

**UNITED STATES SUPREME COURT
REVIEW-PREVIEW-OVERVIEW**

**CRIMINAL CASES GRANTED REVIEW AND DECIDED
DURING THE OCTOBER 2016-17 TERMS
THRU JANUARY 9, 2018**

**PAUL M. RASHKIND
CHIEF, APPELLATE DIVISION
OFFICE OF THE FEDERAL PUBLIC DEFENDER, S.D. FLA.**

I. JUDGES

A. Standard for Recusal under Due Process Clause. *Rippo v. Baker*, 137 S. Ct. ___ (Mar. 6, 2017) (per curiam). Michael Damon Rippo was convicted of first-degree murder and other offenses and sentenced him to death. During his trial, Rippo received information that the judge was the target of a federal bribery probe, and he surmised that the district attorney’s office that was prosecuting him was playing a role in that investigation. Rippo moved for the judge’s disqualification under the Due Process Clause of the Fourteenth Amendment, contending that a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him. But the trial judge declined to recuse himself, and (after that judge’s indictment on federal charges) a different judge later denied Rippo’s motion for a new trial. The Nevada Supreme Court affirmed on direct appeal, reasoning in part that Rippo had not introduced evidence that state authorities were involved in the federal investigation. In a later application for state postconviction relief, Rippo advanced his bias claim once more, this time pointing to documents from the judge’s criminal trial indicating that the district attorney’s office had participated in the investigation of the trial judge. The state postconviction court denied relief, and the Nevada Supreme Court affirmed. It likened Rippo’s claim to the “camouflaging bias” theory that this Court discussed in *Bracy v. Gramley*, 520 U. S. 899 (1997). The *Bracy* petitioner argued that a judge who accepts bribes to rule in favor of some defendants would seek to disguise that favorable treatment by ruling against defendants who did not bribe him. In *Bracy*, the U.S. Supreme Court explained that despite the “speculative” nature of that theory, the petitioner was entitled to discovery because he had also alleged specific facts suggesting that the judge may have colluded with defense counsel to rush the petitioner’s case to trial. The Nevada Supreme Court reasoned that, in contrast, Rippo was not entitled to discovery or an evidentiary hearing because his allegations “d[id] not support the assertion that the trial judge was actually biased in this case. In a

unanimous per curiam decision the Supreme Court vacated the Nevada Supreme Court's judgment because it applied the wrong legal standard. "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); see *Williams v. Pennsylvania*, 579 U.S. ___, ___ (2016) (slip op., at 6) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias' (internal quotation marks omitted)). Our decision in *Bracy* is not to the contrary: Although we explained that the petitioner there had pointed to facts suggesting actual, subjective bias, we did not hold that a litigant must show as a matter of course that a judge was 'actually biased in[the litigant's] case,' 132 Nev., at ___, 368 P. 3d, at 744—much less that he must do so when, as here, he does not allege a theory of 'camouflaging bias.'"

II. SEARCH & SEIZURE

A. **Historical Cell Phone Location Data.** *Carpenter v. United States*, 137 S. Ct. ___ (cert. granted June 5, 2017); decision below at 2013 WL 6385838 (6th Cir. Apr. 13, 2016). In this case, as in thousands of cases each year, the government sought and obtained the historical cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). As a result, the district court never made a probable cause finding before ordering Petitioner's service provider to disclose months' worth of Petitioner's cell phone location records. A divided panel of the Sixth Circuit held that there is no reasonable expectation of privacy in these location records, relying in large part on four-decade-old decisions of this Court. Question presented: Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.

- B. Government Subpoena of Email Records Held Abroad.** *United States v. Microsoft*, 138 S. Ct. ___ (cert. granted Oct. 16, 2017); decision below at 829 F.3d 197 (2d Cir. 2016). The competing interests of this cert petition are fully laid out in the divergent questions presented by the parties; one stresses the Stored Communications Act's law enforcement component, while the other stresses the privacy interests of the law. The government's cert petition outlined the question presented this way: "Under long-standing principles, the recipient of a subpoena to produce documents to the government in the United States is required to produce specified materials within its control, even if the recipient chooses to store those materials abroad. Providers of email services have long adhered to the same approach and have produced foreign-stored data when served with probable-cause-based warrants requiring disclosure of emails to the government in the United States under 18 U.S.C. 2703. In this case, the Second Circuit up-ended that practice by interpreting such a warrant to call for an impermissible extraterritorial application of the statute. *** "Question presented: "Whether a United States provider of email services must comply with a probable-cause-based warrant is-sued under 18 U.S.C. §2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad." Microsoft laid out the issue differently: "The Stored Communications Act, 18 U.S.C. § 2701 et seq., part of the Electronic Communications Privacy Act of 1986, protects the privacy of communications in electronic storage. It restricts hackers from 'access[ing]' stored electronic communications (§ 2701) and bars providers of electronic communications services from voluntarily 'divulg[ing]' the contents of stored communications without permission of the customer (§ 2702). The Act also creates a limited exception to the prohibitions on accessing and divulging the contents of communications in electronic storage. Under that exception, a federal, state, or local law-enforcement officer may obtain a search warrant to compel a service provider to access and disclose the content of stored electronic communications (§ 2703). The question presented is: Given the presumption against applying federal law in other countries and the Government's concession that Congress did not intend to apply the Stored Communications Act outside the United States, are private electronic communications stored in Ireland outside the scope of the Stored Communications Act's interlocking provisions?"
- C. Suppression of Title III Wiretaps.** *Dahda v. United States*, 138 S. Ct. ___ (cert. granted Oct.16, 2017); decisions below at 853 F.3d 1101 and 852 F.3d 1282 (10th Cir. 2017). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes a judge to issue a wiretap order to intercept communications within the court's

territorial jurisdiction and provides for suppression of communications intercepted pursuant to a facially insufficient order. Roosevelt Dahda and his brother Los Dahda (and 41 others) faced criminal charges involving the operation of a marijuana-distribution network centered in Kansas and extending to California. Much of the evidence introduced against them was obtained through wiretaps of cell phones used by Dahda and others. The wiretaps took place during the six months preceding the Dahda's arrests and had been authorized by the U.S. District Court for the District of Kansas. Petitioners moved to suppress wiretap evidence at their criminal trial because the evidence was obtained pursuant to a series of facially insufficient wiretap orders that authorized interception of communications outside of the issuing court's territorial jurisdiction. The district court denied petitioners' motion to suppress the evidence and petitioners were convicted. The Tenth Circuit concluded in their separate appeals that suppression was not warranted even though the orders had been facially deficient. The court agreed with petitioners that the orders were extraterritorial and thus facially insufficient. But the court interpreted 18 U.S.C. 2518(10)(a)(ii)—which provides for suppression of an intercepted communication if the authorizing order was “insufficient on its face”—to include an additional, unwritten requirement that, for suppression to occur, the facial insufficiency must result from a statutory violation that implicates a “core concern” underlying Title III. The court determined that Title III's territorial-jurisdiction limitation did not implicate a core concern of Congress in enacting the statute, and thus held that evidence obtained pursuant to the facially insufficient orders should not be suppressed. In so reasoning, the court of appeals acknowledged the existence of a circuit conflict on the issue whether the territorial- jurisdiction limitation implicates a core concern of Title III. Both Dahdas filed a joint cert petition challenging this ruling and, contending the court's decisions in these cases also deepen a circuit conflict on the threshold issue whether an extratextual “core concerns” requirement even applies to motions to suppress facially insufficient Title III wiretap orders. They contend that the statute requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction. Question presented: Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction. (Justice Gorsuch was named to be on one of the Dahda appellate panels before his confirmation, although the case was decided by a quorum of two judges in his absence. He has elected to not participate in this case, which will be heard by eight justices.)

