cause for the seizure.”

The rest of Officer Fackrell’s conduct “was lawful.” A warrant check, once someone is stopped, is merely “a negligibly burdensome precaution for officer safety.” And there is “no indication” that it was “part of any systemic or recurrent police misconduct;” it was instead an “isolated instance of negligence.” “This was not a suspicionless fishing expedition.” And [here is a direct response to Justice Sotomayor’s dissent:] “we think [it] unlikely” that “because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches” [without reasonable suspicion] – and if they did, then the application of the *Brown* factors could be **[ed. note:** just “could be”?] different.”

Thus the valid arrest warrant “broke the causal chain” and the discovery of methamphetamine was “sufficiently attenuated” from the Fourth Amendment violation.

Sotomayor dissenting, joined in part by Ginsburg: **[Ed. note:** It seems likely, to me, that Justice Ginsburg, as the senior dissenting Justice, assigned the “principal dissent” in this case to Justice Kagan, and that this dissent was added by Justice Sotomayor after Kagan’s was circulated.] “Do not be soothed by the opinion’s technical language” This decision “allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants – even if you are doing nothing wrong.” While it may be “tempting to forgive the officer here,” a “basic principle” of the Fourth Amendment should demand suppression: “two wrongs don’t make a right.” Suppression of evidence that results from an unconstitutional search has been “long required” (citing *Terry*, 1968, and *Mapp*, 1961), because it “removes an incentive for officers to search us without proper justification.” Here the officer “exploit[ed] his own illegal conduct.” The discovery of an outstanding traffic warrant “was not some intervening surprise:” there are over 180,000 such warrants listed in Utah’s database. And “respectfully, nothing about this case is ‘isolated.’” (The Justice provides statistics, such as those from the DOJ Report on Ferguson, showing that “outstanding warrants are surprisingly common.”)

Officer Fackrell “by his own account, did not fear Strieff.” And while a warrant check may be relevant during a legal traffic stop, “a warrant check of a pedestrian on the sidewalk, by contrast, is ... aimed at detecting evidence of ordinary criminal wrongdoing.” **[Ed. note:** Thus in the case that both Justice Sotomayor and the majority cites (*Rodriguez*, 2015), the Court found a Fourth Amendment violation.] “Even officers prone to negligence can learn” from suppression. **[Ed. note:** this is the same “institutional deterrence” argument that the Court has repeatedly rejected in so-called “good-faith” no-suppression decisions such as *Leon* and *Herring*.]

Finally, in a part not joined by Justice Ginsburg – “writing only for myself and drawing on my professional experiences” – Justice Sotomayor provides a heartfelt and rhetorically powerful discussion of why this decision “risk[s] treating members of our communities as second-class citizens.” “Ethnicity,” and “the talk” that “black and brown parents have given their children for generations,” are mentioned. Black authors W.E.B. Dubois, James Baldwin, and Ta-Nehisi Coates are cited. This decision “implies that you are not a citizen of a democracy but the subject of a carceral state.” “Unlawful police stops corrode all our civil liberties and threaten all our lives,” “white and black, guilty and innocent.” “Until their voices matter too, our justice system will continue to be anything but.”

Kagan dissenting, joined by Ginsburg: If an officer found drugs during a pat down after an unlawful stop but before discovering a valid arrest warrant, we would suppress. “The added wrinkle” of discovering a warrant “makes no difference under the Constitution.” There is no “attenuation” here. The officer’s conduct “was a calculated one,” not a “barney Fife-type mishap.” In fact, the facts in *Brown*, where we suppressed, “perfectly describe this case.” Finally, only “unforeseeable” events are said to “break the chain” in a proximate cause analysis. But here the existence of a warrant “was an eminently foreseeable consequence.”

The Court’s opinion “creates unfortunate incentives for the police” – they will “see potential advantage in stopping individuals without reasonable suspicion,” because “millions of people in this country” have outstanding traffic warrants. This “places Fourth Amendment protections at risk.”

Birchfield v. North Dakota (consolidated with *Bernard v. Minnesota* and *Beylund v. North Dakota*), 136 S. Ct. 2160 (June 23, 2016), 5 to 3 (2-1), (**Alito**; Sotomayor dissenting in part with Ginsburg; Thomas dissenting in part in the other direction), reversing, affirming and vacating three consolidated cases.

Headline: Warrantless breathalyzer tests after DUI arrest are okay as searches incident to arrest, but a warrant is required for DUI blood tests absent some other Fourth Amendment exception.

Facts: All three defendants here were arrested on suspicion of driving while intoxicated, based on standard roadside DUI tests. Justice Alito’s first sentence is that “Drunk drivers take a grisly toll on the Nation’s roads,” and this opinion addresses when the Fourth Amendment may require a warrant, after arrest, to administer standard tests (breathalyzer and/or blood draws) to obtain evidence that can be used to prosecute. (Interestingly, pre-arrest roadside breathalyzer results are not generally usable in a later prosecution, by operation of state laws apparently.) Moreover, the states here have made it a criminal offense to refuse to take such tests, in order to eliminate calculated decisions to refuse tests because the penalties for refusal are lower than the penalties for DUI. (A long history of developments in this area is provided.) The defendants here argue that criminalizing refusal to take a test not ordered by search warrant violates the Fourth

Amendment. They rely on the 2013 decision in *Missouri v. McNeely* in which the Court ruled that a warrant is generally required for a DUI blood draw and the “exigency” of blood alcohol percentages going down during delay was not sufficient to dispense with a warrant requirement.

Here Birchfield refused a stationhouse blood test after a DUI arrest supported by probable cause. He pled guilty to a misdemeanor for his refusal, but conditionally, preserving his Fourth Amendment argument. The North Dakota Supreme Court rejected his argument, finding that *McNeely* explicitly endorsed “significant consequences” for DUI test refusals. In Minnesota, Bernard similarly refused a stationhouse breathalyzer test, and the Minnesota Supreme Court decided (5-2) ruled that a warrant was not required, so Bernard could be criminally prosecuted for his refusal. Back in North Dakota, Beylund agreed to a blood test after being told that he could be prosecuted for refusing, and the state Supreme Court upheld his DUI penalties citing its prior *Birchfield* decision.

Alito (for 6): *McNeely* [in which Justice Alito dissented, written by Justice Sotomayor] decided only that “exigent circumstances” does not justify dispensing with the warrant requirement for DUI blood tests. Here we address a different exception, “search incident to arrest.” [Ed. note: Perhaps most interesting is that this case involves only post-arrest DUI testing, because field breathalyzer results are apparently viewed as unreliable and so States don’t use them.] Breathalyzer tests are not a “significant intrusion,” reveal only one thing (percentage of alcohol in the blood), and do not cause an “enhancement” of the “embarrassment that is inherent in any arrest.” Because the government’s “paramount interest in preserving the safety of public highways” is large, not just in taking drunks off the highway but also deterring repeat offenders, a warrant is not required for a breathalyzer “search” after a valid DUI arrest. The interest in preserving evidence is the same, and breathalyzer tests are quick, unintrusive, and efficient. Justice Sotomayor’s dissenting views today [she wrote *McNeely*] are “unconvincing.” Categorical rules are necessary and helpful here, not case-by-case analysis after every arrest. And “other alternatives” that are suggested are “poor substitutes.” Courts would be “swamped” if judges had to issue warrants for breath tests after every DUI arrest.

“Blood tests are a different matter” – “we reach a different conclusion” than for breathalyzers. As the Chief Justice wrote in concurrence in *McNeely*, blood draws which require “piercing the skin” are “significant bodily intrusions.” And a breathalyzer test is usually available, easier to administer, and “less invasive.” We think there is insufficient justification for not requiring warrants for post-arrest DUI blood draws. And if a blood test is desired, officers can always seek a warrant.

Finally, the Court does not find an “implied consent” rationale supportive of criminal penalties for refusal to allow a blood draw. “There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.” [Ed. Note: There is little explanation in the Court’s three-paragraph ruling on this point, other than “the magic wand of *ipse dixit*” (to borrow an old Rehnquistian phrase). It will be interesting if whether and how this brief holding will be used to challenge the concept of implied “consent” in other areas of the law.]

(Birchfield and Beylund both get reversals for further proceedings from the Court’s ruling. Bernard, however, does not, because he refused a warrantless breath, not blood, test.)

Sotomayor dissenting in part, joined by Ginsburg: I dissent from the ruling that a warrant is not generally required for a post-arrest breath test – I agree that a warrant should be required for blood draws. Safety is not at issue and it is not “impractical” to seek a warrant once the DUI suspect has been arrested and removed from the roads. We held the same for

cellphone “search-incident” searches in *Riley* (2014). *McNeely* endorsed a case-by-case approach and we should do the same here. There is clearly some individual privacy invaded here. And the government’s interests in combatting drunk driving are not significantly impeded by a warrant requirement. Most drivers expressly consent to the tests, and the added burden in small numbers of cases would be “small,” perhaps “two extra warrants per week.” “Mere convenience” cannot justify exceptions to the Fourth Amendment. “If the Court continues down this road [of not requiring warrants for tests like, for example, the post-arrest DNA swab in *Maryland v. King* (2013)], I fear that . . . the Fourth Amendment’s warrant requirement will become nothing more than a suggestion.”

Thomas dissenting in part. “The compromise the Court reaches today is not a good one.” I dissented in *McNeely* too. A warrant should not be required for blood draws, just as it is not for breath tests. “Exigent circumstances” supports warrantless DUI tests of all kinds, a “far simpler solution” than the Court’s. Today’s “contortion” of the search-incident exception “is bound to cause confusion in lower courts.”

B. Fifth Amendment Due Process (Double Jeopardy)

Puerto Rico v. Sanchez-Valle, 136 S. Ct. 1863 (June 9, 2016), 5 (3-1-1) to 3 (**Kagan**; *Ginsburg* concurring with Thomas; *Thomas* concurring in the judgment; *Breyer* dissenting with Sotomayor), affirming 2015 WL 1317010 (Puerto Rico 2015).

Headline: Puerto Rico is not a separate “sovereign” for purposes of applying the dual sovereignty exception to the Double Jeopardy clause.

Facts: Sanchez and Vazquez both sold guns to undercover police officers and were indicted by the Commonwealth of Puerto Rico for selling the guns without a permit. Both defendants were then also indicted by federal grand juries for violating federal gun laws. They pled guilty to the federal charges, and then moved for dismissal of the Puerto Rico charges alleging a violation of double jeopardy. The trial courts agreed and dismissed the charges, and the Puerto Rico Supreme court affirmed, ruling that because Puerto Rico’s power to prosecute ultimately derives from the U.S. Congress, the same source as the federal prosecution, double jeopardy was violated and the “dual sovereignty” doctrine did not apply.

Kagan (for 5): “Different sovereigns” – such as two states, or the federal government and a state, or a state and an “Indian tribe” – can prosecute the “same offense” without violating the Fifth Amendment’s Double Jeopardy Clause. But “truth be told, . . . ‘sovereignty’ in this context does not bear its ordinary meaning;” in fact, for double jeopardy purposes, the analysis “overtly disregards common indicia of sovereignty.” Instead, we ask “only whether the prosecutorial powers of the two jurisdictions . . . derive from the same ‘ultimate source’” (citing *Wheeler*, 1978). (“The Court has never explained its reasons for” this test, and “it may appear counter-intuitive, even legalistic.”) Thus, for example, a municipality “cannot qualify as a separate sovereign distinct from a State” from which it draws its governmental power.” Similarly, we ruled in *Grafton* (1907) that the Philippine Islands were not “sovereign” from the federal government because a U.S. Territory draws its power from Congress (even though today, as an “independent” country, the Philippines are a separate sovereign). By contrast, States are independent – even States that were admitted after 1789 when “Congress played some role in establishing them.”

Here, the “ultimate source” of [Puerto Rico’s] prosecutorial power remains the U.S. Congress, even though Puerto Rico today has its own Constitution (approved by Congress)

and exercises a great deal of autonomy. **[Ed. Note:** Detailed history is omitted, from the majority and also from Justice Breyer’s dissent.] Thus Puerto Rico’s prosecution of Sanchez for the “same offense” as the federal charges he pled guilty to, violated the Double Jeopardy Clause.

Ginsburg concurring with Thomas: “I join in full the Court’s opinion.” But “the larger question” of whether the dual sovereignty exception should apply to States “warrants attention in a future case.”

Thomas concurring in part and concurring in the judgment: **[Ed. Note:** How CT can concur only in part and also join Ginsburg’s opinion concurring “in full” is unexplained.] “I continue to have concerns about our precedents regarding Indian law,” so I “cannot join the portions of the opinion” that relate to Indian tribes.

Breyer dissenting, with Sotomayor: “Conceptually speaking,” the Court cannot mean that we trace governmental power to its “furthest-back source.” We trace the federal government’s power not back to the time of King Arthur but rather to the time when it became “independent.” Thus the Philippines are “independent” because Congress granted them that status in 1946; the same could be said of States that joined the Union after 1789, and of Indian tribes. I think a number of factors combine to support the conclusion that Puerto Rico has similarly been granted independent self-rule such that it be considered a separate “sovereign” for Double Jeopardy purposes.

C. Sixth Amendment

Hurst v. Florida, 136 S. Ct. 616 (Jan. 12, 2016), 8 (7-1) to 1 (**Sotomayor**; *Breyer* concurring in the judgment; *Alito* dissenting), reversing 147 So.3d 435 (Fla. 2014).