- D. Search of Premises: Disputed Claim of Invitee.** *District of Columbia v. Wesby*, 137 S. Ct. ___ (cert. granted Jan. 19, 2017); decision below at 765 F.3d 13 (8th Cir. 2016). Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are: (1). Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state. (2) Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.
- E. Warrantless Search of Vehicle at Residence.** *Collins v. Virginia*, 137 S. Ct. ___ (cert. granted Sept. 28, 2017); decision below at 790 S.E.2d 611 (Va. 2016). County police officers were looking for the person who eluded them on a motorcycle in two high-speed incidents. Although the rider's helmet had obscured his face, the officers suspected Ryan Collins. A few months after the eluding incidents, the officers encountered Collins at the DMV. During their conversation, one officer visited Collins's Facebook page and spotted a picture of a motorcycle, covered by a tarp, parked at a house. Collins told the officers he did not know anything about the motorcycle. After leaving the DMV, one of the officers located the house in the photograph. Collins's girlfriend (and mother to his child) lived there, as did Collins himself at least several nights each week. A dark colored car was parked about halfway up the driveway, where a visitor might pass to reach the front door. A motorcycle covered in a white tarp sat behind that car. The motorcycle rested on the part of the driveway running past the house's front perimeter. This portion of the driveway was enclosed on three sides: the home on one side, a brick retaining wall on the opposite side, and a brick wall in the back. The motorcycle was no more than a car's length away from the side of the dwelling. Seeing the motorcycle covered in a tarp, the officer walked onto the driveway. He did not have permission to go onto this property. The officer then entered the partially enclosed parking space alongside the home, removed the tarp, and obtained the license tag and VIN number. After running the VIN number, the officer learned the motorcycle was flagged as stolen. He knocked at the front door, and Collins was arrested for possession of stolen goods after admitting that he owned

the motorcycle. Question presented: Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

F. Warrantless Search of Rental Car. *Byrd v. United States*, 137 S. Ct. ___ (cert. granted Sept. 28, 2017); decision below at 679 Fed. Appx. 146 (3rd Cir. 2017). State troopers in Pennsylvania stopped Byrd for a traffic violation while he was driving a car that his girlfriend had rented for him. Without a warrant or probable cause, the troopers searched Byrd's car and found contraband. Byrd moved to suppress the evidence obtained from the search because it violated the Fourth Amendment, but the district court denied the motion on the ground that Byrd, as a driver not listed on the rental agreement, had no reasonable expectation of privacy in the car. The Third Circuit, while noting a circuit conflict on the issue, affirmed on the same basis. Question presented: A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car – an expectation of privacy that society accepts as reasonable. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?

G. Release or Detention Pending Immigration Proceedings. *Jennings v. Rodriguez*, 137 S. Ct. ___ (cert. granted June 20, 2016); decision below at 804 F.3d 1060 (9th Cir. 2015) [**NOTE- Restored to calendar for reargument during the Oct. 2017 Term**]. Under 8 U.S.C. 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. 1003.19(e). The questions presented are: (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. (3) Whether, in bond hearings for aliens detained for

six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

H. Civil Suit for Fourth Amendment Violation. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. ___ (Mar. 21, 2017). Police searched Manuel during a traffic stop, finding a vitamin bottle containing pills. Suspecting the pills to be illegal drugs, the officers conducted a field test, which came back negative for any controlled substance. Still, they arrested Manuel and took him to the police station. There, an evidence technician tested the pills and got the same negative result, but claimed in his report that one of the pills tested “positive for the probable presence of ecstasy.” An arresting officer also reported that, based on his “training and experience,” he “knew the pills to be ecstasy.” On the basis of those false statements, another officer filed a sworn complaint charging Manuel with unlawful possession of a controlled substance. Relying exclusively on that complaint, a county court judge found probable cause to detain Manuel pending trial. Manuel was held in jail for seven weeks after the judge relied on the allegedly fabricated evidence to find probable cause that he had committed a crime. Can Manuel bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement? In a 6-2 decision authored by Justice Kagan, the Court held that he may: “Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes ‘the standards and procedures’ governing pretrial detention. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). And those constitutional protections apply even after the start of ‘legal process’ in a criminal case—here, that is, after the judge’s determination of probable cause. *See Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion); *id.*, at 290 (Souter, J., concurring in judgment). Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim’s timeliness, to the court below).” Justice Alito dissented with Justice Thomas joining. The dissent contends the majority failed to answer the question presented and should have decided the case differently: “[T]he Court’s approach ... entirely ignores the question that we agreed to decide, *i.e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim. If a malicious prosecution claim may be brought

under the Constitution, it must find some other home, presumably the Due Process Clause.”

- I. Return of Fees, Costs and Restitution after Appellate Reversal of Conviction.** *Nelson v. Colorado*, 137 S. Ct. ___ (Apr. 19, 2017). When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? In a 7-1 decision authored by Justice Ginsburg, the Court held, “Our answer is yes. Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment’s guarantee of due process.” Justice Alito concurred, while Justice Thomas dissented.

III. FIFTH AMENDMENT

- A. Shackling of Defendants.** *United States v. Sanchez-Gomez*, 138 S. Ct. ___ (cert. granted Dec. 8, 2017); decision below at 859 F.3d 649 (9th Cir. 2017). Defendants successfully challenged in the Ninth Circuit a U.S. Marshal’s policy – to which district judges agreed – placing all pretrial detainees in physical restraints during non-jury court proceedings. The Ninth Circuit’s ruling held that the Fifth Amendment forbids the blanket policy. The government petitioned for cert on both the merits of the decision and a procedural claim that the defendant’s challenges became moot when they progressed past the pretrial stage of their own cases. The Supreme Court granted cert on only the mootness question: “Whether the court of appeals erred in asserting authority to review respondents’ interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents’ individual claims were moot.”
- B. Pretrial Use of Compelled Statements.** *Hays, Kansas v. Vogt*, 137 S. Ct. ___ (cert. granted Sept. 28, 2017); decision below at 844 F.3d 1235 (10th Cir. 2017). Petitioner is a city in Kansas; respondent is one of its former police officers. In 2013, while still employed by city, Vogt applied for a job with the police department in a different city. During an interview for that position, he revealed that he had kept a knife for his personal use after coming into possession of it while working as a Hays police officer. The interviewing department extended respondent a job offer conditioned on respondent telling petitioner about the knife and returning it. Vogt told the Hays’ chief of police about the knife. The chief directed Vogt to provide additional information and opened

an internal investigation. Vogt gave the chief a vague one-sentence report related to his possession of the knife and submitted his two weeks' notice of resignation. After the lieutenant in charge of internal investigations asked him to provide additional information, Vogt made a further statement, which included the type of police call he was handling when he came into possession of the knife. Using this information, the lieutenant was able to locate an audio recording which captured the circumstances of how Vogt came into possession of the knife. At that point, the chief terminated the internal investigation, and gave Vogt's statements and the resulting information to the Kansas Bureau of Investigation. Because Vogt had become the subject of a criminal investigation, the other city's police department withdrew its job offer. The State of Kansas charged Vogt with two felony counts related to the knife. Under state law, Vogt was entitled to a probable cause hearing. At this hearing, his statements about the knife and the resulting information were allegedly "used against him." A state district court judge dismissed both charges based on lack of probable cause. Following dismissal of all criminal charges against him, Vogt sued Hays City, the other city with which he sought employment, and four police officers. Vogt alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights. Specifically, he alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) those statements were used against him in a criminal case when they were used at the probable cause hearing. Question presented: "The Self-Incrimination Clause provides that '[n]o person * * * shall be compelled in any criminal case to be a witness against himself.' A "circuit split has developed over whether certain pretrial uses of compelled statements force a person 'to be a witness against himself' within the meaning of that provision. The question presented is: Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial." Justice Gorsuch has recused himself from this case since he sat on the underlying circuit court panel.

C. DOUBLE JEOPARDY

1. **Double Jeopardy Following Successful Appeal.** *Bravo-Fernandez v. United States*, 137 S. Ct. 352 (Nov. 29, 2016). This case concerns the issue-preclusion component of the Double Jeopardy Clause, which has been set forth generally in three prior decisions of the Supreme Court. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court held that the collateral

estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. In *United States v. Powell*, 469 U.S. 57 (1984), the Court held that, in a single trial, the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if the conviction is logically inconsistent with the acquittal. And in *Yeager v. United States*, 557 U.S. 110 (2009), the Court held that when a jury acquits on one count and hangs on another, the acquittal retains preclusive effect under *Ashe* and prevents retrial of the hung count—even if the acquittal was logically inconsistent with the hung count. The defendants here were charged with conspiring and traveling to violate 18 U.S.C. § 666, in an alleged program bribery based on a single weekend trip to see a boxing match in Las Vegas. The jury acquitted them of conspiracy, but convicted them of violating § 666. The convictions were vacated on appeal because they rested on incorrect jury instructions, and it is undisputed that the acquittals depended on the jury's finding that petitioners did not violate § 666. The government nonetheless sought to retry petitioners on the § 666 charges. The Supreme Court granted review to decide, "Whether, under *Ashe* and *Yeager*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause." In a unanimous opinion written by Justice Ginsburg (with Justice Thomas concurring) the Court held that the Double Jeopardy Clause does not bar the government from retrying defendants after a "jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated for legal error unrelated to the inconsistency." The Court's opinion explains: "In criminal prosecutions, as in civil litigation, the issue-preclusion principle means that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). *see Green v. United States*, 355 U.S. 184, 188 (1957), but because the verdicts are rationally irreconcilable, the acquittal gains no preclusive effect, *United States v. Powell*, 469 U.S. 57, 68 (1984). Does issue preclusion attend a jury's acquittal verdict if the same jury in the same proceeding fails to reach a verdict on a different count turning on the same critical issue? We have answered yes, in those circumstances, the acquittal has preclusive force. *Yeager v. United States*, 557 U.S. 110, 121–122

(2009). As ‘there is no way to decipher what a hung count represents,’ the Court had reasoned, a jury’s failure to decide ‘has no place in the issue-preclusion analysis.’ ([T]he fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything.’) ‘In the case before us, the jury returned irreconcilably inconsistent verdicts of conviction and acquittal. Without more, *Powell* would control. There could be no retrial of charges that yielded acquittals but, in view of the inconsistent verdicts, the acquittals would have no issue preclusive effect on charges that yielded convictions. In this case, however, unlike *Powell*, the guilty verdicts were vacated on appeal because of error in the judge’s instructions unrelated to the verdicts’ inconsistency. Petitioners urge that, just as a jury’s failure to decide has no place in issue-preclusion analysis, so vacated guilty verdicts should not figure in that analysis. We hold otherwise. One cannot know from the jury’s report why it returned no verdict. ‘A host of reasons’ could account for a jury’s failure to decide—‘sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few.’ *Yeager*, 557 U.S., at 121. But actual inconsistency in a jury’s verdicts is a reality; vacatur of a conviction for unrelated legal error does not reconcile the jury’s inconsistent returns.” Justice Thomas’ concurrence contends that the doctrine of issue preclusion under the Double Jeopardy clause is wrong and the Court should revisit *Ashe* and *Yeager*.

2. **Double Jeopardy Following Acquittal at Severed Trial.** *Currier v. Virginia*, 138 S. Ct. ___ (cert. granted Oct. 16, 2017); decision below at 292 Va. 737 (Va. 2016). The Double Jeopardy Clause protects the integrity of acquittals through the doctrine of issue preclusion, also known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016) (preferring the term “issue preclusion” to “collateral estoppel”). Issue preclusion dictates that where a jury’s acquittal has necessarily decided an issue of ultimate fact in the defendant’s favor, the Double Jeopardy Clause bars the prosecution “from trying to convince a different jury of that very same fact in a second trial.” *Bravo-Fernandez*, 137 S. Ct. at 359. Particularly now that “prosecutors [can] spin out a startlingly numerous series of offenses from a single alleged criminal transaction,” the issue preclusion doctrine ensures that individuals who are acquitted cannot be forced to defend a second time against functionally the same allegations. *Ashe*, 397 U.S. at 445 n.10. Here, Currier faced three charges relating to the burglary of a home and theft

of a safe containing cash and firearms: (i) breaking and entering, (ii) grand larceny, and (iii) possessing a firearm after being convicted of a felony. The firearm charge was based on the theory that he had briefly handled the guns inside the safe. In Virginia (as elsewhere), evidence that a defendant has committed crimes other than the offense for which he is being tried is highly prejudicial and generally inadmissible. Therefore, “unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction. The parties acceded to that procedure here. Trying all three charges simultaneously would have unduly prejudiced petitioner by bringing his prior convictions to the attention of the jury to which the breaking-and-entering and grand larceny charges would be tried. Accordingly, the trial court severed the felon-in-possession charge from the other two charges. The Commonwealth elected to first try Currier for breaking and entering and grand larceny. Notably, due to a discovery violation, the trial court excluded from evidence a DNA report connecting Currier to a cigarette butt found in the pickup truck used in the theft. In the end, both the prosecution and defense agreed that the sole issue before the jury was whether Currier was involved in stealing the safe. The prosecutor argued to the jury: “What is in dispute? Really only one issue and one issue alone. Was the defendant, Michael Currier, one of those people that was involved in the offense?” The jury acquitted Currier of both charges concerning the theft of the safe. The Commonwealth insisted on pressing ahead with the felon-in-possession prosecution. In response, Currier asserted that the issue preclusion component of the Double Jeopardy Clause barred the Commonwealth from trying to convince a second jury that he had been involved in the break-in and theft. In a related motion, Currier asked to have the felon-in-possession charge dismissed outright, emphasizing that “if he did not steal the firearms[,] he cannot [have] possess[ed] the firearms.” The trial court denied both motions. It described the issue preclusion doctrine as concerned with “prevent[ing] the Commonwealth from subjecting the accused to the hazards of vexatious multiple prosecutions.” Reasoning that the Commonwealth had not sought separate trials for the purpose of harassing Currier—t o the contrary, it had been required to try the charges separately to avoid unduly prejudicing him—the court held that this concern was not implicated. The case then proceeded to trial for a second time.

The Commonwealth advanced the same basic theory as in the first trial: that petitioner broke into the residence and helped steal the safe containing cash and firearms. But given the second opportunity to convince a jury of Currier's involvement in the break-in and theft, the Commonwealth modified its presentation in two ways: (1) Its key witnesses refined their testimony and redelivered it with greater poise; and (2) the Commonwealth corrected its procedural error from the first trial by successfully introducing into evidence the cigarette butt found in the back of the pickup truck—thereby confirming that Currier had at some point been in the truck used to steal the safe. This time, the jury found Currier guilty and sentenced him to five years in prison. Currier moved to set aside the verdict on double jeopardy grounds. The trial court acknowledged that the jury in the first trial had necessarily rejected the theory the Commonwealth renewed in the second trial: "If they didn't find him guilty of [stealing] the safe, they didn't find him guilty of [possessing] the guns" inside it. The court, however, denied Currier's motion. It reasoned that issue preclusion did not apply because the severance had not been an attempt by the government to infringe upon Currier's Fifth Amendment protection against double jeopardy, but rather to protect him from undue prejudice. The Virginia Court of Appeals affirmed, although recognizing that courts are divided over whether issue preclusion applies when the defendant has obtained severance of the charges against him and the first trial results in an acquittal. It acknowledged that one of the purposes of the Double Jeopardy Clause is to protect final judgments; nevertheless, the court held that issue preclusion did not apply because the Clause's other purpose—preventing prosecutorial overreaching through successive trials—was not implicated. It saw no overreaching in this case because the separate trials occurred with the defendant's consent and for his benefit." The Virginia Supreme Court affirmed. Currier filed this cert petition. Question presented: Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue preclusive effect of an acquittal.

IV. CRIMES

- A. **Intimidating or Impeding IRS Officer.** *Marinello v. United States*, 137 S. Ct. ___ (cert. granted June 27, 2017); decision below at 839 F3d 209 (2d Cir. 2016). The Internal revenue Code at 26 U.S.C. § 7212(a) includes the following residual clause provision:

Whoever corruptly or by force . . . endeavors to intimidate or impede any officer . . . of the United States acting in an official capacity under this title, ***or in any other way corruptly or by force . . . endeavors to obstruct or impede[] the due administration of this title***, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both

(emphasis added). The question presented is whether § 7212(a)'s residual clause, italicized above, requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct. The Sixth Circuit has limited the potentially broad sweep of the conduct criminalized under § 7212(a), holding that the clause is limited to cases in which the defendant knew of a pending IRS action. *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998); *United States v. Miner*, 774 F.3d 336, 342-45 (6th Cir. 2014). The Sixth Circuit is in the minority, however. The Second Circuit in this case instead followed three other circuits (First, Ninth, and Tenth) to uphold Mr. Marinello's conviction under the clause, which the jury could have found was based on any one of the following acts, but did not need to decide unanimously as to which: "failing to maintain corporate books and records for Express Courier [his small business]"; "failing to provide [his] accountant with complete and accurate information related to [his] personal income and the income of Express Courier"; "destroying, shredding and discarding business records of Express Courier"; "cashing business checks received by Express Courier for services rendered"; and "paying employees of Express Courier with cash." Judges Jacobs and Cabranes dissented from the denial of rehearing en banc, warning that "[i]f this is the law, nobody is safe." They continued:

The panel opinion in *Marinello* affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed. . . . The panel opinion likely took comfort in the *mens rea* requirement that the act or acts be done "corruptly." Any such comfort is surely an illusion, for two reasons. First, the risk of wrongful conviction, even with a *mens rea* requirement, is real: the line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active. Second, alleging a corrupt motive is no burden at all. Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is

also the power to destroy people. How easy it is under the panel's opinion for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict anybody.

The saving requirement that the Sixth Circuit added is that there must have been a pending IRS action of which the defendant was aware. That measure goes a good way toward setting some bounds. It construes the statute as a specialized tool for active IRS investigations, rather than a prosecutor's hammer that can be brought down upon any citizen.