Headline: *Apprendi* doctrine invalidates state death penalty statute that permits a judge to determine what factors warrant a death sentence after a jury’s “advisory” verdict.\

Facts: Hurst was convicted of a 1998 robbery-murder. The victim, bound, gagged, and stabbed 60 times, was found in the freezer of the restaurant where she worked. After a separate sentencing hearing (an initial death sentence imposed was remanded for resentencing), a jury recommended a death sentence by a 7-5 vote. The Florida capital sentencing statute, however, specified that the jury’s sentence was “advisory,” and that to impose death, there must be separate “findings by the court.” Hurst’s judge made those findings, while also assigning “great weight” to the jury’s recommendation. The Florida Supreme Court affirmed, 4-3, despite Hurst’s argument that *Ring v. Arizona* (2002) holds that death sentences based on separate factual findings by a judge, not jury, violate the Sixth Amendment under *Apprendi* (2000). The Florida court noted that its capital statute had been upheld by the U.S. Supreme Court in *Spaziano* (1984).

Sotomayor (for 7): “The Due Process Clause requires that each element of a crime be proved to a jury beyond reasonable doubt. *Alleyne* (2013); *Apprendi*.” *Ring* held that where a state requires a judge to find the facts necessary to sentence a defendant to death,” it is unconstitutional under *Apprendi*. *Ring* “applies equally” to Florida’s statute, so Florida’s statute is similarly unconstitutional. **[Ed. Note:** This conclusion seems obvious; yet in the 14 years between *Ring* and now, 40 people have been executed in Florida, including one just 5 days before this *Hurst* opinion was filed.] “The Sixth Amendment protects a defendant’s right

to an impartial jury,” which “require[s]” a state “to base [s] death sentence on a jury’s verdict, not a judge’s fact-finding.”

The Court rejects “a bevy of arguments” offered now by Florida. For example, the jury’s advisory opinion cannot supply “the necessary factual finding that *Ring* requires” from a jury, not judge. Neither did Hurst “concede” the necessary aggravating facts required for death, merely because he did not contest the robbery at the guilt-innocence stage. As for *stare decisis*, we now overrule *Spaziano* to the extent it is inconsistent with *Ring*. Finally, we “leave it to state courts” to consider any harmless error argument.

Breyer concurring in the judgment: I do not agree with *Apprendi*. However, as I stated in *Ring*, I believe “the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death” – just as Justice Stevens said in dissent to *Spaziano*.

Alito dissenting: I would not overrule *Spaziano* and *Hildwin* (1989) without also reconsidering *Ring* and *Alleyne*. Even if *Ring* is correct, it is “quite different” than here, because in *Ring* the Arizona statute gave “no role” to the jury in capital sentencing. In Florida, however, the jury does make findings, and considers both aggravating and mitigating factors. A Florida jury “plays a critically important role,” and is “the initial and primary adjudicator” of death (even if its sentence is “advisory”). And finally, “the evidence [here] in support of both [aggravating] factors [in the course of a robbery; and especially heinous] was overwhelming,” so any error was harmless beyond any doubt. “In the interest of bringing this protracted litigation to a close,” I would so rule now.

Luis v. U.S., 136 S. Ct. 1083 (Mar. 30, 2016), 5 (4-1) to 3 (**Breyer**; *Thomas* concurring in judgment; **Kennedy** dissenting; **Kagan** dissenting), vacating 564 Fed. Appx. 493 (11th Cir. 2014).

Headline: Pre-trial freeze of a criminal defendant’s untainted assets violates the 6th Amendment if the assets are needed to retain counsel of choice..

Facts: Title 18 of the United States Code permits a court to “freeze,” pre-trial, the assets of defendants charged with health care or banking fraud. Even assets that are unrelated to the crimes charged can be frozen, as “substitute assets” (that is, “property of equivalent value”) when there is reason to believe that forfeitable assets (that is, assets derived from or “traceable to” the crimes) will not be available after trial. Luis was charged with federal health care crimes which the government alleged gave her \$45 million, “almost all of which she had already spent” by the time of indictment. So the government froze her remaining \$2 million, some of which is “stipulated” to be “not connected to the indictment.” Luis sought release of these funds to obtain the “counsel of her choice,” but the District Court said there was no Sixth Amendment bar to the substitute assets forfeiture statute, and the Eleventh Circuit affirmed.

Breyer (for 4, joined by Roberts, Ginsburg, and Sotomayor): The Sixth Amendment right to “counsel of [one’s] own choice” (*Gonzalez-Lopez*, 2006; *Powell*, 1932) is “fundamental” and is violated by the pretrial freezing of untainted assets “reasonably” needed to hire counsel to defend against as-yet-unproven criminal charges. “We see no reasonable way to interpret the . . . statutes to avoid answering this constitutional question.”

“The nature of the assets at issue here” – not traceable to the alleged crimes – “differs from the assets at issue in” our prior cases (*Caplan & Drysdale* and *Monsanto*, 1989) that

approved pretrial freezing and forfeiture of tainted assets even when needed to retain counsel. Rather than an “imperfect” property interest in tainted assets, untainted assets rightfully “belong to the defendant.” This “critical” difference is “the difference between what is yours and what is mine.” Even if it is constitutional to forfeit untainted “substitute” assets after conviction, the government’s interest before conviction is no better than an “unsecured creditor” in bankruptcy. Justices Kagan and Kennedy are wrong to say that the interests are “exactly the same.”

On balance, the government’s statutory interest in making sure sufficient funds for forfeiture are available if the defendant is convicted, is less than the fundamental right to counsel of choice. There is also no historical “tradition” allowing pretrial seizure of assets (Breyer quotes *Blackstone* and Justice Story). And allowing pretrial seizure of untainted assets “would unleash a principle of constitutional law that would have no obvious stopping place,” and would “erode the right to counsel.” Innocent defendants would not have counsel of their choice but instead “would fall back on publically paid counsel, including overworked and underpaid public defenders.” Finally, we think the line between tainted and untainted assets is “workable,” even if it will “sometimes be difficult” to clearly define. And **the “right” may be limited to “reasonable” attorneys’ fees** [the Court suggests this only by citation to some cases], not the “highest priced defense team” that Justice Kennedy foresees.

Thomas [the necessary fifth vote] concurring in the judgement: “I do not agree with the plurality’s balancing approach,” but rather rely “strictly on the Sixth Amendment’s text and common-law backdrop,” which “limited pretrial asset restraints to tainted assets.” [Among other sources, Justice Thomas cites to his sadly absent colleague Justice Scalia’s *Interpretation of Legal Texts* treatise.] “Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise,” including the Second Amendment [**Ed. note:** here advertent to what is currently Justice Thomas’s most pressing constitutional issue], which would be “toothless” without this principle. [He also cites to the *Citizens United* First Amendment rationale here.] It is “a meaningful right to counsel” that the Sixth Amendment protects. Meanwhile, seizure of untainted assets did not come into being until “the late 20th century.” (Justice Thomas says, with little explanation, that the common law pretrial restraint of untainted *in rem* boats is just “not relevant here.”) Once we see that a constitutional right is infringed, this “leaves no room for balancing.” Although “incidental burdens” are allowed [**ed. note:** which sounds a lot like “balancing”], “the People, through ratification, have already weighed the policy tradeoffs.” “The asset freeze here is not merely an incidental burden.”

Kennedy dissenting, with **Alito**: The Court’s “unprecedented holding rewards criminals who hurry to spend . . . stolen property.” This “makes little sense in cases that involve fungible assets.” The ruling “distorts” the Sixth Amendment right and “ignores” our *Caplan & Drysdale* and *Monsanto* (and other) precedents. Interestingly, we can restrain innocent persons before trial; why not assets? [**Ed. note:** I see no response in the Court’s opinions to this point.] I don’t assert that the government “owns” the property prior to forfeiture. Rather, the time-honored “relation back” doctrine applies, where title passes at conviction but “relates back” to the first date of the crime. Also, I limit my reasoning to restraint of “forfeitable” assets, which are different from fines imposed purely as punishment after conviction.

The Court ignores the “far reaching implications” of its ruling; “no explanation” of the “limits” is provided. [Here Justice Kennedy quotes directly from *Caplan & Drysdale*:] “If defendants have a right to spend forfeitable assets on attorneys’ fees, why not on exercises of

the right to speak, practice one's religion, or travel?" **[Ed. note:** Or, Justice Thomas might add, the right to bear arms.]

"The true winners today are sophisticated criminals" who will understand the law and "know how to make criminal proceeds look untainted." "The facts of this case illustrate" this: Luis is alleged to have engaged in many transfers and expenditures of the assets obtained by her Medicare fraud. "The best [lawyers as well as] investigators, experts, paralegals and law clerks that money can buy" should not be protected by an "unfettered right to counsel of choice." There are other limits on this right – for example, a chosen attorney must be a member of the Bar and not have a disqualifying conflict of interest. And public defenders provide "adequate representation;" it "would be troubling to suggest" otherwise. The Court's ruling "treats a defendant accused of ... a lucrative crime differently than a defendant who is indigent from the outset." The "tracing" of tainted assets is more complicated than the Court acknowledges; meanwhile simplicity is a value. And the Court itself "curtails the very right it recognizes" when it suggests that only "reasonable" attorneys' fees are protected. (Justice Kennedy twice notes that his dissent is "respectful.")

Kagan dissenting: Although I find *Monsanto* "troubling," its "correctness ... is not at issue today." Under that precedent, "I agree with the principal dissent." "The plurality's approach leads to utterly arbitrary distinctions."

Betterman v. Montana, 136 S. Ct. 1609 (May 19, 2016), 8 (5-2-1) to 0 (**Ginsburg**; *Thomas* concurring; *Sotomayor* concurring), affirming 342 P.3d 971 (Mont. 2015).

Headline: The Speedy Trial Clause does not apply to post-conviction sentencing proceedings. [This brief unanimous decision generates more "Editor's notes" here than any other case this Term.]

Facts: After Betterman pled guilty to bail jumping (on a prior charge of domestic assault), he was in jail for 14 months until his sentence of seven years (four suspended) was finally imposed. A "large part" of the 14 months was assumed to be "due to institutional delay," not Betterman's fault. After being jailed for some months, Betterman moved to be sentenced soon, alleging that he could not receive certain rehabilitation services in the county jail that he could receive in state prison, and that he wanted his sentence to start running concurrently with a prior sentence. The Montana Supreme Court affirmed his sentence, ruling that the Speedy Trial guarantee of the Sixth Amendment does not apply to post-conviction proceedings.

Ginsburg for a unanimous Court: The Speedy Trial Clause does not apply to delayed sentencing. Instead, the "primary safeguard" is statutes and rules that impose deadlines. "Due process serves as a backstop against exorbitant delay," but "Betterman advanced no due process claim here." **[Ed. note:** (The Court in footnote 12 suggests (without citing a case) that the *Baker v. Wingo* (1972) Sixth Amendment factors may also apply in any Due process analysis.) "We reserve the questions" (1) whether the Speedy Trial Clause might apply to post-conviction sentencing proceedings where facts must be established in order to "increase [a] prescribed sentencing range" **[ed. note:** *i.e.*, *Apprendi* and death penalty sentencing proceedings]; and (2) whether the right "reattaches upon renewed prosecution following a defendant's successful appeal." **[Ed. note:** Reservation of this second question seems surprising, since the answer would seem obviously to be "yes, it does."]

"Criminal proceedings generally" have "three discrete phases": investigation until charged; charging until conviction, during which the defendant is "presumed innocent;" and

conviction until sentence is imposed. Only the Due Process Clause protects against delay during the investigative stage, see *Lovasco*, 1977. The Speedy Trial Clause then “homes in on” the second period. And “today we hold that the right detaches upon conviction.” Because the Speedy Trial Clause is a Measure protecting the presumptively innocent,” it “loses force upon conviction.” **[Purely an Editor’s note: ??** I would have thought that the Speedy Trial Clause protects other interests besides the presumption of innocence, such as the public’s interest in speedy criminal resolutions, and even a guilty defendant’s interests in fairness and “getting on with their life.”] “A presumptively innocent person should not languish under an unresolved charge.” [But should a guilty person “languish”?] “Trial” means the “discrete episode after which judgment would follow.” **[Ed. note:** Nice to see a little textualism here, albeit not mentioned until after policy and history are discussed!] And “this Court’s precedent aligns with the text and history.” Also, the legislative understanding of the right, and the fact that “the sole remedy for a violation ... is dismissal of the charges,” support our conclusion. Finally, the use of presentencing reports in “contemporary sentencing” requires some amount of wholly reasonable presentencing delay.”

(Footnote: “we do not mean to convey that [Sixth Amendment] provisions protecting interests other than the presumption of innocence are inapplicable to sentencing.” For example, “we have held that” the right to counsel applies to sentencing, *Memphis v. Rhay*, 1967). As for Betterman’s claims of prejudice, “a defendant will ordinarily earn time-served credit for any period of presentencing detention. **[Ed. note:** Where does this “rule” come from? Betterman did not in this case.] And “local jail” versus state prison “is of no constitutional moment” because a defendant “has no right to serve his sentence in the penal institution he prefers.”

[Ed. note: Back-of-the-hand statements such as these, and others, found in footnotes in this case, I think support my longstanding view that unanimous decisions are often the Court’s worst ones, because there is no smart Justice trying to present the “other side.”]

Thomas concurring, with Alito: Unlike Justice Sotomayor’s concurrence, “I would not prejudge” whether *Baker v. Wingo*’s four-factor analysis should be adopted for a Due Process post-conviction delay claim. Other things, such as special remedies, might be relevant. The Court is correct not to opine on this.

Sotomayor concurring: I too agree that the flexible Due Process Clause remains open to challenge sentencing delay. And I think the “*Barker* factors capture many of the concerns posed.”

Foster v. Chatman, 136 S. Ct. 1737 (May 23, 2016), 7 (6-1) to 1 (**Roberts**; *Alito* concurring in the judgment; Thomas dissenting), reversing unpublished Order denying a Certificate of Probable Cause to Appeal (Ga. 2014).