(Hat tip to Jennifer Coffin for her analysis of the underlying decisions, much of which is included in this summary)

V. TRIAL AND PLEA

- A. **Post-Trial Inquiry of Juror Prejudice.** *Pena-Rodriguez v. Colorado*, 137 S. Ct. ___ (Mar. 6, 2017). A man entered a women's bathroom at a Denver horse-racing track and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him away. The man also grabbed the other girl's shoulder and buttocks. The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was another employee at the racetrack, who worked in the nearby horse barn. From that description, their father surmised they were referring to Mr. Pena-Rodriguez. At his criminal trial for unlawful sexual contact and harassment, a juror injected racial animus into the deliberations—urging, for example, that the jury convict petitioner "because he's Mexican and Mexican men take whatever they want," and that the jury disbelieve petitioner's alibi witness because the witness was Hispanic. The jury convicted the defendant after deliberating for 12 hours and being given an *Allen* charge. The jurors' comments were revealed to defense counsel by two other jurors in a post-trial informal discussion. After learning of these statements, Mr. Pena-Rodriguez sought a new trial, claiming a violation of his constitutional right to an impartial jury. But the Colorado Supreme Court held that the Sixth Amendment allows a "no impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict. In fact, most states and the federal government have a rule of evidence generally prohibiting

the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law. The Supreme Court has ruled, in *Warger v. Shauers*, 135 S. Ct. 521 (2014), and *Tanner v. United States*, 483 U.S. 107 (1987), that the Sixth Amendment posed no barrier to ignoring affidavits alleging, respectively, that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue and that jurors were intoxicated during trial; but it also cautioned that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. The Supreme Court granted cert. here to decide if a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury. In an opinion by Justice Kennedy, the Supreme Court held (5-3) that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." PRACTICE NOTE: The Court cautioned that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." Justice Alito dissented, joined by Chief Justice Roberts and Justice Thomas.

1. **COA for Juror's Alleged Racial Bias.** *Tharpe v. Sellers*, 138 S. Ct. ___ (Jan. 8, 2018) (per curiam). Tharpe moved to reopen his federal habeas corpus proceedings under Fed. R. Civ. P. 60(b) regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. The district court denied the motion on the ground that, among other things,

Tharpe's claim was procedurally defaulted in state court. The district court also noted that Tharpe could not overcome that procedural default because he had failed to produce any clear and convincing evidence contradicting the state court's determination that Gattie's presence on the jury did not prejudice him. Tharpe sought a certificate of appealability, which the Eleventh Circuit denied after deciding that jurists of reason could not dispute that the district court's procedural ruling was correct. The Eleventh Circuit's decision, as the Supreme Court read it, was based solely on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Supreme Court reversed (6-3). It noted that Tharpe had produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." The Court held that Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. Thus, the Court held, the Eleventh Circuit erred when it concluded otherwise. The Court also noted the ground on which the Eleventh Circuit chose to dispose of Tharpe's application—prejudice—is not the only question relevant to the broader inquiry whether Tharpe should receive a COA. The district court denied Tharpe's Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit. As to those additional issues, the majority expressed no view. It also noted that under the applicable standard for relief from judgment under Rule 60(b)(6), which is available only in " 'extraordinary circumstances,' " *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), Tharpe faces a high bar in showing that jurists of reason could disagree whether the district court abused its discretion in denying his motion. It may be that, at the end of

the day, Tharpe should not receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the Court of Appeals' review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe. Justice Thomas dissented, joined by Alito and Gorsuch. In their view Tharpe will not be able to meet the procedural requirements for relief and the remand is therefore is an unnecessary do-over.

B. Appellate Consequences of Guilty Plea. *Class v. United States*, 137 S. Ct. ___ (cert. granted Feb. 21, 2017); decision below unreported (D.C. Cir. 2016). The defendant had firearms in his car, which was parked and locked in a parking lot on the grounds of the U.S. Capitol. He was charged with violation of 40 U.S.C. § 5104(e), which prohibits carrying on, or having readily accessible, a firearm on the grounds of the U.S. Capitol building. In defense, he raised Second Amendment and due process challenges, but he ultimately pled guilty, conceding his factual guilt. The plea agreement did not contain an express waiver of his right to appeal his conviction. On appeal, he re-raised his constitutional challenges to the statute. The D.C. Circuit held that by pleading guilty, he waived all “claims of error on appeal, even constitutional claims.” The Supreme Court granted cert. to decide if “a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.” The question implicates two prior Supreme Court decisions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), the Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does not depend on challenging his “factual guilt.” In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime. In the years since those two cases were decided, the circuits have become deeply divided on whether a defendant's challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt. Two circuits (First and Tenth) agree with the D.C. Circuit that a guilty plea waives constitutional challenges to the statute of conviction. Other circuits (Third, Fifth, Sixth, Ninth, and Eleventh) hold that a guilty plea does not inherently waive such constitutional challenges. Three others (Fourth, Seventh, and Eighth) allow facial, but not as-applied, constitutional challenges to a conviction.

C. **Immigration Consequences of Guilty Plea.** *Lee v. United States*, 137 S. Ct. ___ (June 23, 2017). In 1982, Jae Lee and his family moved from South Korea to the United States. After completing high school, Lee moved to Memphis and became a successful restaurateur. He also started using—and sharing—ecstasy at parties and was charged in 2009 with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1). Because the evidence against Mr. Lee was considered quite strong, his attorney advised him to plead guilty in exchange for a shorter sentence. The attorney assured Mr. Lee that the plea would not subject him to deportation, but that advice was wrong. Possession of ecstasy with intent to distribute is an aggravated felony that results in mandatory and permanent deportation. *See* 8 U.S.C. §§ 1101(a)(43)(B), 1227 (a)(2)(A)(iii); 1182(a)(9)(A)(i). Upon learning of this consequence, Lee moved to vacate his conviction and sentence under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The government conceded that his attorney provided deficient performance, the first part of the two-part test under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The question presented was whether Lee can demonstrate prejudice under the second part of *Strickland* where he is deemed to be facing strong evidence of guilt. The Sixth Circuit held that Lee could not show prejudice because he had “no *bona fide* defense, not even a weak one,” so he “stood to gain nothing from going to trial but more prison time.” The Supreme Court reversed (6-2) in an opinion written by Chief Justice Roberts, holding that Lee was prejudiced by his attorney’s bad advice. The question is not whether, had he gone to trial, the result of the trial would have been different than the result of the plea bargain. Rather, the question is whether Lee could show a reasonable probability that, but for counsel’s bad advice, he would have insisted on going to trial rather than give up that right. Here, Lee was prejudiced under the proper standard despite that he “knew, correctly, that his prospects of acquittal at trial were grim, and his attorney’s error had nothing to do with that.” The Court rejected the government’s request that the Court, like the Sixth Circuit, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Justice Thomas dissented, joined by Justice Alito. Justice Thomas reasoned: “Under the majority’s standard, defendants bringing these challenges will bear a relatively low burden to show prejudice.” . . . “[A] defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the ‘smallest chance of success at trial’—relying on nothing more than a ‘Hail Mary’—may be able to satisfy it.” “[A] challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking,” requiring a hearing in

every case. [ENDNOTE: On remand, the government voluntarily dismissed the indictment.]

VI. SENTENCING

A. Sentencing Variances in Counts Accompanying § 924(c) Convictions. *Dean v. United States*, 137 S. Ct. 368 (Apr. 3, 2017). Levon Dean and his brother were charged and convicted of various counts relating to two Hobbs Act robberies of different drug dealers, and possession of a firearm in furtherance of the robberies. Dean was sentenced to 400 months for the robberies, including consecutive terms of 60 and 300 months for the § 924(c) violations. At sentencing, Dean requested a variance to 1 day from the advisory guideline range of 84-105 months on the guidelines counts that did not carry mandatory minimum or consecutive terms, but U.S. District Judge Mark Bennett declined, stating that he had no authority to do so under Eighth Circuit precedent, because 924(c) did not permit it. He did state, however, that if he did have such authority he would have sentenced Dean to 360 months on the § 924(c) convictions, and a one-day sentence on the remaining convictions. Instead, he departed downward somewhat from the guidelines range, sentencing Dean to 40 months in addition to his mandatory 360 month sentence. The Eighth Circuit affirmed the 400-month sentence, holding that its decision in *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), controlled. The panel did not address Dean’s argument that the Court’s decision in *Pepper v. United States*, 562 U.S. 476 (2011), overruled *Hatcher*. *Pepper* held that 18 U.S.C. § 3661 states “no limitation” may be placed on a court’s power to consider information about a defendant’s “background, character, and conduct” when seeking to fashion an appropriate sentence. Dean argued that by failing to consider the sentences imposed on the §924(c) charges, a court is essentially barred from considering an entire category of information about a defendant and risks contravening express Congressional intent in 18 U.S.C. § 3661. The Supreme Court reversed the Eighth Circuit in a unanimous decision written by Chief Justice Roberts, holding that a district court is free to consider the mandatory minimum and mandatory consecutive sentence required by 18 U.S.C. § 924(c) in determining the sentence for the underlying predicate offense. “Nothing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count.” In other words, “nothing . . . prevents a district court from imposing a 30-year mandatory minimum sentence under § 924(c) and a one-day sentence for the predicate violent or drug trafficking crime, provided those terms run one after the other.” In the present case of Levon Dean, who

was 23 years old when he committed the two robberies, the fact “[t]hat he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether—in connection with his predicate crimes—still more incarceration is necessary to protect the public. Likewise, in considering ‘the need for the sentence imposed . . . to afford adequate deterrence,’ § 3553(a)(2)(B), the District Court could not reasonably ignore the deterrent effect of Dean’s 30-year mandatory minimum.”

B. Eligibility for Sentence Reduction Based on Retroactive Reduction of Applicable Sentencing Guidelines Under 18 U.S.C. §3582(c)(2)

- 1. Eligibility Following Rule 11(c)(1)(C) Sentence.** *Hughes v. United States*, 138 S. Ct. ___ (cert. granted Dec. 8, 2017); decision below at 849 F.3d at 1008 (11th Cir. 2017). Is a defendant who enters into an agreed sentence under Fed. R. Crim. P. 11(c)(1)(C) eligible for a later sentence reduction based on a retroactively applicable change in the Sentencing Guidelines, under 3582(c)(2)? The application and construction of seemingly competing Supreme Court precedent is highlighted by the detailed question presented by petitioner: “This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor’s concurrence shared no common rationale and the courts of appeals have divided over how to apply *Freeman*’s result. The questions presented are: (1) Whether this Court’s decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality’s reasoning nor the concurrence’s reasoning is a logical subset of the other; (2) Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor’s separate concurring opinion with which all eight other Justices disagreed. (3) Whether, as the four-Justice plurality in *Freeman* concluded, a defendant

who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.”

2. Eligibility Following Substantial Assistance Sentence.

Koons v. United States, 138 S. Ct. ___ (cert. granted Dec. 8, 2017); decision below at (850 F.3d 973 (8th Cir. 2017)). Koons, and four similarly situated defendants in other cases, received initial sentences reduced to account for their substantial assistance to the government. Koons, for example, was sentenced to 180 months of prison after pleading guilty to conspiracy to distribute 500 grams or more of meth, a violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(A), 846 and 851. The sentencing court found Offense Level 31–Criminal History IV = advisory range of 151-188 months, which was elevated to 240 months based on the statutory minimum mandatory sentence. The 180 month sentence resulted because the 240 months was reduced by 25% based on a government motion recognizing substantial assistance. Each of the defendants was denied later sentence reductions under 18 U.S.C. § 3582(c)(2), after the U.S. Sentencing Commission implemented guideline amendment 782, retroactively applying sentence reductions in such cases. Their cases were consolidated on appeal and each was categorically denied eligibility for relief: The Eight Circuit held that a defendant sentenced based on a mandatory minimum was not sentenced “based on a sentencing range that has been lowered” by the sentencing commission, as required by § 3582(c). Question Presented: Whether a defendant who is subject to a statutory mandatory minimum sentence, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e), is eligible for a further sentence reduction under 18 U.S.C. § 3582(c)(2), when the Sentencing Commission retroactively lowers the advisory sentencing guidelines range that would have applied in the absence of the statutory mandatory minimum.

- C. Forfeiture.** *Honeycutt v. United States*, 137 S. Ct. ___ (June 5, 2017). Under 21 U.S.C. § 853(a)(1), any person convicted of a federal drug crime must forfeit “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.” This case concerned the application of § 853(a)(1) to individuals convicted of participating in a drug conspiracy who did not personally receive proceeds of that conspiracy. In an 8-0 decision, the

Supreme Court held that § 853(a)'s limitation of forfeiture to tainted property acquired or used by the defendant, together with the plain text of § 853(a)(1), foreclose joint and several liability for co-conspirators. Justice Gorsuch took no part in the decision.

VII. DEATH PENALTY

- A. **IAC for Conceding Guilt Over Client's Objection.** *McCoy v. Louisiana*, 137 S. Ct. ___ (cert. granted Sept. 28, 2017); decision below at 218 So.3d 535 (La. 2017). McCoy was convicted and sentenced to death after his counsel conceded his guilt over his repeated, timely and express objections. Throughout his representation by a public defender and his subsequent representation by retained counsel McCoy steadfastly and adamantly maintained his innocence, and repeatedly stated his desire to plead not guilty, to go to trial, to advance his innocence claim and ultimately, to secure a complete acquittal. McCoy had moved for his public defender to be removed due to his belief that the public defenders were doing nothing to assist him in proving his innocence, resulting in a breakdown in their relationship. Instead, he sought to represent himself until he could retain counsel. Following a *Faretta* hearing, McCoy was permitted to represent himself on the understanding that he would represent himself through trial if he did not retain counsel. Eventually a retained lawyer appeared on his behalf, paid for by his parents. About a month prior to trial, defense counsel visited with McCoy to tell him that his case could not be won and that he needed to take a plea. McCoy adamantly refused to take a plea. Two weeks prior to trial, a hearing was held at which counsel stated that he would not offer any alibi evidence, despite McCoy's *pro se* alibi notice, and declined to adopt any of the subpoenas McCoy had filed. Immediately after the court hearing, counsel visited McCoy in jail and told him for the first time that he intended to concede that McCoy was the killer. McCoy emphatically opposed this course. The trial court denied McCoy's subsequent request to discharge counsel as untimely, given that substitute counsel were not present and trial was due to start in two days. McCoy immediately sought to represent himself but the trial court cut him off, refusing to entertain the request on the basis that it was untimely. Counsel then sought guidance from the trial court, advising that contrary to his intention, McCoy wished a defense to be presented in the guilt phase of his trial; the trial court ruled that as counsel was the attorney, it was for counsel to make the decision of what defense he would proceed with at trial. During his opening statement, counsel explicitly and repeatedly conceded that McCoy had murdered the three deceased: "I'm telling you, Mr. McCoy committed these crimes." Counsel argued for verdicts of second degree murder on a theory of diminished capacity, a theory that is seemingly foreclosed by Louisiana law. McCoy immediately interrupted defense counsel's opening statement and renewed his objection to being represented by him and to

his concession of guilt. He reiterated his objection to being represented by this defense counsel, which was overruled. McCoy then exercised his right to testify in his own defense, asserting his complete innocence, testifying to his alibi, refuting the State's evidence and describing a drug trafficking ring headed by law enforcement personnel that was responsible for the killings and for framing him. Yet, in closing argument, defense counsel once again repeatedly and emphatically argued that McCoy murdered the three victims ("He killed them") and explicitly stated that he had relieved the State of its burden of proof and the jury of its burden in this regard. Question presented: (1) Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection? (The Court did not grant cert on Question 2, which raised a *Batson* claim)

B. Execution of Intellectually Disabled Persons. *Moore v. Texas*, 137 S. Ct. ___ (Mar. 28, 2017). Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed fact findings and determined that, under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. ___ (2014), Moore qualified as intellectually disabled. For that reason, the court concluded, Moore's death sentence violated the Eighth Amendment's proscription of "cruel and unusual punishments." The habeas court therefore recommended that Moore be granted relief. The Texas Court of Criminal Appeals declined to adopt the judgment recommended by the state habeas court. In the court of appeal's view, the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (2004). The appeals court further determined that the evidentiary factors announced in *Briseno* "weigh[ed]heavily" against upsetting Moore's death sentence. In a 5-3 decision authored by Justice Ginsburg, the Supreme Court vacated the Texas appellate judgment. "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' . . . That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors 'creat[e]an unacceptable risk that persons with intellectual disability will be executed,' . . . Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as

intellectually disabled.” Chief Justice Roberts dissented, joined by Justices Thomas and Alito.

- C. Reasonably Necessary Investigative Costs in Capital Collateral Review.** *Ayestas v. Davis, Dir. Tex. DCJ*, 137 S. Ct. ___ (cert. granted Apr. 3, 2017); decisions below at 817 F.3d 888 and 826 F.3d 214 (5th Cir. 2016). While Carlos Ayestas’ federal habeas proceeding was pending, the Harris County District Attorney’s Office (“HCDA”) accidentally disclosed a document memorializing the basis of its charging decision. The author of that HCDA charging memo had provided as one of two typewritten reasons for seeking the death penalty “THE DEFENDANT IS NOT A CITIZEN.” The lower federal courts have denied the routine stay-and-amendment procedure necessary to exhaust the claims associated with the HCDA memo in state court. The lower courts have also denied Mr. Ayestas’ motion, under 18 U.S.C. § 3599, for “investigative, expert, [and] other services” that were “reasonably necessary” to develop facts associated with a separate Sixth Amendment ineffective assistance-of-counsel (“IAC”) claim that had been forfeited by his state habeas lawyer. The Fifth Circuit interprets “reasonably necessary” to require an inmate to show “substantial need,” an interpretation of § 3599(f) that forms an express circuit split with other federal courts of appeal. Through the substantial-need standard, the Fifth Circuit withholds expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself. Ayestas raised two claims in his cert petition, one involving anticipatory procedural default, and the second addressing reasonably necessary investigative costs. The Supreme Court granted cert on only the second question: (2) Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds “reasonably necessary” resources to investigate and develop an IAC claim that state habeas counsel forfeited, where the claimant’s existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.