Headline: Decision of Georgia courts that prosecution’s striking of all black jurors and proffered reasons did not show purposeful discrimination under *Batson* was clearly erroneous.

Facts: At Foster’s capital trial for a 1986 murder, the state prosecutors struck all four of the qualified black jurors from the jury (a fifth black juror was withdrawn for cause the day of jury selection). The prosecutors offered various “race-neutral” reasons for their strikes, and Foster’s *Batson* motions (at trial and post-trial) were denied. Foster had confessed to the murder; his death sentence was affirmed on direct appeal.

Twenty years later, in 2006, Foster obtained the prosecution's jury selection notes under Georgia's Open Records law. These notes showed, among other things, that (1) the names of prospective black jurors had all been highlighted in green and [as Foster's lawyer Stephen Bright has joked, "for the colorblind"], marked with a "B"; (2) the first five names on a "definite NO's" list were the black jurors; (3) a document entitled "Church of Christ" was marked "NO. No Black Church;" (4) the race was circled on the questionnaires of black potential jurors; (5) a draft affidavit for one prosecutor contained a statement about "if it comes down to having to pick one of the black jurors" and "if we had to pick a black juror" This last statement was crossed out by hand and was not included in the affidavit that had been filed in court on the post-trial *Batson* motion. After an evidentiary hearing, at which the prosecutors did not testify, the Georgia state habeas (trial) court ruled that Foster had "failed to demonstrate purposeful discrimination. The Georgia Supreme Court denied a Certificate of Probable Cause to appeal.

Roberts, for 6: First, although the state habeas court also referred to *res judicata*, we think its ruling was "not independent of" the federal *Batson* constitutional ground; and the otherwise unexplained Georgia Supreme Court's denial of leave to appeal (which is a decision "on the merits" absent "positive assurance to the contrary") was predicated on that analysis. So the Court has federal jurisdiction.

On the merits, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose" (*Snyder*, 2008; *Batson* 1986). Here, under *Batson*'s "third step" (after a prima facie case by a defendant, and race neutral reasons given by prosecutors), we find that Georgia's prosecutors "were motivated in substantial part by race." [Ed. note: This is the first time the Supreme Court has ever reversed based on a *Batson* "third-step" argument.] Despite some questions "about the provenance" of some of the prosecution's file documents, "we are comfortable that all the documents in the file were authored by *someone* in the district attorney's office." As for the "laundry list of [race-neutral] reasons," while they "seem reasonable enough on their face," they have "no grounding in fact" on our "independent examination" of the record. [Ed. note: This is actually an amazing, if gentle, ruling that, in fact, the prosecutors appear to have lied about their reasons. More samples from the opinion:] Evidence "belies [District Attorney] Lanier's assertion." It is "contrary to the prosecution's submissions," and is not "mis-speaking" but rather "an intricate story." "Lanier's reasons . . . are contradicted by the record," "mischaracterization[s]," "not true," "pretextual," and "difficult to credit." "Reasons . . . shifted over time, suggesting that [they] may be pretextual." "Many justifications cannot be credited;" "we are not faced with a single isolated misrepresentation." One reason is just "nonsense," "implausible," and "fantastic" (quoting *Miller-El*, 2003). "The record persuades us that [the juror's] race . . . was Lanier's true motivation." The prosecutor's "persistent focus on race" supports our conclusion. The state's counter-arguments ("indeed...downright indignant") simply "fall flat" and are "not credible." Instead the record "demonstrates a concerted effort to keep black prospective jurors off the jury."

Alito concurring in the judgment: "I agree that the" decision below "cannot be affirmed." However, the state court is now "free" to "reassess its decision on the state law" of *res judicata*. Now that this Court is inclined to review state post-conviction decisions directly (see *Weary v. Cain*, a summary reversal earlier this same Term), States must be allowed to "structure their systems of post-conviction review in a way that militates against repetitive litigation and endless delay."

Thomas dissenting: First, the “most likely explanation” for the Georgia Supreme Court’s denial of review is the state law procedural ground. Second, the Court’s Batson review “distorts the deferential Batson inquiry.” “On a record far less cold than today’s,” the Georgia courts denied Batson relief, and the “new evidence .. has limited probative value” because both state prosecutors “averred that they did not make any of the highlighted marks.” This is a “sandbagging” of the state courts. **[Ed. note: !!!]** The Court should not “spill so much ink over a factbound claim arising from a state postconviction proceeding ... nearly 30 years later.”

United States v. Bryant, 136 S. Ct. ____ (June 13, 2016), 8-0 (**Ginsburg** for a unanimous Court; *Thomas* concurs), reversing and remanding 769 F3d 671 (9th Cir. 2015).

Headline: A federal criminal conviction predicated on uncounseled tribal court convictions does not violate the Sixth Amendment, because the Sixth Amendment does not apply to tribal court proceedings and the tribal convictions were valid under federal law.

Facts: Title 18 U.S.C. § 117(a) makes it a federal crime for someone to “commit a domestic assault within Indian country” if the person has two prior convictions for domestic violence in “federal, State, or Indian tribal court[s].” (This federal crime is called “domestic assault by a habitual offender.”) Bryant had “multiple tribal-court convictions for domestic assault,” so was federally charged under section 117(a) when he assaulted two different women on his reservation in 2011. Bryant sought dismissal, arguing that his prior tribal court convictions ought not to count because he had not been provided an attorney in the prior cases.

Unlike state and federal criminal proceedings, in which the Sixth Amendment requires appointment of counsel for indigents if sentenced to even just one day in jail, tribal courts are separate sovereignties and therefore are governed only by the Indian Civil Rights Act of 1968, which requires appointment of counsel only when a sentence of imprisonment of more than one year is imposed. Bryant’s prior convictions (all having sentences of less than a year) were thus valid under tribal law. The district court therefore denied his motion and he pled guilty conditionally. But the Ninth Circuit reversed and directed dismissal. Judge Watford concurred, although he suggested that CA9 precedent on the question be re-examined. Eight judges of the Ninth Circuit then dissented from denial of rehearing *en banc*.

Ginsburg (for unanimous 8): Under various precedents, “the Sixth Amendment does not apply to tribal court proceedings,” so Bryant’s prior tribal court convictions were not unconstitutional. Moreover, in *Nichols v. United States* (1994), the Court ruled that uncounseled convictions that do not violate the Constitution may be relied upon in subsequent federal proceedings: convictions “valid when entered” may lawfully be used to enhance sentences. We will not create a “hybrid” category of tribal court convictions, valid for the punishment originally imposed but invalid for subsequent uses. Uncounseled convictions are not “categorically unreliable.” However, the Due Process clauses as well as the Indian Civil Rights Act require “fundamental fairness.” So individual uncounseled convictions might still be challenged.

Thomas concurring: Although our precedents “dictate” the Court’s holding, I think our Sixth Amendment right to counsel, and our Indian law, precedents have gone “far afield.” The Court ought to “reconsider” precedents on “tribal sovereignty” as well as Congress’s authority to regulate criminal proceedings as a general matter on tribal lands.

D. Eighth Amendment

Kansas v. Carr and Gleason [consolidated cases], 136 S. Ct. 633 (Jan. 20, 2016), 8-1 (Scalia; Sotomayor dissenting), reversing and remanding 329 P. 3d 1102; 1195 and 331 P. 3d 544 (Kan. 2014).

Headline: (1) Capital juries do not have to be instructed that mitigating circumstances need not be proved beyond a reasonable doubt; and (2) severance is not required for capital sentencing proceeding where defendants were jointly tried for the capital offenses.

Facts: Gleason: Less than a month after being released from prison for attempted voluntary manslaughter, Gleason and his co-conspirators robbed a man at gunpoint and “cut [him] up” in the process. Gleason and a companion later killed one of his co-conspirators and her boyfriend because Gleason was afraid they would snitch. Gleason was sentenced to death.

Carr: The Carr brothers, Jonathan and Reginald, were responsible for a “crime spree culminating in the Wichita Massacre,” a horrible set of violent robberies, rapes, and murders, which are graphically summarized in the Court’s opinion. In brief, after hours of torture, sexual assaults, and rapes, the Carr brothers drove their five victims to a snow-covered field, naked, and shot them in the back of their heads. One woman miraculously survived to testify against them.

The Kansas Supreme Court (which is notoriously out of step with the Kansas legislature and executive branch – it “time and time again invalidates death sentences”), vacated the death penalties in both cases, citing the Eighth Amendment along with state law.

Scalia (for 8): [Ed. note: This was Justice Scalia’s last opinion for the Court before his untimely death on February 13, 2016.] First, we reject any “adequate state law ground” argument to our jurisdiction. Although it discussed state law, the Kansas Supreme Court also left “no room for doubt that it was relying on the Federal Constitution.”

Second, there is simply no Eighth Amendment requirement for capital sentencing judges “to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.” Certainly our precedents do not require it. Indeed, such a burden for proving facts hardly fits here: A juror’s decision “whether mitigation exists” is “largely a judgment call (or perhaps a value call) . . . a question of mercy,” not fact. We think such an instruction would add to, not reduce, possible juror confusion.

Third, a joint capital sentencing hearing does not violate the “Eighth Amendment right to an individualized sentencing determination,” even when one co-defendant suggests that he may have mitigation at the expense the other. Joint proceedings “are not only permissible but are often preferable” when the conduct “arises out of a single chain of events.” The Eighth Amendment governs “punishment,” and does not “establish a special federal code of evidence” for capital sentencing hearings. And while there may be a constitutional due process standard for “unfairness” in capital sentencing, it is “beyond reason” to think that standard was passed here. The jury here was instructed to evaluate each defendant individually. The Kansas Court’s ruling was based on “the most extravagant speculation,” and “none of [it] mattered. What these defendants did [were] acts of almost inconceivable cruelty and depravity.”

Finally [and for good measure], “we are confident” that any Confrontation Clause issue [not granted for review here and not a basis for the vacation below] “would not have had the slightest effect upon the sentences.” **[Ed. note:** So the Court’s not-so-subtle message to the Kansas Court? Don’t try to vacate these death penalties again, at least on any other federal constitutional ground.]

Sotomayor dissenting: “I respectfully dissent because I do not believe these cases should ever have been reviewed by” us. “If anything, the State has overprotected its citizens” and states should be permitted to “serve as necessary laboratories for experimenting with how best to guarantee defendants a fair trial,” especially in capital cases. Other states routinely allow severance at capital sentencing, and we ought not discourage such state decisions. The facts here are indeed horrible. But, apparently, “shocking cases make too much law.”

Montgomery v. Louisiana, 136 S. Ct. 718 (Jan. 25, 2016), 6-3 (**Kennedy**; **Scalia** dissenting; **Thomas** dissenting), reversing 141 So.3d 264 (La. 2014)

Headline: Retroactivity doctrine. The rule of *Miller v. Alabama* that juveniles may not receive automatic life-without-parole sentences is fully retroactive, thus applying even on habeas.

Facts: In 1963, Montgomery, then 17 years old, killed a deputy sheriff. Upon conviction for murder he received an automatic sentence of life without parole (“LWOP”) under Louisiana law, despite a wealth of mitigation evidence Montgomery now says he would have presented. In 2012, the Supreme Court in *Miller v. Alabama* ruled that an automatic LWOP sentence for juveniles, without consideration of individualized mitigation, violates the Eighth Amendment. But when Montgomery appealed from denial of his collateral “motion to correct an illegal sentence” based on *Miller*, a divided Louisiana Supreme Court ruled that *Miller* is not required to be applied “retroactive” to cases that have become final after direct appeal (that is, not retroactive on “collateral review”).

Kennedy, for 6: First, despite the parties’ agreement that we have jurisdiction, we appointed an *amicus* to argue the view that federal retroactivity doctrine as expressed in *Teague v. Lane* (1989) need not be followed as a matter of state law. We now reject that view. We believe that “the Constitution requires” that a “new substantive rule of constitutional law” must be applied retroactively on collateral review by state, as well as federal, courts. Justice Harlan’s approach to retroactivity, which we later adopted in *Teague*, described substantive rules “as a matter of constitutional interpretation” (*Desist*, 1969). “Substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose.” “The Constitution immunizes the defendant from the sentence imposed.” (This is unlike new “procedural” rules, which still allow for the possibility that a criminal conviction was “accurate” despite violation of the rule.) Indeed, *Siebold* (1880) explains why this is so. “A court has no authority to leave in place a conviction or sentence that violates a substantive rule.” The Supremacy Clause, among other things, requires this for State courts as well as federal – “the state court has a duty to grant the relief that federal law requires.” Because the continued incarceration is unconstitutional, we think our ruling “does not implicate a State’s weighty interests in . . . finality.” Indeed, Louisiana itself recognizes that collateral attack must be available for unconstitutional (“illegal”) sentences.

On the merits, we think *Miller* announced a new substantive rule. It placed automatic LWOP sentences “beyond the State’s power to impose” as a “substantive guarantee of the Eighth Amendment.” *Miller* did not just require consideration of mitigation; even an individualized LWOP sentence for a juvenile would “still violate the Eighth Amendment” if the “child’s crime reflects unfortunate yet transient immaturity.” **[Ed. note:** Here, the Court, via Justice Kennedy (who wrote *Miller*) does appear to extend mildly the holding of *Miller*.]

Although Miller “did not bar a punishment for all juvenile offenders,” and it does have “a procedural component,” it did “bar life without parole for all but the rarest of juvenile offenders.” Thus it is “no less substantive” than other categorical Eighth Amendment prohibitions (like death for juveniles or LWOP for juvenile non-killers). Courts should not “conflate” procedural rules that “regulate only the manner of determining” a sentence, with categorical substantive prohibitions.