VIII. APPEALS

- A. Fourth Prong of Plain Error Review.** *Rosales-Mireles v. United States*, 137 S. Ct. ___ (cert. granted Sept. 28, 2017); decision below at 850 F.3d 246 (5th Cir.2017). Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The PSR calculated a total offense level of 21 and criminal history of 13 points, resulting in a criminal history category of VI = advisory guidelines range of 77 to 96 months’ imprisonment. The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal

history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was V, yielding an advisory Guidelines range of 70 to 87 months. Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence would be a within-Guidelines sentence. The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment. On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double counting the prior conviction in his criminal history. The government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error. The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. It also held that Rosales had satisfied the third prong of plain-error review. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. And the district court did not explicitly and unequivocally indicate that it would have imposed the same sentence irrespective of the Guidelines range. Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009))). Such errors, the court said, are "ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "no discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." The court of appeals thus affirmed. Question presented: In *United States v. Olano*, the Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the Fifth Circuit Court of Appeals required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of

justice, or seriously call into question the competence or integrity of the district judge?”

- B. Perfecting Appeal of Deferred Restitution Judgment.** *Manrique v. United States*, 137 S. Ct. ___ (Apr. 19, 2017). Sentencing courts are required to impose restitution as part of the sentence for specified crimes. But the amount to be imposed is not always known at the time of sentencing. When that is the case, the court may enter an initial judgment imposing certain aspects of a defendant’s sentence, such as a term of imprisonment, while deferring a determination of the amount of restitution until entry of a later, amended judgment. Does a single notice of appeal filed after the initial sentence, but before the amended judgment including restitution, suffice, or must the appellant file two notices of appeal? In a 6-2 decision authored by Justice Thomas, the Supreme Court held that a single notice of appeal does not suffice, at least where, as here, the government objects to the defendant’s failure to file a notice of appeal following the amended judgment. Fed. R. App. P. 4(b)(2), relating to premature notices of appeal, does not apply to mature the original notice of appeal since it was filed before restitution was actually ordered. The filing of a notice of appeal is required by a claim processing rule, so if the government objects to its timely filing, the appeal should be dismissed “We hold that a defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order.” Justice Ginsburg dissented, joined by Justice Sotomayor. [Disclosure: The Office of the Federal Public Defender for the Southern District of Florida served as counsel for Mr. Manrique.]
- C. Return of Fees, Costs and Restitution after Appellate Reversal of Conviction.** *Nelson v. Colorado*, 137 S. Ct. ___ (Apr. 19, 2017). When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? In a 7-1 decision authored by Justice Ginsburg, the Court held, “Our answer is yes. Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment’s guarantee of due process.” Justice Alito concurred, while Justice Thomas dissented.

IX. IMMIGRATION

A. **False Statement re Citizenship Application.** *Maslenjak v. United States*, 137 S. Ct. 809 (June 22, 2017). Divna Maslenjak and her husband, Ratko, are ethnic Serbs who resided in Bosnia during the 1990's, when a civil war between Serbs and Muslims divided the new country. In 1998, she, her husband and two children met with an American immigration official to seek refugee status in the United States. Interviewed under oath, Maslenjak explained that the family feared persecution in Bosnia from both sides of the national rift. Muslims, she said, would mistreat them because of their ethnicity. And Serbs, she testified, would abuse them because her husband had evaded service in the Bosnian Serb Army by absconding to Serbia—where he remained hidden, apart from the family, for some five years. Persuaded of the Maslenjaks' plight, American officials granted them refugee status, and they immigrated to the United States in 2000. Six years later, Maslenjak applied for naturalization. Question 23 on the application form asked whether she had ever given "false or misleading information" to a government official while applying for an immigration benefit; question 24 similarly asked whether she had ever "lied to a[] government official to gain entry or admission into the United States." Maslenjak answered "no" to both questions, while swearing under oath that her replies were true. She also swore that all her written answers were true during a subsequent interview with an immigration official. In August 2007, Maslenjak was naturalized as a U.S. citizen. But Maslenjak's professions of honesty were false: In fact, she had made up much of the story she told to immigration officials when seeking refuge in this country. Her fiction began to unravel at around the same time she applied for citizenship. In 2006, immigration officials confronted Maslenjak's husband Ratko with records showing that he had not fled conscription during the Bosnian civil war; rather, he had served as an officer in the Bosnian Serb Army. And not only that: He had served in a brigade that participated in the Srebrenica massacre—a slaughter of some 8,000 Bosnian Muslim civilians. Within a year, the government convicted Ratko on charges of making false statements on immigration documents. The newly naturalized Maslenjak attempted to prevent Ratko's deportation. During proceedings on that matter, Maslenjak admitted she had known all along that Ratko spent the war years not secreted in Serbia but fighting in Bosnia. As a result, the government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U.S.C. §1425(a). According to the government's theory, Maslenjak violated §1425(a) because, in the course of procuring her naturalization, she broke another law: 18 U.S.C. §1015(a), which prohibits knowingly making a false statement under oath in a

naturalization proceeding. The false statements the government invoked were Maslenjak's answers to questions 23 and 24 on the citizenship application (stating that she had not lied in seeking refugee status) and her corresponding statements in the citizenship interview. Those statements, the government argued to the district court, need not have affected the naturalization decision to support a conviction under §1425(a). The court agreed: Over Maslenjak's objection, it instructed the jury that a conviction was proper so long as the government "prove[d] that one of the defendant's statements was false"—even if the statement was not "material" and "did not influence the decision to approve [her] naturalization." She was found guilty and the district court, based on that finding, stripped Maslenjak of her citizenship under 8 U.S.C. §1451(e). Her conviction was affirmed on appeal, but reversed by the Supreme Court (9-0) in an opinion by Justice Kagan (with Justice Gorsuch concurring and concurring in the judgment -- joined by Thomas-- and with Justice Alito, concurring in the judgment). Justice Kagan's opinion for the majority interpreted section 1425(a) to contain a "requirement of causal influence. "To get citizenship unlawfully . . . is to get it through an unlawful means," which requires that the "illegality played some role in its acquisition." To meet this requirement in a prosecution predicated on a false statement, the government may show either that (1) "the facts the defendant misrepresented are themselves disqualifying"; or (2) that the truth would have prompted reasonable officials to undertake further investigation, which "would predictably have disclosed some legal disqualification."

- B. Derivative Citizenship.** *Sessions v. Morales-Santana*, 137 S. Ct. ___ (June 12, 2017). In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. Under the main rule, an unwed U.S. citizen father may transmit citizenship to his child if he had been present in the U.S. for five years before the child's birth. (The rule was previously ten years.) This rule applies also to married couples. Congress made an exception for unwed U.S. citizen mothers, who may transmit citizenship if she has lived in the U.S. for just one year pre-birth. In an opinion by Justice Ginsburg, the Court held (8-0) that the gender line Congress drew is incompatible with the requirement that the government accord to all persons "the equal protection of the laws." Nevertheless, the Court held, it cannot convert §1409(c)'s exception for unwed mothers into the main rule displacing §1401(a)(7) (covering married couples) and §1409(a) (covering unwed fathers). "We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten

years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination.” What this means is that until Congress changes the law, the current five-year rule for unwed fathers applies, rather than the one-year rule for unwed mothers. Importantly, this new rule applies only to children of unwed mothers who are born AFTER today, since citizenship is automatically acquired at birth and a later decision can't strip you of it. As the Court states: “In the interim [until Congress adopts a uniform rule], as the Government suggests, §1401(a)(7)’s now-five- year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers. See Brief for Petitioner 12, 51; Reply Brief 19, n.3.” For ease of reference, here is what the government said in its Reply Brief:

Respondent errs in suggesting (Br. 56) that the government’s proposed remedy would withdraw citizenship from children born abroad between 1952 and 1986 who would qualify for citizenship under Section 1409(c). The government proposes (Gov’t Br. 51) imposing the longer physical-presence requirement in Section 1401(a)(7) on children born abroad out of wedlock to U.S.-citizen mothers, but only on a prospective basis. The Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for a continuous period of one year before the birth (but less than the ten or five years of physical presence required by Section 1401(a)(7)). The Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. *Cf. Heckler v. Mathews*, 465 U.S. 728, 745-750 (1984) (upholding Congress’s decision to continue for certain individuals a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests).

The full reply brief is available at 2016 WL 6472054 (U.S. 2016). If you are currently litigating a case for a child of an unwed mother, the physical presence requirement should still be one year. NOTE: This case was decided in the context of removal proceedings. Those who have closely followed this issue believe there is a good argument that

footnote 24 means that for purposes of criminal prosecutions under 1325/1326, a client born out of wedlock to a U.S. citizen father would only have to prove one year of physical presence. Keep this in mind when screening clients for citizenship. Footnote 24 states:

We note, however, that a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), for example, the defendant participated in a civil rights demonstration in front of a school. Convicted of violating a local “antipicketing” ordinance that exempted “peaceful picketing of any school involved in a labor dispute,” he successfully challenged his conviction on equal protection grounds. *Id.*, at 107 (internal quotation marks omitted). It was irrelevant to the Court’s decision whether the legislature likely would have cured the constitutional infirmity by excising the labor dispute exemption. In fact, the legislature had done just that subsequent to the defendant’s conviction. *Ibid.*, and n.2. “Necessarily,” the Court observed, “we must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted.” *Id.*, at 107, n.2. *See also Welsh*, 398 U.S., at 361–364 (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would cure the unequal treatment by extending rather than invalidating the criminal proscription).

In *Grayned*, the Court held that an ordinance that violated the equal protection clause was unconstitutional, and thus invalid, on its face. As a result, “Appellant’s conviction under this invalid ordinance must be reversed.” *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972). In *Welsh*, Justice Harlan would have held a statute violated the Establishment Clause. Because the petitioner was convicted under an unconstitutional statute that extended benefits to others not accorded to him, “this conviction must be reversed [] unless *Welsh* is to go remediless.” *Welsh v. United States*, 398 U.S. 333, 361-62 (1970) (Harlan, J., concurring in the result). [Special thanks to SRC Jennifer Coffin and San Diego AFD Kara Hartzler for preparing this in-depth summary and practice guide].

- C. **Unconstitutional Vagueness of 18 U.S.C. § 16(b).** *Sessions v. Dimaya*, 137 S. Ct. 31 (cert. granted Sept. 29, 2016); decision below at

803 F.3d 1110 (2d Cir. 2016). **[NOTE – Restored to the calendar for reargument during the Oct. 2017 Term]** Whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act’s provisions governing an alien’s removal from the United States, is unconstitutionally vague. This is a certiorari petition filed by the government, seeking to overturn the Ninth Circuit’s holding that the provision—a residual clause similar to that found vague in *Johnson*—is also void for vagueness, following the Supreme Court’s decision in *Johnson*. There is presently a circuit split on this question: The Sixth, Seventh, Ninth, and Tenth Circuits have held that § 16(b) is unconstitutionally vague under the reasoning in *Johnson*; the Fifth Circuit held that it is not. The residual clause in § 16(b) is identical to the residual clause in 18 U.S.C. § 924(c)(3)(B), so the outcome in this case will likely also decide whether the residual clause in § 924(c)(3)(B) is unconstitutionally vague.

- D. Categorical Approach to Sex Between 20-Year-Old and 16-Year-Old.** *Esquivel-Quintana v. Sessions*, 137 S. Ct. ___ (May 30, 2017). Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct. At issue here was whether Juan Esquivel-Quintana’s conviction under a California statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old (almost 18 year old) qualified as “sexual abuse of a minor” under the Immigration and Nationality Act (INA). The Immigration and Nationality Act provides that “[a]ny alien who is convicted of an aggravated felony after admission” to the United States may be removed from the country by the Attorney General. 8 U.S.C. §1227(a)(2)(A)(iii). One of the many crimes that constitutes an aggravated felony under the INA is “sexual abuse of a minor.” §1101(a)(43)(A). A conviction for sexual abuse of a minor is an aggravated felony regardless of whether it is for a “violation of Federal or State law.” §1101(a)(43). The INA does not expressly define sexual abuse of a minor. The question presented was whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualifies as sexual abuse of a minor under the INA. In an 8-0 decision authored by Justice Thomas, the Supreme Court held that it does not. Employing the categorical approach from *Moncrieffe v. Holder* and *Johnson v. United States*, the Court explained that it must presume that Esquivel-Quintana’s no contest plea and resulting conviction “rested upon . . . the least of th[e] acts’ criminalized by the statute, and then . . . determine whether that conduct would fall within the federal definition of the crime.” It concluded that in order to fit within the definition of “sexual abuse of a

minor” under INA, the minor had to be under the age of consent, which is 16 years old. Justice Gorsuch took no part in the decision.

X. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254 AND 2255

A. **Application of *Johnson* to Federal Sentencing Guidelines.** *Beckles v. United States*, 137 S. Ct. ___ (Mar. 6, 2017) *Johnson v. United States*, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining “violent felony”). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2) (defining “crime of violence”). But the Supreme Court ruled (7-0) that *Johnson*’s holding does not apply to the post-*Booker* federal sentencing guidelines, which are only advisory. In an opinion written by Justice Thomas, the Court held that “the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause” and that § 4B1.2’s residual clause is not void for vagueness. The majority reasoned that the advisory guidelines do not “fix the permissible sentences” for the defendant, but “merely guide the exercise of the court’s discretion.” According to the Court’s majority, the advisory guidelines do not “implicate the twin concerns underlying vagueness doctrine”—notice and preventing arbitrary enforcement. Even if a person regulates his or her conduct to avoid a guideline enhancement, such as the career offender enhancement, the sentencing court has the discretion to impose the same enhanced sentence. And the district court “did not ‘enforce’ the career offender Guideline” against Beckles; it merely enforced the statutory penalty range for Beckles’ conviction under § 922(g). Justice Ginsburg concurred in the judgment only. In her view, Beckles’ case should have been decided on the narrow ground that the Sentencing Commission identified possession of a sawed-off shotgun as a “crime of violence” in the commentary to § 4B1.2, which she says was “authoritative” under *Stinson*. She would have deferred “any more encompassing ruling” on the vagueness issue. Justice Sotomayor also concurred in the judgment only. She agreed with Justice Ginsburg that Beckles’ particular case falls on the commentary issue (stating simply that “the commentary under which he was sentenced was not unconstitutionally vague”), but wrote a lengthy opinion explaining why the majority’s vagueness analysis is wrong. She recognized that the advisory guidelines involve legal “rules” that set the “baseline” from which defendants must negotiate, and that “[y]ears of Beckles’ life thus turned solely on whether the career-offender Guideline applied.” Justice Kagan recused herself from participation in this case. **NOTE:** The Court’s holding is limited to the advisory guidelines only, leaving open the possibility

that those sentenced under the mandatory guidelines may raise vagueness challenges to their sentence. Justice Sotomayor expressly notes that the issue regarding the mandatory guidelines was not decided and was left open. Neither Justices Ginsburg nor Sotomayor fully analyzed the commentary issue. Justice Ginsburg summarily dispatched it in a single footnote, and Justice Sotomayor offered no analysis at all. If the government relies on their concurring opinions regarding the commentary issue, in this or any context, contact the Sentencing Resource Counsel Project for assistance in formulating arguments to show why the government's view is wrong. Additionally, the majority emphasized that its holding does "not render the advisory Guidelines immune from constitutional scrutiny." Among other things, it specifically pointed out that "in the Eighth Amendment context," "a district court's reliance on a vague sentencing factor in a capital case, even indirectly, 'can taint the sentence.'" (*See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992)). Justice Sotomayor, too, pointed to the Eighth Amendment and *Espinosa*, stating that "the Guidelines carry sufficient legal weight to warrant scrutiny under the Eighth Amendment." Finally, for those who have already been resentenced after *Johnson* without the career offender or § 2K2.1 enhancement, Deputy Solicitor General Michael Dreeben stated during oral argument "They will keep their sentences," (OA Tr. at 43), implying the government will not appeal those cases (at least those decided by the oral argument date in November 2016. [Disclosure: The Office of the Federal Public Defender for the Southern District of Florida served as counsel for Mr. Beckles. Also, thank you to Sentencing Resource Counsel Jennifer Coffin for providing valuable portions of this summary.]

B. *Brady* Violations.

1. ***Brady* Violations.** *Turner v. United States* and *Overton v. United States*, 137 S. Ct. ___ (June 22, 2017). Under *Brady v. Maryland*, 373 U.S. 83 (1963), evidence favorable to the defense is material, and constitutional error results from its suppression by the government, if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam). In this murder case involving seven convicted petitioners, the District of Columbia Court of Appeals required a post-conviction petitioner to show a reasonable probability that the suppressed evidence—including identifications of two potential alternative perpetrators, information suggesting that the crime was committed by a much smaller group than posited by the government, information calling into question the thoroughness and accuracy of the government's investigation, and evidence

impeaching a purported eyewitness who testified against petitioner—“would have led the jury to doubt virtually everything” about the government’s case. Applying that standard, the court rejected petitioner’s *Brady* claim, even though the jury deadlocked repeatedly before finding him guilty and the prosecution itself acknowledged that the case “easily could have gone the other way.” The Supreme Court affirmed (6-2) in an opinion by Justice Breyer. The Supreme Court held that certain evidence possessed by the government but not disclosed to the defense was not “material” for purposes of *Brady v. Maryland*. The Court “examine[d] the trial record, evaluat[ed] the withheld evidence in the context of the entire record, and determine[d] in light of that examination” that there was no “reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” Justice Kagan dissented, joined by Ginsburg. Justice Gorsuch did not participate.