By the way, a State can remedy a *Miller* violation by merely making LWOP juveniles eligible for parole. They do not have to “relitigate” the sentences themselves. “The opportunity for release will be afforded to those who demonstrate the truth of *Miller*... -- that children who commit even heinous crimes are capable of change.” So remanded: “Montgomery must be given the opportunity to show that [his] crime did not reflect irreparable corruption.”

Scalia dissenting, joined by Thomas and Alito [Ed. note: This was Justice Scalia’s final dissent before his untimely Feb. 13 death]: “The Court has no jurisdiction to decide this case” and its “decision . . . is wrong.” *Teague*’s framework, based on the federal habeas statute, is not constitutionally required to be adopted by state courts – “this conscription into federal service of state postconviction courts is nothing short of astonishing.” [Ed. note: This is the sort of unique Scalia phrasing that some will miss.] (A lengthy exegesis of U.S. Supreme Court retroactivity precedents is omitted here.) Moreover, *Teague* was not decided until long after Montgomery was sentenced, and “a state court need only apply the law as it existed at the time.” The Court “misappropriates” precedents to rule otherwise, based on “dicta cherry picked,” a “sleight of hand.” *Seibold* addressed only “this Court’s statutory power.” Finally, neither the Due Process nor the Equal Protection Clauses requires today’s rule. “No principle of equal protection requires the criminal law of all ages to be the same.” And “finality” requires otherwise. (Justice Scalia here once again fights against the “evolving standards of decency” Eighth Amendment doctrine of *Trop v. Dulles*, 1958.)

On the merits, “the majority . . . rewrites *Miller*,” “plain as day.” *Miller* expressly said it “does not categorically bar a penalty for a class,” but rather “mandates only that a sentence follow a certain process.” Moreover, now the state must decide “whether a 17-year-old who murdered an innocent sheriff’s deputy half a century ago was at the time ‘incorrigible.’ . . . What silliness. (And how impossible.)” This is “just a devious way of eliminating life without parole for juvenile offenders,” a result the Court could not muster the votes for in *Miller* itself.

Thomas dissenting: There is no “federal right” to retroactivity, so we have no jurisdiction. “No provision of the Constitution supports the Court’s holding.” “The Constitution does not require postconviction remedies” at all. Nor is there any historical support for the Court’s broad ruling. Finally, there is no “logical stopping point” to the Court’s ruling; “why can courts [now] let stand” any wrong constitutional judgment, no matter how long ago? The “one silver lining to today’s ruling” appears to be that States can, if they so desire, simply to decline to hear collateral attacks to state convictions on the basis of any federal constitutional right, “and leave federal habeas courts to shoulder the burden.” [Ed. note: It is unclear that Justice Thomas is correct as to this extreme “solution,” and neither the majority nor Justice Scalia appear to comment about it.]

E. Fourteenth Amendment Due Process

Musacchio v. United States, 136 S. Ct. 709 (Jan. 25, 2016), 9-0 (**Thomas**), affirming 590 Fed. Appx. 359 (5th Cir. 2014).

Headlines: Constitutional sufficiency of the evidence is measured against the elements of the crime, not against additional elements erroneously added (to the defendant's benefit) in jury instructions. (Also, a federal statute of limitations defense is factual, and cannot be raised for the first time on appeal.)

Facts: Musacchio formed a company to compete with his prior employer, and continued to use a password of another former employee and an insider, without authorization to access his former employer's computers and get useful information. He was charged with federal computer fraud, which criminalizes, inter alia, persons who access computers "without authorization *or* exceeds authorized access." Musacchio was ultimately charged only under the "without authorization" prong. When the case went to trial, the court erroneously instructed the jury, without objection from anyone, that the government had to prove that Musacchio had accessed a computer "without authorization *and* exceeding access."

Also, two years after indictment (and seven years after his conduct), the government obtained a superceding indictment; at no time did Musacchio claim in the trial court that this exceeded the relevant five-year statute of limitations.

On appeal, Musacchio argued: (1) the evidence of him "exceeding" access was constitutionally insufficient, even though that allegation was not required as an element of the "without authorization" crime; and (2) the superceding indictment had placed his conduct beyond the five-year limitations period. The Fifth Circuit rejected both challenges.

Thomas (for 9): First, "when a jury instruction [and the indictment, see footnote 2] sets forth [correctly] all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened . . . jury instruction." The sufficiency standard comes from the Due Process requirements of *Winship* (1970) and *Jackson v. Virginia* (1979). Sufficiency rests on the "elements" of the crime, "not . . . on how the jury was instructed." A defendant is "entitled," under a sufficiency challenge, only to a "legal" determination whether the evidence was strong enough to reach the jury at all." (We don't consider other reasons an erroneous instruction might require reversal – just sufficiency.) But also note that a district court's jury instruction is not "law of the case" when the case is on appeal. "An appellate court's function is to revisit matters decided in the trial court."

As for the federal statutory limitations period, it is often subject to factual litigation and proof in the trial court, and thus cannot be raised for the first time on appeal. Common law history of limitations statutes confirms this view. It is a "nonjurisdictional defense" that is waived or forfeited if not raised when the government can factually rebut it – it is not even reviewable for "plain error."

Welch v. United States, 136 S. Ct. 1257 (Apr. 18, 2016), 7-1 (**Kennedy**; **Thomas** dissenting), reversing unpublished Order denying certificate of appealability (CA5 2014).

Headline: Retroactivity doctrine. Last Term's *Johnson* ruling – that a portion of a federal enhanced sentencing statute is unconstitutionally vague – is fully retroactive, even on habeas.

Facts: [Ed. note: The procedural facts are overly complicated, because the Court wanted to be sure to take a case they could decide fast and leave prisoners time to file habeas's based on *Johnson* error within a year of *Johnson*. They succeeded; *Johnson* was decided ten months earlier on June 26, 2015.]

Welch pled guilty to federal felon-in-possession and argued that his prior state robbery felony should not count as a “violent felony” for purposes of the ACCA enhanced sentence. The district court held that it counted under the “residual clause” (as well as under a separate “elements” clause that is not at issue here.) The Eleventh Circuit affirmed, *certiorari* was denied, and “Welch’s conviction became final.” Welch then filed a *pro se* “collateral challenge” (federal habeas petition). The district court denied it and denied a “certificate of appealability.” Welch applied for a certificate from the Eleventh Circuit, noting that the issue of the “residual clause” was pending before the Supreme Court in *Johnson* and that his enhanced sentence could be illegal if *Johnson* was decided his way. The Eleventh Circuit denied that motion. Three weeks later the *Johnson* decision issued, ruling that the residual clause was unconstitutionally “void for vagueness.” Welch then asked the Eleventh Circuit for more time to file for reconsideration of the denial of his certificate motion, but the Circuit “returned that motion unfiled because [the] time to seek reconsideration . . . had expired.” Welch filed a *pro se* petition for *certiorari*, which was granted.

Kennedy (for 7): *Johnson* is fully retroactive, including to cases that are “final” and on habeas. Given that conclusion, and because “reasonable jurists could debate” whether Welch should get relief in his case, the certificate of appealability should have issued. “We proceed on the assumption” that “the *Teague* (1989) framework” for determining retroactivity applies. [Ed. note: See also the retroactivity decision in *Montgomery v. Louisiana*, above.] “It is undisputed that *Johnson* announced a ‘new rule’” under *Teague*. And we hold today that *Johnson*’s rule was “substantive,” not just “procedural.” It did not just affect “the manner of determining” a sentence. Rather, *Johnson* “altered the range of conduct or the class of persons” that the ACCA can reach. “Even the use of impeccable factfinding procedures could [no longer] legitimate a sentence based on th[e residual] clause.”

[Because the government did not argue against full retroactivity, we appointed *amicus* to defend the Eleventh Circuit’s judgment.] We reject *amicus*’s suggestion that we should examine whether the right at issue is substantive or procedural. *Teague* does not support that; “the balance” *Teague* sets between finality and fairness “turns on the function of the rule at issue, not” its source. The rule here does not regulate “only the procedures for determining” a sentence; it changes the scope” of who the statute can reach. Welch’s sentence is now “not authorized by substantive law,” so he should be permitted to seek relief. This is consistent with Justice Harlan’s approach to retroactivity which we followed in *Teague*. And the fact that *Johnson* does not put people like Welch “beyond the legislative power of Congress” – that is, Congress may be able to write a new law that is not vague – is not dispositive. See *Bousley* (1998). And adopting now a distinction between invalidating a statute and interpreting it, would be “arbitrary.” However, “not every decision striking down a statute is *ipso facto* substantive.” A statute “regulating the types of evidence that can be presented at trial” would be procedural and decision striking it down would not be fully retroactive.

“It may well be” that Welch’s sentence can be affirmed on the alternative ground of the “elements clause” of the ACCA. But that is for remand.

[Ed. note: Note that Justice Kennedy asserts early in his opinion that “*Johnson* cast no doubt on the many laws” that require evaluation of “the riskiness of conduct . . . on a particular occasion.” Rather, “the residual clause failed” because the “categorical approach” that the Court’s ACCA precedents developed “required courts to assert the hypothetical risk posed by an abstract generic version of the offense.” Readers should contrast this statement with the Court’s opinion addressing the “categorical approach” in *Mathis*, below – and particularly Justice Kennedy’s “reservation” in *Mathis* suggesting that the categorical approach should be “reconsidered.”]

Thomas, dissenting: First, Welch never argued below that the residual clause was unconstitutionally vague, or that *Johnson* should be retroactive. He only argued that the residual clause ought not apply to him. Thus the Court decides an issue not presented below. This “distorts” the law of certificates of appealability; and the government’s attempt to “waive” this obstacle ought not matter.

Moreover, the Court “gets the merits wrong” because it “misconstrues the retroactivity framework developed in *Teague*” and “undermin[es] . . . the finality of federal convictions.” The Court’s opinion “erodes any meaningful limits on what a ‘substantive’ rule is.” [Remainder of dissent omitted.]

Williams v. Pennsylvania, 136 S. Ct. 1899 (June 9, 2016), 5-3 (**Kennedy**; **Roberts** dissent; **Thomas** dissent), reversing 105 A.3d 1234 (Pa. 2014).

Headline: Due process violated when judge refused to recuse from case in which the judge had “significant, personal involvement in a critical decision” regarding the defendant (here, the judge was the prosecutor that approved the death penalty 30 years earlier). And this is “structural error.”

Facts: Williams was convicted of murder and sentenced to death in Pennsylvania in 1984 when he was 18. At trial, the line prosecutor sought permission from the District Attorney, Ronal Castille, to pursue the death penalty; Castille wrote at the bottom of the prosecutor’s memo “Approved to proceed on the death penalty.” Over the next 26 years Williams’ conviction and sentence were upheld on appeal, state habeas, and federal habeas. Then in 2012, Williams filed a state collateral motion to vacate his conviction based on newly discovered evidence (testimony from his co-conspirator who had testified for the government at trial, but now said the prosecution had withheld significant exculpatory evidence). Discovery in that proceeding produced the previously undisclosed memo showing that Castille had approved the death penalty.

On the merits, the Pennsylvania trial court **granted** Williams a new sentencing proceeding. The government sought a reversal from the Pennsylvania Supreme Court. By that time, Castille had been elected to that court and was serving as its Chief Justice. (In his election campaign in 1993 Castille had touted that he had “sent 45 people to death rows.”)

Williams filed a motion to recuse now-Justice Castille from considering his case. Castille denied that motion. After full briefing on the merits the Pennsylvania Supreme Court unanimously (5-0) vacated the trial court’s grant of relief. Castille filed a concurring opinion, criticizing the trial court and also the “obstructionist anti-death penalty agenda” of “this particular advocacy group” [Castille’s lawyers from the Federal Community Defender’s Office] for turning postconviction proceedings “into a circus where they are the ringmasters.” Castille retired from the court two weeks later. The U.S. Supreme Court then granted Williams’ cert petition on the issue of recusal.

Kennedy (for 5): Due process is violated, because there is an **“impermissible risk of actual bias when a judge earlier had a significant, personal involvement as a prosecutor in a critical decision** regarding the defendant’s case.” This is an “objective standard” that “avoids having to determine whether actual bias is present.” “No man can be a judge in his own case;” this also applies in a case where “he or she had made a critical decision.” “This follows” from *In re Murchison* (1955), where the Court overturned a state conviction where a judge had served as both “the accuser and the decisionmaker.” “Having been a part of the [accusatory] process a judge cannot be, in the very nature of things, wholly

disinterested in the conviction or acquittal” (quoting *Murchison*). “The likelihood of bias ... is too high to be constitutionally tolerable” (quoting *Caperton*, 2009). [Other similar language is omitted here.]

“The involvement of other actors and the passage of time” (here, three decades) “only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured.” “The neutrality of the judicial process” must be ensured. **[Ed. Note:** Here the absence of Justice Scalia is felt, as we recall his lengthy opinion explaining why he did not recuse in the Vice-President Cheney dock-hunting episode, *see* 541 U.S. 913 (2004).] Whether to seek the death penalty is surely a critical decision, and Castille’s administrative role was “significant The Court will not assume that , , , Castille treated so major a decision as . . . perfunctory . . . requiring little time, judgement or reflection.” Indeed, he took “personal responsibility” for capital decisions in his election campaign, thus indicating “his own view” that his role was “meaningful” and “important.” Furthermore, the merits of whether his office had violated *Brady* raise a “potential conflict” as it would raise “criticism . . . of his own leadership and supervision.” “It would be difficult for a judge” to view it otherwise.

We note the “utility of statutes and professional codes of conduct that provide [even] more protection than due process” (*citing* the ABA Model Code of Judicial Conduct and *amicus* brief in this case). **[Ed. note:** The Court implicitly suggests, simply by quoting the rule, that Pennsylvania’s own Code of Judicial Conduct would have required recusal in this case.]

Finally, this is “structural error” requiring reversal, even though Castille’s vote was unnecessary on the five-Justice Court. Appellate deliberations are highly confidential and “it is neither possible nor productive to inquire” whether Castille actually influenced his colleagues. (The Court quotes Justice Brennan’s concurrence in *Lavoie*, 1986). The judgment must be reversed and Williams’ case be considered by the Pennsylvania court “without the participation of the interested member” (even though this may not be a “complete remedy” because some Justices who served with Castille are still on the court).

Roberts dissenting with Alito: “The majority opinion rests on proverb rather than precedent.” There is a “presumption of honesty and integrity,” and unlike in *Murchison*, Castille is not alleged to have known anything about the underlying merits of the alleged *Brady* violation. Moreover, this was Williams’ fifth habeas petition and it was untimely under state law. If the facts now asserted were true, then Williams knew of them at his trial and he lied about them when he testified. Whether or not state rules were violated by the failure to recuse, Due Process does not demand it. [Note that Chief Justice Roberts also dissented in *Caperton*.]

Thomas dissenting: “The specter of bias alone in a judicial proceeding is not a deprivation of due process,” and we should not “constitutionalize every judicial disqualification rule.” Disqualification for bias alone was not permitted at common law [Thomas asserts, citing Blackstone and Frank]. Moreover, disqualification is limited to a judge assuming dual roles “in the same case,” Williams’ criminal case is over; his lawsuit now is a “new civil [habeas] proceeding.” **[Ed. Note:** this last point seems both overly formalistic as well as irrelevant to due process, which applies to criminal and civil proceedings alike.] History has many examples of judges acting despite conflicts of interest, most notably Chief Justice John Marshall in *Marbury v. Madison*. *Caperton*’s extension of constitutional due process to “perceived bias” was questionable and ought not be further extended here. Also,

the Pennsylvania Supreme Court “entertained” Williams’ motion for reargument (but denied it) even after Castille retired, so the remand here is probably useless.

II. FEDERAL CRIMINAL STATUTES

A. *Hobbs Act Extortion*, 18 U.S.C. § 1951(a)

Ocasio v. United States, 136 S. Ct. 1491 (Mar. 2, 2015), 5 (4-1) to 3 (**Alito**; *Breyer* concurring; *Sotomayor* dissenting), affirming 750 F.3d 399 (4th Cir. 2014).

Headline: Conspiracy to commit federal extortion reaches an agreement to take property even from one another member of the criminal conspiracy.

Facts: Ocasio, a Baltimore police officer at the time, participated in a scheme with a local autobody repair shop to “steer” auto-accident car owners to the body shop in return for a payment (“kickback”) from the body shop to Ocasio. A number of other officers participated in this scheme. Ocasio and the others were charged with obtaining money (from their co-conspirators, the body shop owners) “under color of official right,” and conspiring to do so, under the federal Hobbs Act. The Hobbs Act requires that property be obtained “from another.” Ocasio argued that the conspiracy charge had to be dismissed because the body shop owners, alleged members of the conspiracy, could not agree to obtain money “from another” if the money was in fact coming from themselves. Because the body shop owners were not agreeing to take property “from another,” Ocasio argued that there was as a matter of law no “agreement” between them and him (that is, no “conspiracy”) on this element. The Sixth Circuit had ruled, on different facts, that a Hobbs Act conspiracy must allege property obtained from “someone outside the conspiracy.” But in Ocasio’s case, the Fourth Circuit rejected that as a requirement for a Hobbs Act conspiracy, and affirmed Ocasio’s jury conviction.

Alito (for 5): “Longstanding principles of conspiracy law,” which federal law is presumed to incorporate, allow conviction when the conspiracy has “as its objective the obtaining of property from another coconspirator.” “Conspirator[s] need not agree to commit . . . every part of the substantive offense,” so long as they agree “with specific intent that the underlying crime be committed.” Moreover, “a conspirator may be convicted even though he was incapable of committing the substantive offense himself.” Thus “in a succinct opinion by Justice Holmes” in *Holte* (1915), the Court ruled that a woman could be convicted under the Mann Act for conspiring to transport a woman across state lines for immoral purposes, even though she could not be convicted of the substantive offense herself. The Court ruled similarly in *Gebardi* (1932), but noted that the woman must do more than “acquiesce” – she must be an active participant in the crime. “Reluctant” consent, for “the consent required to pay a bribe,” will not always rise to the level of a conspiracy to violate the Hobbs Act. **[Ed. note:** Thus the line between a victim of extortion, and a Hobbs Act co-conspirator, can be murky at the edges.] These principles “resolve this case,” because the body shop owners clearly agreed to assist Ocasio in obtaining property from someone other than Ocasio (and it is only Ocasio’s conviction that we address here). Thus no arguments of “lenity” or federalism apply here. (And we stick with the decision in *Evans*, 1992, that the Hobbs Act reaches “the rough equivalent of bribery” at the state level.) Meanwhile, Ocasio’s position, requiring identification of who “owns” property, would raise “practical problems” of determining complicated property ownership rules.

Breyer concurring: I agree with Justice Thomas’s dissent that “*Evans* [decided before Justice Breyer joined the Court] may well have been wrongly decided.” But it is not challenged here, so “I join the majority’s opinion in full.” **[Ed. note:** This is one of many examples this Term of the Court working hard, in Justice Scalia’s absence, to decide cases with a clear majority vote rather than 4-4 ties or a 4-Justice plurality.]

Thomas dissenting: “The Court holds that an extortionist can conspire to commit extortion with the person whom he is extorting.” This shows *Evans* was wrongly decided, and in any case “I would not extend *Evans*’ errors further.” Obviously this was a bribery-kickback scheme, not “extortion as the common law understood that term.” *Evans* erred “by blurring the distinction between bribery and extortion.” Moreover, this extension of *Evans* “further wrenches from States the presumptive control they should have over their own officials’ wrongdoing.” **[Ed. note:** Of course, it is the sometimes ineffectiveness of local officials in prosecuting their own officials that has led Congress to enact federal criminal statutes to reach such conduct in a number of areas.]

Sotomayor dissenting, with Roberts: “Ordinarily” we would think that “if a group of conspirators sets out to extort ‘another’ person,” they would be proposing to extort money or property from someone else, “not one of themselves.” “The relevant entity to consider is the conspiratorial group” and the Court’s conclusion is not “natural or logical” and not the “plain meaning” of the statute. The Mann Act cases are distinguishable on statutory text as well as their facts. And the Court’s “odd theory” about “mere acquiescence” merely “raises more questions than answers.” **[Ed. note:** Justice Sotomayor may be right about that]. “Conspiracy law has long been criticized as vague and elastic,” and we have warned against broadening its “already pervasive and wide-sweeping net.” **[Ed. note:** Interesting, in that Justice Sotomayor was a prosecutor for a number of years, although stateside and not, like Justice Alito, federal. She may thus have a distaste for interfering federal prosecution theories.] Meanwhile, I don’t consider whether *Evans* is rightly decided.

Taylor v. United States, 136 S. Ct.2074 (May 23, 2016), 7-1 (**Alito**; Thomas dissenting), affirming 754 F.3d 217 (4th Cir. 2014).

Headline: Because, under *Raich* (2005), even the *intrastate* production and sale of marijuana always affects commerce, individual proof of “affecting interstate commerce” is not required.

Facts: Taylor participated in two “home invasion” robberies in Virginia, of persons the robbers thought were marijuana dealers. In one robbery no drugs were found but \$40 and some property was stolen; in the other no drugs were found and “only a cell phone” was taken. Taylor was federally indicted for Hobbs Act robbery, which requires an effect on, or an attempt to effect, interstate “commerce” over which the federal government has jurisdiction (18 U.S.C. § 1951). At an initial trial, Taylor argued to the jury that the marijuana may have been grown in, and intended to stay in, Virginia. That jury hung, so at the second trial the government requested (and was granted) a ruling that Taylor not be permitted to introduce evidence, or argue, that the marijuana might have been only intra-state. On appeal from conviction, the Fourth Circuit ruled that “because drug dealing in the aggregate necessarily affects interstate commerce,” the evidence was sufficient so long as Taylor intended to deplete the assets of a marijuana dealing operation.

Alito (for 7): The “broad” Hobbs Act reaches “any effect on commerce even if small.” **[Ed. note:** The Court once again does not square this settled Hobbs Act principle, with its 1995 decision in *Lopez* that an effect on commerce must be “substantial” for Congress to have constitutional authority to reach it.] “The sale of marijuana is unquestionably an economic activity,” and we think *Raich* (2005) settled that the distribution of even locally-grown marijuana may be federally regulated as “an economic ‘class of activities’ that have a substantial effect on interstate commerce.” Thus “a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State” can be reached under the Hobbs Act. This is a “question of law,” not fact, so it is not a question for the jury. Individualized “proof that the defendant’s conduct” in the specific case “affected or threatened commerce is not needed.” “As a matter of law,” evidence that a defendant “knowingly stole or attempted to steal drugs or drug proceeds” is sufficient to prove the “commerce” element. This is not an “expansion” of *Raich*, but merely its logical application. **[Ed. note:** So says Justice Alito, the career federal prosecutor.] However, we limit our ruling today to drug cases, and not cases where “some other type of business” is robbed.

Thomas dissenting: I disagreed with *Raich* and its extension of our “flawed commerce power precedents.” But even if I didn’t, this extends *Raich* beyond its purely theoretical “did Congress have a rational basis for the statute” holding. “Congress has no freestanding power to punish robbery,” and for the federal government to have criminal jurisdiction here, I believe it must prove, in every Hobbs Act case, “that the robbery itself affected interstate commerce.” Otherwise *Winship* [1970, requiring proof beyond reasonable doubt of every element is in a criminal case] is violated. This is a “dangerous step” that “weakens longstanding protections for criminal defendants.”

McDonnell v. United States, 136 S. Ct. 2355 (June 27, 2016), 8-0 (**Roberts**), vacating 792 F.3d 478 (4th Cir. 2015).

Headline: For purposes of federal bribery and extortion statutes, an “official act” does not include setting up a meeting, talking to other officials, or hosting events, even if they may aid a business.

Facts: Robert McDonnell, the former Virginia state Governor, and his wife, were indicted under federal statutes for, *inter alia*, federal “honest services fraud” and Hobbs Act extortion by a public official. The underlying theory was that McDonnell had accepted bribes in exchange for being “influenced in the performance of any official act” as defined in the federal bribery statute (which does not apply directly to state officials, hence the roundabout Hobbs Act extortion charge). The evidence showed that McDonnell and his wife had accepted “things of value” from a Virginia businessman named Jonnie Williams who wanted the State to do research on, and business with, his “nutritional supplement” product. The prosecution alleged that the Governor’s “official acts” were: his “arranging meetings,” “hosting and attending events” at the Governor’s mansion, “contacting [other Virginia] government officials,” “allowing Williams to invite [others] to exclusive events at the Governor’s Mansion,” and “recommending that senior government officials meet” with William’s company executives. McDonnell conceded that, as Governor, he was interested in stimulating business activity in Virginia; but he argued that his hundreds of informal actions in support of that objective were not “official acts.” After a five-week jury trial, the jury was instructed that these were, indeed, “official acts” sufficient for conviction. Further instructions to limit the definition were refused. The Governor was convicted and sentenced to two years imprisonment; the Fourth Circuit affirmed.

Roberts (for 8): We reject the government’s view that “the term ‘official act’ encompasses nearly any activity by a public official.” Statutory text and context, our precedents, and “constitutional concerns” lead us to “a more bounded interpretation.” A “formal exercise of governmental power” is required, akin to a “cause, suit, proceeding or controversy” (quoting from the federal Crimes Act of 1790 as well as the federal bribery statute, 18 U.S.C. § 201(a)(3)). Moreover, just “helping bring business to Virginia” is at too high a “level of generality” for an official government “matter.” “The pertinent question ... must be more focused and concrete.” Still, the Fourth Circuit’s focus on specific issues for Williams’s business with Virginia were sufficient. But that does not answer whether the Governor’s actions were “official” acts. We think our decision in *Sun Diamond Growers* (1999) “rejects” and government’s “expansive” view. To violate the federal statutes, a public official must “make a decision or take an action on” the matter in question, “or agree to do so.” But simply “expressing support” for a business, to subordinates, or calling them or setting up a meeting with them, is not enough. Such actions could be “evidence of an agreement” to perform an official act, but they are not official acts “standing alone.”

In addition, because public officials do these sorts of things for constituents “all the time,” adopting the government’s expansive view “would raise significant constitutional concerns” as well as “federalism concerns.” “The basic compact underlying representative government *assumes* that public officials will act appropriately on the[] concerns” of their constituents. An amicus from White house Counsel over the past 30 years “warn that” the expansive view “would chill federal officials’ interactions with the people they serve.” It could also deny “fair notice” to public officials. As in *Sun Diamond*, we “decline to rely on the government’s discretion” to use the statutes “responsibly.” Because the instructions here did not limit the jury’s consideration, we remand to the Fourth Circuit to determine whether the evidence might have been sufficient under our more narrow interpretation. If so, McDonnell is entitled to a new trial. If not, outright dismissal is the remedy. While “this case is distasteful, . . . tawdry” or even “worse,” a “boundless interpretation of the federal bribery statute” cannot be affirmed.

B. RICO (*Racketeer Influenced and Corrupt Organizations Act*), 18 U.S.C. § 1962

RJR Nabisco, Inc. v. The European Community et al., 136 S. Ct. 2090 (June 20, 2016), 7 (4-2-1) to 0 (**Alito**; **Ginsburg** dissenting in significant part; **Breyer** dissenting in significant part; Sotomayor not participating), **reversing** 764 F.3d 129 (2d Cir. 2015).

Headline: RICO predicate offenses can be extraterritorial offenses; but the RICO injury must be a domestic one, at least for private plaintiffs.

Facts: The “European Community” and 26 of its members sued RJR under RICO’s private cause of action provision, § 1964(c). The cases have seen “multiple trips up and down the federal court system” over 16 years. They alleged (“greatly simplified”) RJR’s participation “in a global money-laundering scheme . . . with various [Russian and Columbian] organized crime groups” involving “large shipments of RJR cigarettes into Europe.” The district court, however, dismissed this case, saying that RICO does not apply to racketeering activity occurring outside the U.S., or to foreign racketeering enterprises. The Second Circuit reinstated the RICO counts, on various complicated and fact-specific grounds.

Alito (for 7, in parts I-III): It is a “basic premise of our legal system” that “absent clearly expressed congressional intent to the contrary, federal laws will be construed to have

only domestic application.” *Morrison*, 2010. We first ask for the “clear, affirmative” indication (not necessarily an “express statement”) that it applies extraterritorially. If there is none, then we ask whether a “domestic application of the statute” is shown, that is whether “conduct relative to the statute’s focus occurred in the United States.” If not, “then the case involves an impermissible extraterritorial application.

Here, the presumption against extraterritoriality “has been rebutted” by congressional indications, “but only with respect to certain applications” of the RICO statute. “A number of [RICO] predicates plainly apply to at least some foreign conduct,” and as to these predicates, RICO can apply to foreign conduct. (But we rule only as to subsections of (b) and (c) of §1962. We don’t decide whether subsections (a) and (d), addressing investment of racketeering income, and conspiracy, are necessarily applied the same way.)

In addition, RICO is not limited to domestic “enterprises.” When extraterritoriality is plainly shown, then the “focus” of the statute is irrelevant. Moreover, “Congress did not limit RICO to domestic enterprises,” to avoid obvious line-drawing problems and counter-intuitive results [not detailed here].

[And for only four Justices:] The private cause of action section of RICO, §1964(c), “does not overcome the presumption against extraterritoriality.” Thus “a private RICO plaintiff must allege . . . a domestic injury.” A “private right of action raises issues beyond the mere” substantive reach of a statute, “a decision to permit enforcement without the check imposed by prosecutorial discretion” (*Sosa*, 2004). “Dangers of international friction” are presented. We don’t think our precedents on the Clayton antitrust Act are “interchangeable.” Because the Respondents have dismissed their damages claims based on any domestic injury allegations, their “remaining RICO damages claims . . . must be dismissed.” (Whether any RICO “equitable” claims based on domestic injuries remain viable is open on remand.)

Ginsburg concurring in parts I-III but dissenting from Part IV and the judgment, joined by Breyer and Kagan: Plaintiffs here allege that RJR “orchestrated from their U.S. headquarters a complex money-laundering scheme.” “**The Court has no authority to amend RICO**” and “deny [plaintiffs] a remedy” by imposing an atextual “domestic injury requirement.” [Further reasoning omitted here.]

Breyer concurring in part and dissenting in part and from the judgment: I agree with Justice Ginsburg that “this case has the United States written all over it.” “I would not place controlling weight” on the Solicitor General’s amicus claim of possible “international friction,” given that the European Union and its members agree that that its complaint “comports with” international law and “respects the dignity of foreign sovereigns.”

C. Federal Sentencing Guidelines

Molina-Martinez v. United States, 136 S. Ct. 1338 (Apr. 20, 2016), 8 (6-2) to 0 (**Kennedy**; *Alito* concurring in judgment), reversing 588 Fed. Appx. 333 (5th Cir. 2014).

Headline: When court applies an incorrect guidelines range, the defendant need not show “additional evidence” to support an effect on defendant’s “substantial rights” for plain error review.

Facts: Molina pled guilty to unlawful U.S. presence after being deported with an aggravated felony conviction. The probation office determined his Guidelines range to be 77-96 months, a calculation to which neither side objected. The government argued for a high

end (96 month) sentence, while Molina argued for the low end (77 months). The judge imposed a 77-month sentence with “no further explanation” as to why.

On appeal, Molina’s court-appointed attorney filed a “no nonfrivolous grounds” *Anders* brief. But Molina filed a *pro se* brief arguing an error in calculation of the Guidelines range, and ultimately demonstrated that his Guideline range should have been 70-87 months (because five burglary sentences were imposed on the same day without an intervening arrest, and thus should have been counted as one prior conviction under USSG § A1.2(a)(2) (Nov. 2012)). The government conceded the error. But the Fifth Circuit ruled that because the sentence imposed was within the corrected range, Molina could not satisfy the “affected substantial rights” required under the federal plain error rule (Fed. R. Crim. Proc. 52).

Kennedy (for six): “When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome . . .” The Guidelines have a “real and pervasive effect” on federal sentencing, and a judge who begins with the Guidelines – as Federal Rule 32 requires – is likely influenced by them. The “realities” of the relationship between the “discretionary” Guidelines and actual sentences imposed show that the Guidelines have “the intended effect of influencing” federal sentences. Of course, sentencing is individualized, and in some cases the record will show no effect of the Guidelines – for example, if a judge says s/he would have imposed the same sentence no matter what the Guidelines say. But “the dynamics of federal sentencing” often lead to no reasons being given, particularly for within-Guidelines sentences. “Defendants in [such] cases should not be prevented by a categorical [“additional evidence”] rule from showing plain error.” And we don’t think our ruling today will result in “much of an increased burden” on federal courts.

Alito concurring in the judgment, with Thomas: I agree with the Court about the rule and about this case. But “I would not speculate about how often the reasonable probability test will be satisfied in future cases.” “We have previously warned against” rigid rules in applying the plain error standards, and here “the Fifth Circuit applied exactly the sort of strict, categorical rule against which we have warned.” But “I do not read the Court’s opinion as replacing the Fifth Circuit’s inflexible pro-Government presumption with an equally inflexible pro-defendant presumption.” And the Court ought not engage in “questionable predictions” about incorrect Guidelines applications in the future, based on “unstable and shifting” Guidelines statistics.

D. Enhanced Sentencing for Possession of Child Pornography (18 U.S.C. § 2252(b)(2))

Lockhart v. United States, 136 S. Ct. 958 (Mar. 1, 2016), 6-2 (**Sotomayor**; Kagan dissenting), affirming 749 F.3d 148 (2d Cir. 2014).

Headline: Statutory phrase “involving a minor” applies only to the last of three listed predicate crimes, under the “rule of the last antecedent.”

Facts: Lockhart pled guilty to a federal charge of possessing child pornography. Title 18 U.S.C. § 2252(b) requires a ten-year mandatory minimum sentence if the defendant has “a prior conviction . . . under the laws of any state relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” Lockhart had previously been convicted under New York law for first-degree sexual abuse of his 53-year-old girlfriend. He now argued that §2252(b)’s phrase “involving a minor or ward” modifies (and limits) all

of the statute's predicate offenses. The district court disagreed, ruling that the phrase applied only to the last of the three predicates. The Second Circuit affirmed, while the Eighth Circuit had ruled oppositely.

Sotomayor (for 6): Although the statute is “awkwardly phrased (to put it charitably),” a “straightforward reading” of “text and context” requires that the limiting phrase be read to modify only the final predicate crime. This result, demonstrating a “timeworn textual canon” called “the rule of the last antecedent,” is confirmed by the “structure and internal logic of the statutory scheme.” **[Ed. note:** Presumably because Justice Kagan dissents at length and with typical eloquence, Justice Sotomayor's majority opinion goes on for some 12 more pages to support this conclusion.] The Court cites a 1799 opinion applying the “last antecedent” canon; includes a hypothetical involving the “World Champion Kansas City Royals;” and also notes that the three predicates track, word-for-word, the headings of three separate federal sexual abuse statutes, only the last of which is limited to minors.

In addition, the predicates would be “redundant” if all were limited to minors, and while the Court does not attempt to define the predicates, restricting “minor or ward” to the third predicate helps “eliminate superfluity.” Importantly, we think the other view would mean that state sexual abuse predicates would be treated differently than federal (which clearly provides for enhanced sentences for predicates against adults under a different provision), and Congress could not have intended that. Meanwhile, a few contrary stray legislative history references are not indicative of the “full reach” of the statute. **[Ed. note:** The absence of Justice Scalia is felt in this discussion, for he surely would not have agreed even to consider the few legislative references addressed, and dismissed, by the majority. Meanwhile, at oral argument of this case, prior to the Justice's untimely passing, he seemed to find the “rule of lenity” persuasive for Lockhart.] No reading of the statute's “odd repetition and inelegant phrasing” fits everyday conversational English; so the specific context of this statute predominates. Finally, noting that “there are two opposing canons” of statutory construction “on almost every point,” the Court says it “will not apply the rule of lenity to override a sensible grammatical principle buttressed by . . . text and structure.”

Kagan dissenting, joined by Breyer: Justice Kagan begins by saying that the “ordinary understanding of how English works . . . should decide this case.” **[Ed. note:** This is somewhat belied by the length of her 17-page dissent that is longer than the majority opinion.] She also says that the “uncommonly clear-cut legislative history” shows that the sentencing enhancement was intended to be limited to abuse of children; and that the rule of lenity should “command” the same result. **[Ed. Note:** One can wonder whether the dissent is really driven by hostility to severe mandatory sentences.] Justice Kagan's opinion on the intricacies of reading a “parallel series with a modifying clause at the end” reads like the sort of highly technical – even if correct – debates about language that may be heard in the hallways of Harvard Law, but not on the streets of one's neighborhood. Indeed, former law professor Justice Kagan actually gives readers a “homework assignment” urging readers to examine “a journal, a book, or a Supreme Court opinion.” She also [as a former U.S. Department of Justice lawyer, the U.S. Solicitor General] places great weight on a letter submitted by DOJ to Congress when the statute was amended.

[Ed. Note: It is impossible to know who is right about this statute. But it is a surprisingly hot tempest in a teapot, debated at great length by two Justices who rarely disagree, regarding a sentencing enhancement that is rarely applied in even more rare (compared to number of state prosecutions) federal cases.]

E. *Enhanced Sentencing for Felons in Possession* (18 U.S.C. § 922(g)(9))

Voisine and Armstrong v. United States, 136 S. Ct. 386 (Oct. 30, 2015), 6-2 (**Kagan; Thomas** dissenting), affirming 778 F.3d 176 (1st Cir. 2015) and 706 F.3d 1 (1st Cir. 2013).

Headline: Reckless convictions are included within the phrase “misdemeanor crime of domestic violence.”

Facts: Federal law has long made it a crime for felons to possess firearms. In 1996, Congress amended the statute to extend to “misdemeanor crimes of domestic violence,” defined as any misdemeanor committed against a domestic relation that necessarily involves the “use . . . of physical force.” Voisine and Armstrong both pled guilty to misdemeanor domestic violence assaults under Maine law, which theoretically encompasses “reckless” as well as intentional assaults. When both men were later prosecuted for possessing guns, they argued that a “reckless” assault does not involve the “use” of force. The district courts and, on appeal, the First Circuit rejected that argument; there was a Circuit split.

Kagan (for 6): “Text and background” mean that **Congress intended to encompass reckless domestic violence assaults within the statute.** Congress clearly wanted to reach misdemeanant domestic assaulters, and “two-thirds of state [misdemeanor assault] laws extend to recklessness.” We presume that Congress was aware of this when it amended the statute. So to rule otherwise “would substantially undermine the provision’s design.” The Court adopts the Model Penal Code’s definitions of *mens rea* states [**Ed. note:** notably, without debate], and notes that even reckless force is “used,” so long as it is “volitional.” A reckless actor must use force “with the understanding that it is substantially likely to” cause physical harm. MPC 2.02(c). “Merely accidental conduct” is excluded. But otherwise the word “use” is “indifferent” as to state of mind regarding “harmful consequences.” Whatever reckless meant at common law (which was “confusing,” “obscure,” and inconsistent), it is irrelevant (“a legal anachronism”), because when Congress wrote the statute, most States had adopted the MPC mens rea definitions. (The Court leaves open whether another federal statute, 18 U.S.C. § 16 defining a “crime of violence,” also encompasses reckless conduct. The court also notes that the “categorical approach” discussed in *Descamps* in 2013 [and *Mathis*, this Term] is used.) Finally, because the statute seems clear to us, we reject any “constitutional doubt” argument based on a Second Amendment objection to a lifetime ban on firearms possession for a misdemeanor.

Thomas (joined by Sotomayor in part), dissenting: First, the phrase “use of physical force” is “best read to require intentional conduct.” But the majority would extend liability to a person who had a car accident from texting while driving and injured a family member passenger. [**Ed. note:** This hypothetical seems inaccurate to me -- frankly, Justice Thomas seems confused here as to the difference, under the MPC at least, between reckless and negligent, or “accidental,” conduct.] The majority’s additional limitation to “volitional” reckless conduct “will cause confusion.” [**Ed. note:** Justice Thomas may be right about that.]

Second [in a part that Justice Sotomayor does not join], there are “serious constitutional problems” under the Second Amendment with imposing a lifetime ban on firearms possession for a misdemeanor conviction, possibly just “a single intentional nonconsensual touching of a family member.” “We treat no other constitutional right so cavalierly.” Would the majority affirm a lifetime ban on publishing, under the First Amendment, as punishment for a misdemeanor? [**Ed. note:** Justice Thomas had actually asked this question at oral argument, the first time he had spoken at oral argument in a decade. See my “Brief Overview of the Term,” p. 1 above.]

F. Armed Career Criminal Act, 18 U.S.C. § 924(e) (“burglary” as prior “violent felony”).

Mathis v. United States, 136 S. Ct. 2243 (June 23, 2016), 5 (3-1-1) to 3 (**Kagan**; *Kennedy* concurring; *Thomas* concurring; Breyer dissenting; Alito dissenting), reversing 786 F.3d 1068 (8th Cir. 2015).

Headline: A State burglary offense can’t be used as a “violent felony” predicate for an enhanced federal “felon in possession” sentence, even under the “modified categorical approach,” where the state statute lists “means” of proving elements that are broader than the elements of “generic” felony burglary. [Perhaps the most complicated, and certainly the most fractured and divisive, criminal case of the term. Five opinions spanning 49 pages. Justice Alito’s dissent is also the most entertaining of the Term. A short summary can’t do justice to all the views and subtleties.]

Facts: Mathis pled guilty to the federal offense of being a felon in possession of a firearm. He had five prior convictions for burglary under Iowa law. So the government argued that Mathis should receive the ACCA’s enhanced 15-year mandatory minimum sentence for any defendant with three prior “violent felony” convictions, which the statute says includes “burglary.” The Iowa statute, however, includes burglaries of not just buildings, but also of “vehicle[s].” It thus encompasses more conduct than what the U.S. Supreme Court ruled, 26 years ago in *Taylor*, fits the “generic” definition of burglary. So Mathis argued that his prior burglary convictions, which theoretically might have been of boats, should not count. The district court, however, examined underlying court documents and ruled that Mathis’s prior burglaries had been of structures, and thus fit within the federal generic burglary definition. The Eighth Circuit affirmed the 15-year sentence. But other Circuits had ruled that convictions under similar broad state statutes, which list “means” of committing burglary (as opposed to “elements”), can’t count.

How to decide if various state offenses qualify as a “violent felony,” to merit the ACCA’s “lengthy” 15-year mandatory minimum sentence, has plagued the Court for over 25 years. Congress failed to define “burglary,” and some state statutes include “mere shoplifting” within burglary. Believing that Congress did not intend to broadly reach such non-violent felonies, the Court in *Taylor* in 1990 adopted its own “generic” definition of the elements of “burglary,” and ruled that state offenses not matching those elements can’t count. Moreover, the Court adopted a “categorical approach” to determine which state burglary offenses qualify, no matter what the underlying real facts of a specific offense were. In this method, the Court asks only whether the “elements” of a particular state offense are the same as, or narrower, than the Court’s “generic” definition of burglary. If broader, then the offense can’t qualify. If the state statute is unclear, the Court has allowed a “modified categorical approach” to look beyond the words of the statute to a “limited class” of underlying court documents specific to the individual case. But this is allowed only to determine what “elements” were proved in that case – the actual facts of the case don’t matter, “even if the defendant’s actual conduct fits within the generic” definition.

[Ed. note: If this sounds confusing, it is. And at bottom, this case actually revolves around not so much the technical question presented, but the larger issues of whether a Justice likes mandatory minimum sentences or wants to limit them; and whether the Justice agrees with the reasoning of *Apprendi* (2000) or not.]

Kagan (for 5, although two concur in opposite directions): This case involves a type of state statute not considered before: “not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element.” [It is the

Iowa Supreme Court that says its statute lists “means” and not “elements.” Justice Breyer’s dissent calls this a “distinction without a difference” – “I do not see what it has to do with sentencing.”] Under the categorical approach, the Iowa burglary statute “covers a greater swath of conduct than the elements of . . . generic burglary [so] our precedents . . . resolve this case.” Even if there is no dispute that Mathis actually burglarized structures, a court can’t use the “modified” approach to determine case-specific “elements” when the statute only describes “means.”

And we will not abandon the categorical approach. “Coherence has some claim on the law.” We have been consistent in using it for 25 years. Three reasons support this: (1) The text of the ACCA “favors” it. **[Ed. note:** That claim is simply wrong as a matter of text, although *Taylor* did say it.] (2) it avoids unfairness, because if a type of means of committing a burglary doesn’t matter for proof of elements of the offense, then defendants have little incentive to challenge it and “inaccuracies” about the means will “come back to haunt the defendant many years down the road” when a “lengthy mandatory sentence” is proposed. And finally (3), allowing judges to later determine facts that trigger an enhanced sentence – facts the jury or factfinder did not have to find at the time because not “elements” – then “serious Sixth Amendment concerns” arise under *Apprendi*. Justice Breyer is wrong when he suggests that our prior uses of “elements” really meant “factual means”: “a good rule of thumb for reading out decisions is that what they say and what they mean are one and the same.” The categorical approach may lead to “oddities” and “counter-intuitive” results. But the arguments offered today to depart from it have all been offered and rejected before. The task of distinguishing statutory “elements” from “means” will usually be “easy.” Just read our decisions in *Descamps* and *Shad* among others. Perhaps Congress could “reconsider” the law as it stands under our precedents, but our “elements-based approach remains the law, [a]nd we will not introduce inconsistency and arbitrariness into our ACCA [prede]nts by here declining to” follow them.

Kennedy concurring [a necessary fifth vote]: I join the majority with “one reservation.” **[Ed. Note:** Note that his is the necessary fifth vote; otherwise the case would have gone 4-4, something the Court tried hard to avoid this Term.] “Reliance on *Apprendi*” is unnecessary, because “in my view *Apprendi* was incorrect” and it “does not compel” the result in this case. “It could not have been Congress’s intent for a career offender to escape” the mandatory sentence when, as Justice Alito notes in dissent, “the record makes it clear beyond any possible doubt” that Mathis in fact committed generic ACCA burglary of a structure. “Continued congressional inattention” to “arbitrary and inequitable results” like should “require this Court to revisit its precedents.”

Thomas concurring: Not only is *Apprendi* right, but its exception for prior convictions (*Almendarez-Torres*, 1998) “was wrong” and should be “reconsidered.” Otherwise the Constitution is violated when a judge, not jury, finds facts that increase sentences.

Breyer dissenting, with Ginsburg: “The elements/means distinction the Court draws should not matter for sentencing purposes.” We know that Mathis was charged with burglarizing a “house and a garage,” and “the jury . . . must have found” that. “Why is that not the end of the matter?” *Taylor* allowed a court to look at charging documents to determine this; “so again, what is the problem?” Even if the Iowa Supreme Court said the list of things in its statute described “means” and not “elements,” that is “a distinction without a difference” and our precedents do not require anything to turn on that. [Justice Breyer goes into an extended discussion of the theory of “compromises” between “real” and “charge” sentencing that underlie the federal sentencing Guidelines, of which he was, of course, a

primary author back in 1986.] “The majority’s approach” requiring “means vs. elements” findings for all state offenses “is . . . not practical.” It will “produce a time-consuming legal tangle.” And it is not required by precedent, let alone by *Apprendi* [which Justice Breyer vehemently opposed]. “The genius of the common law” is that it would “modify a prior holding in light of new circumstances.” We should do that here. “With respect, I dissent.”

Alito dissenting: [Justice Alito begins with an entertaining, and apparently true, news story of a woman who, relying on her GPS that was supposed to take her 38 miles to Brussels, Belgium, drove instead to Zagreb, Croatia, 900 miles and two days later. “I kept my foot down” she was quoted as saying.] The Court acts similarly. “Programmed” 26 years ago to follow *Taylor*, the Court’s decisions “increasingly lead to results that Congress could not have intended.” “Maybe we made a wrong turn . . . or perhaps . . . a malfunctioning navigator.” But today’s result “should set off a warning bell.” Courts now have to determine state statutory “means” from “elements.” “I wish them luck.” The Court says it will be easy: “Really?” “A real world approach would avoid the mess” in today’s case. The charging documents make it “perfectly clear that a building was burglarized.” [Justice Alito then provides an imagined three page colloquy where a defendant bends over backwards to concede that he burglarized a house and not a boat,] but “real-world facts are irrelevant.” For aficionados of pointless formalism, today’s decision is a wonder, the veritable *ne plus ultra* of the genre.” “The Court has reached the legal equivalent of Zagreb,” but “is determined to stay the course and travel on . . . Who knows when, if ever, the Court will call home.” **[Ed. Note:** Note the lack of a question mark in this last sentence of Justice Alito’s dissent. Justice Alito was surely channeling Justice Scalia in this dissent.]

G. Sex Offender Registration

Nichols v. United States, 136 S. Ct. 1113 (Apr. 4, 2016), 8-0 (Alito), reversing 775 F.3d 1225 (10th Cir. 2014).

Headline: Federal law (since amended) did not require offender to update Kansas registration once he left the United States.

Facts: Nichols, a registered sex offender, moved to the Philippines without notifying Kansas authorities of his change in residence. Federal law at the time required registrants to notify only one “jurisdiction involved” “where the offender resides.” Nichols was arrested in Manila and pled guilty conditionally to violating the sex registration statute. The Tenth Circuit ruled that even after a registrant leaves a State, “that state remains a ‘jurisdiction involved’” for purposes of the statute.

Alito (for 8): A “straightforward reading” of the complicated interwoven statutes lead to the conclusion that once a person leaves a State, that state is no longer a “jurisdiction involved.” The government’s counterarguments are “too clever by half” and “cannot be the basis for imposing criminal punishment.” Any “purpose” of the statute “cannot overcome the clarity we find in the statute’s text.” Nichols did not have to tell Kansas of his address change and his conviction must be reversed. And because Congress has now changed the law to capture Nichols’ conduct, “we are reassured that our holding is not likely to” endorse “loopholes and deficiencies” in the “nationwide sex offender registration scheme.”

III. HABEAS CORPUS

Duncan v. Owens. 136 S. Ct. 18 (Jan. 20, 2015), 9-0 Order: The writ of *certiorari* was dismissed as improvidently granted after oral argument in the case. The underlying question, which was quite fact-specific, was what counts as “clearly established law” for habeas corpus relief under §2254(d). The Seventh Circuit had granted habeas relief in this first-degree murder case (25 year sentence), so the State’s petition to overturn that relief now stands as rejected, meaning (surprisingly) the defendant wins!

IV. IMMIGRATION LAW

Luna-Torres v. Lynch, 136 S. Ct. 1619 (May 19, 2016), 5-3 (**Kagan**; Sotomayor dissenting), affirming 764 F.3d 152 (2d Cir. 2014).

Headline: A state offense can count as an “aggravated felony” for removal of aliens when it is equivalent to federal crime with the exception of an interstate commerce element.

Facts: Luna was a lawful permanent resident of the United States for 32 years, having emigrated here when he was 9 years old. In 1999 he was convicted for “attempted arson in the third degree” under New York law and sentenced to one day in jail. In 2006 federal authorities initiated proceedings to remove Luna because his New York offense was an “aggravated felony.” The Board of Immigration Appeals found that Luna’s offense was equivalent to (“described” as) a listed “aggravated felony” of arson, except for the additional federal jurisdiction element of “affecting interstate or foreign commerce.” The BIA ruled that this purely “jurisdictional” element did not matter, and the Second Circuit denied Luna’s petition for review.

Kagan (for 5): States do not usually have “interstate commerce” as an element of their offenses, while federal offenses often do for obvious jurisdictional reasons. Does this “slight discrepancy” mean that many state offenses cannot serve as the “aggravated felony” basis for applying Congress’s immigration laws? [The answer is “no.”] The key statutory word (“described”) does not “resolve this case,” because it can “take on different meanings in different contexts.” But [and details are omitted here], Congress’s intent “to capture serious crimes regardless of whether they are . . . federal state, or foreign,” and the settled non-substantive character of “jurisdictional elements,” persuades us that Luna’s New York crime must count. **[Ed. note:** Justice Kagan, always seeking to appear youthful and “hip,” includes an entertaining footnote 5 referencing descriptions of journeys in “a Lonely Planet guide,” and instructions “for setting up an iPhone.”]

Sotomayor dissenting, with Thomas and Breyer: The plain meaning of an offense “described in” the list of aggravated felonies means that a state offense that lacks any element of a listed federal offense is not an “aggravated felony.” “Case closed” [– **but** Justice Sotomayor goes on for 15 pages.] The result **[Ed note:** which is really what seems to disturb SMS] is that “long-time legal permanent residents with convictions for minor state offenses are foreclosed from even appealing to the mercy of the Attorney General.”

V. CIVIL CASES RELATED TO CRIMINAL TOPICS

Bruce v. Samuels, 136 S. Ct. 627 (Jan. 12, 2016), 9-0 (**Ginsburg**), affirming 761 F.3d 1 (D.C. Cir. 2014).

Headline: Prison Litigation Reform Act. Federal law requiring even indigent prisoners to pay small monthly installments toward the filing fee for federal civil lawsuits they have filed, is interpreted to mean that prisoners must pay the monthly installments “per case” filed, not just one lower fee (“here, \$0.64”) “per prisoner.” The statutory text shows a “per case” focus for the initial filing fee, and “there is scant indication that the statute’s perspective shifts partway through” a subsequent paragraph addressing subsequent monthly installments. “The per-case approach more vigorously serves the statutory objective of containing prisoner litigation, while the safety valve provision ensures against denial of access to federal courts;” and “several states” report “that the per-case approach is unproblematic.”

Husky International Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (May 16, 2016), 7-1 (**Sotomayor**; Thomas dissenting), reversing 787 F.3d 312 (5th Cir. 2015).

Headline: Bankruptcy fraud. “Actual fraud” can include fraudulent conveyances even if there is no false “representation.” Here a creditor alleged that the bankrupt owner of a debtor company had committed “actual fraud” by transferring much of the company’s funds to other entities he controlled, so that the owner’s debts could not be paid in bankruptcy. The Fifth Circuit ruled that an actual “false representation” was required, but the Court here rules that “actual fraud” encompasses “traditional forms of fraud that can be accomplished without a false representation. This is the meaning that “actual fraud” has “long held” in the common law.

Justice Thomas dissents, arguing that a fraudulent transfer of funds does not represent a debt “obtained by” fraud. (The majority responds that if a debt is “traceable to” fraud, it can meet the definition of “obtained by” in the statute, even if such occasions “may be rare.”)

Ross v. Blake, 136 S. Ct. 1850 (June 6, 2016), 8 (6-1-1) to 0 (**Kagan**; *Thomas* concurring in part; *Breyer* concurring in part), vacating 7867 F.3d 693 (4th Cir. 2015).

Headline: Prison Litigation Reform Act. There is no extra-textual “special circumstances” exception to the PLRA exhaustion of administrative remedies requirement. However, a prisoner does not need to exhaust remedies that are not actually “available.” Here, after an inconclusive internal investigation, a prisoner filed a federal civil rights lawsuit against two guards for excessive use of force. The Fourth Circuit was wrong to find a “special circumstance” exception to exhaustion that is not in the statute. However, Blake’s lawsuit “may yet be viable” on remand, because there are at least three circumstances (which we discuss in detail) “in which an administrative remedy, although officially on the books, is not capable of use to gain relief” (that is, not really “available” as we have defined it).

Justice Thomas concurs “except for the discussion of Maryland’s prison grievance procedures” which is based on Blake’s “questionable lodging” of extra-record documents.

Justice Breyer concurs, noting his prior opinion in *Woodford v. Ngo* (2006) that described other “well-established exceptions to exhaustion.”

Dietz v. Bouldin, 136 S. Ct. 1885 (June 9, 2016), 6-2 (**Sotomayor**; Thomas dissenting), affirming 764 F.3d 152 (2d Cir. 2014).

Headline: Inherent power to recall jury. Where no federal rule prohibits it, federal courts have “inherent” authority to recall a jury even after it has been discharged, in civil cases, when the jury has returned a verdict that was not permitted and there is no prejudice. But this equitable power is “limited.” The power to recall must be exercised relatively quickly, and courts must be “careful” to ensure that the jurors have not spoken with anyone about the case or even seen reactions to their verdict. Most importantly, our decision is “limited to civil cases only” and “we do not address whether it would be appropriate to recall a jury after discharge in a criminal case.”

Thomas dissenting, with Kennedy: This undefined “inherent authority” will “produce more litigation” and “create more confusion.” [**Ed. note:** On the first point, it’s inevitably true. On the second, only time will tell.]

VI. OPINIONS WITHOUT ARGUMENT (SUMMARY REVERSALS)

- **Maryland v. Kulbicki**, 136 S. Ct. 2 (Oct. 5, 2015): Habeas. Ineffective assistance should not be based on scientific advances not available at time of trial.
- **Mullenix v. Luna**, 136 S. Ct. 305 (Nov. 9, 2015): Habeas. Law is not “clearly established” for purposes of denying qualified immunity (in Fourth Amendment deadly force case) where precedent did not place officer’s conduct “beyond debate” on facts presented. (Justice Scalia concurred and Justice Sotomayor dissented.)
- **White v. Wheeler**, 136 S. Ct. 456 (Dec. 14, 2015): Habeas, death penalty case. Court “again advises” the Sixth Circuit that it must be deferential to state court decisions in criminal cases (here, a decision to strike juror for *Witherspoon* reasons).
- **Wearry v. Cain**, 136 S. Ct. 1002 (Mar. 7, 2016): Habeas, death penalty case. State court’s judgment that failure to disclose evidence did not violate *Brady* was wrong “beyond doubt.” (Justice Alito dissented, with Thomas.)
- **Caetano v. Massachusetts**, 136 S. Ct. 1027 (*per curiam*, March 21, 2016): Second Amendment. State Supreme Court misapplied *Heller* in upholding a law banning stun guns; decision vacated and remanded for further proceedings. (Justice Alito, joined by Thomas, concurs.)
- **Woods v. Etherton**, 136 S. Ct. 1149 (*per curiam*, Apr. 4, 2016): Habeas. Under deferential AEDPA standard, “fair-minded jurist” could conclude that uncontested facts in an anonymous tip were not “offered for their truth” and thus no Confrontation Clause or ineffective counsel violation occurred.

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- **Johnson v. Lee**, 136 S. Ct. 1802 (*per curiam*, May 31, 2016): Habeas. Procedural bar of failing to raise issue on direct appeal is “adequate” state law ground to block habeas, even if not always applied, or applied without citation, by the State’s courts.
- **Lynch v. Arizona**, 136 S. Ct. 1818 (*per curiam*, May 31, 2016): Habeas, death penalty case. When state puts future dangerousness at issue, defendant is entitled to inform jury that he is ineligible for parole. (Justice Thomas dissents.)

VII. OPINIONS RELATING TO ORDERS (SUCH AS DENIAL OF *CERTIORARI*)

- *Correll v. Florida* (Oct. 29, 2015), **Breyer**, with **Sotomayor**, dissenting from denial of *certiorari* and application for stay of execution: We should hold this petition from a Florida prisoner facing impending execution, until we resolve the pending case of *Hurst* in which the constitutionality of Florida’s death penalty statute is challenged. [**Ed. Note:** Correll was executed that day. Three months later the Court struck down the Florida capital sentencing statute in *Hurst*.]
- *Holiday v. Stephens* (Nov. 15, 2015), **Sotomayor** statement respecting denial for stay of execution and *certiorari*: Denial of appointed counsel to file a clemency petition in a death penalty case is an abuse of discretion. Even though here the lawyers ultimately did file such a petition, that petition “would have benefitted from . . . more zealous advocates”.
- *Rapelje, Warden v. Blackstone* (Nov. 30, 2015), **Scalia**, joined by Thomas and Alito, dissenting from denial of *certiorari*: We have never held that the right to Confrontation includes a right to *admit* evidence. We should summarily reverse that decision here.
- *Friedman v. City of Highland Park* (Dec. 7, 2015), **Thomas**, joined by Scalia, dissenting from denial of *certiorari*: The Seventh Circuit here upheld a “categorical ban” on “semiautomatic firearms,” but applied a “political process, interest-balancing” test that is inconsistent with *Heller*. The Second Amendment right should be protected the same as other constitutional rights, not given “second class” treatment.
- *Brooks v. Alabama* (Jan. 21, 2016), **Sotomayor** joined by Ginsburg concurring in denial *certiorari*: Although we recently overruled precedents (in *Hurst*) that were also relied upon in the past to uphold Alabama’s capital sentencing statutes, “I believe procedural obstacles would have prevented us from granting relief” here.

Breyer dissenting from denial of *certiorari* and application for stay of execution: Just like in *Hurst*, Alabama’s statute allows death to be based on an “advisory” jury verdict “not binding on the court.” Moreover, as I said last Term in *Glossip*, we ought to “reconsider the validity of capital punishment under the Eighth Amendment.

- *Ben-Levi v. Brown* (Feb. 29, 2016), **Alito** dissenting from denial of *certiorari*: We should review the North Carolina prison’s imposition of “stringent restrictions on

Jewish group meetings” that are “not applied to other religious groups.” [An unusually lengthy 11-page dissent.]

- *American Freedom Defense Initiative v. King County* (March 7, 2016), **Thomas**, joined by Alito, dissenting from denial of *certiorari*: We should review the application of our First Amendment “public forum” doctrine as applied to “public transit advertising.” Here the Ninth Circuit upheld “content-based restrictions” in Seattle.
- *Boyer v. Davis* (May 2, 2016), **Breyer** dissenting from denial of *certiorari*: Boyer has spent 32 years on death row in California, under a state system of judicial review described by the State itself as “dysfunctional.” For reasons I expressed in *Glossip* (2015), I dissent from reviewing his petition challenging that system here.
- *Adams v. Alabama* (May 23, 2016), **Thomas**, joined by Alito, concurring the decision to grant, vacate, and remand in light of *Montgomery v. Louisiana*: Our order “does not reflect any view regarding petitioner’s entitlement to relief” and there may be reasons [he offers two] to deny relief in this case “and many others” that we may remand.

Alito joined by Thomas, concurring: “Petitioner committed a heinous murder ... when he was 17. “In this case, it can be argued that” his sentencing “fulfilled the individualized sentencing requirement” that *Miller* (upon which *Montgomery* is predicated) imposed. The court on remand (in this case and a number of others like it) is “free to evaluate” this.

Sotomayor joined by Ginsburg, concurring: We disagree with Justice Alito’s suggestion. There is “no shortcut” to evaluating whether the language of *Montgomery* is fulfilled: is the defendant “the rarest of juvenile offenders, whose crimes reflect permanent incorrigibility.”

VIII. CRIMINAL LAW *CERTIORARI* GRANTS FOR THE OCTOBER 2016) TERM

As of August 4, 2016, the Court has granted *certiorari* in 31 (depending on how you count consolidated cases) for the coming Term. Seven of these cases appear to be criminal-law-or-related, a relatively low number. However, a number of new criminal cases will likely be added to the docket after the Court’s post-summer-recess “long” (or “summer” or “opening”) Conference, scheduled for Monday September 26, 2016. Also, due to Rosh Hashanah, the Court has scheduled the opening oral arguments of the Term for Tuesday October 4, 2016, not the “First Monday in October.”

Interestingly, all five cases to be argued in the first week of October – and seven of the eight cases set for argument during both weeks of the October sitting – are criminal cases. This may be due to the eight-Member Court being hesitant to grant review in controversial civil cases, as well as the willingness of criminal petitioners to meet expedited summer briefing schedules. On Monday October 3, the new *certiorari* grants from the September 26 “long Conference” will be announced.

Here are brief descriptions (my own, not the parties') of the questions presented in granted criminal cases that were scheduled for oral argument in October 2016:

1. **Bravo-Fernandez v. United States**, No. 15-537 (the opening oral argument of the Term, held on the First Tuesday of October rather than the First Monday): Whether, under the “collateral estoppel” component of the Double Jeopardy Clause, a conviction that was vacated can be retried, or is retrial precluded by an acquittal that was returned on another count.
2. **Shaw v. United States**, No. 15-5991: Whether federal bank fraud requires a specific intent to “cheat” the bank of money or property by deceit, that is, cause a loss to the bank, not just take money from a customer’s account.
3. **Salman v. United States**, No. 15-628: Whether the Second Circuit’s 2014 decision in *Newman*, requiring at least “some potential gain” to an inside-information tipper, should be applied, or whether gifting confidential information to a close family relation is sufficient for insider trading liability (the SEC (and Solicitor General) argues the latter).
4. **Buck v. Davis**, No. 15-8049: Whether the “certificate of appealability” requirement for habeas challenges was properly applied to deny review of a claim that this capital defendant’s lawyer was ineffective for calling an “expert” who testified that black men generally are more likely to be dangerous in the future.
5. **Manual v. City of Joliet**, No. 14-9496: Whether the Fourth Amendment governs a §1983 action for “malicious prosecution” for wrongful pretrial detention without cause after the institution of “legal process.”
6. **Pena-Rodriguez v. Colorado**, No. 15-606: Whether the traditional prohibition on impeaching a jury’s verdict may bar post-verdict evidence from a juror that racial bias infected the jury’s deliberations (Sixth Amendment right to impartial jury).
7. **Manrique v. United States**, No 15-7250, scheduled for argument on Tuesday October 11, 2016: Whether a notice of appeal filed after sentencing, but before restitution is precisely ordered, is sufficient to challenge the restitution award.

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WHO WROTE WHAT in the 2015-16 Term

(All written opinions in argued cases, not just majorities)

Majority opinions are in **Bold**; Concurrences are in *italics*; Dissents are underlined**ROBERTS**Foster
McDonnell
Williams**SCALIA**Carr
Montgomery**KENNEDY**Montgomery
Welch
Williams
Molina
Mathis
Luis**THOMAS**Strieff
Musacchio
Betterman
Sanchez-Valle
Luis
Bryant
Mathis
Ross
Birchfield
Foster Williams
Montgomery Taylor
Welch Voisine
Husky Int'l Dietz**GINSBURG**Betterman
Bryant
Bruce
Sanchez-Valle
RJR Nabisco**BREYER**Luis
Hurst
Ocasio
Ross
Sanchez-Valle
RJR Nabisco
Mathis**ALITO**Birchfield
Ocasio
Taylor
RJR Nabisco
Nichols
Foster
Hurst
Mathis
Molina**SOTOMAYOR**Hurst
Lockhart
Husky Int'l
Dietz
Betterman
Strieff
Birchfield
Carr
Ocasio
Luna-Torres**KAGAN**Sanchez-Valle
Voisine
Mathis
Luna-Torres
Ross
Strieff
Luis
LockhartTotal Authored decisions in argued Criminal Law-and-Related cases: 27 (out of 69 total argued Court decisions) – plus 8 *per curiam* Summary Reversals (see page 34 above).Total Writings in argued Criminal Law-and-Related cases: 67 (plus 8 summary reversals).Criminal Law Workhorse: Justice Thomas. A record number for him, 17 writings. But only two were majorities. His large number of dissents (9) may indicate taking up the “slack” in Justice Scalia’s absence.**Justice Sotomayor** again leads the “liberals” in criminal case writings. She has become a consistent voice (with Breyer) against death penalties; while **Justice Thomas** has become a consistent voice in the support of death penalty verdicts. Meanwhile, **Justices Alito** and **Kagan** are the obvious choices to write in federal statutory criminal cases. Finally, **Justice Scalia**’s totals from a sadly truncated Term for him, are the lowest in his career.