XI. AEDPA

A. Certificate of Appealability

1. **Standard for IAC Claim; Race; Rule 60(b).** *Buck v. Davis*, 137 S. Ct. 759 (Feb. 22, 2017). A Texas jury convicted Duane Buck of capital murder. Under state law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Buck’s attorney called a psychologist, Dr. Quijano, to offer his opinion on that issue. The psychologist testified that Buck probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person’s propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black. The jury sentenced Buck to death. Buck contended that his attorney’s introduction of this evidence violated his Sixth Amendment right to the effective assistance of counsel. This claim was never heard on the merits in any court, because the attorney who represented Buck in his first state postconviction proceeding failed to raise it. In 2006, a federal district court relied on that failure—properly, under then-governing law—to hold that Buck’s claim was procedurally defaulted and unreviewable. In 2014, Buck sought to reopen that 2006 judgment by filing a motion under Federal Rule of Civil Procedure 60(b)(6). He argued that this Court’s decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. ___ (2013), had changed the law in a way that

provided an excuse for his procedural default, permitting him to litigate his claim on the merits. In addition to this change in the law, Buck's motion identified ten other factors that, he said, constituted the "extraordinary circumstances" required to justify reopening the 2006 judgment under the Rule. *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The district court denied the motion, and the Fifth Circuit declined to issue the certificate of appealability (COA) requested by Buck to appeal that decision. The Supreme Court granted cert. to decide the question: "Whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an 'expert' who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?" In a 6-2 decision authored by Chief Justice Roberts, the Court held that (1) the Fifth Circuit exceeded the limited scope of proper COA analysis; (2) Buck demonstrated ineffective assistance of counsel under *Strickland*; and (3) denial of the Rule 60(b) motion was an abuse of discretion. As to the first part of the holding, the Court held that the COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U.S.C. § 2253. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327. Here, the Fifth Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the case on the merits, repeatedly faulting Buck for having failed to demonstrate extraordinary circumstances. The question for the court of appeals was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. Second, the Court held that Buck demonstrated ineffective assistance of counsel under *Strickland*. To satisfy *Strickland*, a defendant

must first show that counsel performed deficiently. Buck’s trial counsel knew that Dr. Quijano’s report reflected the view that Buck’s race predisposed him to violent conduct and that the principal point of dispute during the penalty phase was Buck’s future dangerousness. Counsel nevertheless called Dr. Quijano to the stand, specifically elicited testimony about the connection between race and violence, and put Dr. Quijano’s report into evidence. No competent defense attorney would introduce evidence that his client is liable to be a future danger because of his race. *Strickland* further requires a defendant to demonstrate prejudice—“a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. The Court held that it is reasonably probable that without Dr. Quijano’s testimony on race and violence, at least one juror would have harbored a reasonable doubt on the question of Buck’s future dangerousness. This issue required the jury to make a predictive judgment inevitably entailing a degree of speculation. But Buck’s race was not subject to speculation, and according to Dr. Quijano, that immutable characteristic carried with it an increased probability of future violence. Dr. Quijano’s testimony appealed to a powerful racial stereotype and might well have been valued by jurors as the opinion of a medical expert bearing the court’s imprimatur. For these reasons, the district court’s conclusion that any mention of race during the penalty phase was *de minimis* was rejected by the Supreme Court. So was the state’s argument that Buck was not prejudiced by Dr. Quijano’s testimony because it was introduced by his own counsel, rather than the prosecution. Jurors understand that prosecutors seek convictions and may reasonably be expected to evaluate the government’s evidence in light of its motivations. When damaging evidence is introduced by a defendant’s own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value. Third, the Supreme Court held that the district court’s denial of Buck’s Rule 60(b)(6) motion was an abuse of discretion. Relief under Rule 60(b)(6) is available only in “extraordinary circumstances.” *Gonzalez*, 545 U.S. at 535. Determining whether such circumstances are present may include consideration of a wide range of factors, including “the risk of injustice to the parties” and “the risk of undermining the public’s confidence in the judicial process.” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–864. The district court’s denial of Buck’s motion rested largely on its

determination that race played only a *de minimis* role in his sentencing. But there is a reasonable probability that Buck was sentenced to death in part because of his race. This is a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are. That it concerned race amplifies the problem. Relying on race to impose a criminal sanction “poisons public confidence” in the judicial process, *Davis v. Ayala*, 576 U.S. ___, a concern that supports Rule 60(b)(6) relief. The extraordinary nature of this case is confirmed by the remarkable steps the state itself took in response to Dr. Quijano’s testimony in other cases. Although the state attempted to justify its decision to treat Buck differently from the other five defendants also subject to Dr. Quijano’s testimony in other cases, the Supreme Court found that justification suspect. Finally, the Supreme Court rejected as “waived” the state’s argument that *Martinez* and *Trevino* should not govern Buck’s case because they announced a “new rule” under *Teague v. Lane*, 489 U.S. 288, that does not apply retroactively to cases (like Buck’s) on collateral review. Justices Thomas and Alito dissented.

2. **COA for Juror’s Alleged Racial Bias.** *Tharpe v. Sellers*, 138 S. Ct. ___ (Jan. 8, 2018) (per curiam). Tharpe moved to reopen his federal habeas corpus proceedings under Fed. R. Civ. P. 60(b) regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. The district court denied the motion on the ground that, among other things, Tharpe’s claim was procedurally defaulted in state court. The district court also noted that Tharpe could not overcome that procedural default because he had failed to produce any clear and convincing evidence contradicting the state court’s determination that Gattie’s presence on the jury did not prejudice him. Tharpe sought a certificate of appealability, which the Eleventh Circuit denied after deciding that jurists of reason could not dispute that the district court’s procedural ruling was correct. The Eleventh Circuit’s decision, as the Supreme Court read it, was based solely on its conclusion, rooted in the state court’s factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had “failed to demonstrate that Barney Gattie’s behavior ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The Supreme Court reversed (6-3). It noted that Tharpe had produced a sworn

affidavit, signed by Gattie, indicating Gattie’s view that “there are two types of black people: 1. Black folks and 2. Niggers”; that Tharpe, “who wasn’t in the ‘good’ black folks category in my book, should get the electric chair for what he did”; that “[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn’t my reason”; and that, “[a]fter studying the Bible, I have wondered if black people even have souls.” The Court held that Gattie’s remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe’s race affected Gattie’s vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court’s factual determination was wrong. Thus, the Court held, the Eleventh Circuit erred when it concluded otherwise. The Court also noted the ground on which the Eleventh Circuit chose to dispose of Tharpe’s application—prejudice—is not the only question relevant to the broader inquiry whether Tharpe should receive a COA. The district court denied Tharpe’s Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit. As to those additional issues, the majority expressed no view. It also noted that under the applicable standard for relief from judgment under Rule 60(b)(6), which is available only in “‘extraordinary circumstances,’ ” *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), Tharpe faces a high bar in showing that jurists of reason could disagree whether the district court abused its discretion in denying his motion. It may be that, at the end of the day, Tharpe should not receive a COA. And review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review. But on the unusual facts of this case, the Court of Appeals’ review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie’s service on the jury did not prejudice Tharpe. Justice Thomas dissented, joined by Alito and Gorsuch. In their view Tharpe will not be able to meet the procedural requirements for relief and the remand is therefore is an unnecessary do-over.

- B. Overcoming Procedural Default by IAC.** *Davila v. Davis*, 137 S. Ct. ___ (June 26, 2017). The Court granted cert. in this death penalty case to decide if the rule established in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013)—that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial claim of ineffective-of-assistance-of-counsel by trial counsel – also applies to a procedurally defaulted, but

substantial, claim of ineffective assistance by appellate counsel. The Court answered “no” (5-4), in an opinion by Justice Thomas. The Court held that ineffective assistance of counsel in state post-conviction proceedings does not qualify as cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims. Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan.

- C. **Clearly Established Precedent re Independent Expert Assistance.** *McWilliams v. Dunn*, 137 S. Ct. ___ (June 19, 2017). Thirty-one years ago, McWilliams was convicted of capital murder by an Alabama jury and sentenced to death. The defendant’s mitigation in the penalty phase of his case was based on severe mental health disorders that resulted from multiple head injuries. In response to the defense motion for a mental health expert, the trial judge appointed an expert who reported his findings simultaneously to the court, the prosecution, and the defense just two days before the sentencing hearing. Defense counsel had no opportunity to consult with the expert or have him review voluminous medical and psychological records that were not made available to the defense until the start of the sentencing hearing. McWilliams challenged his sentence on appeal, arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. Thus, as the dissent on the Eleventh Circuit noted, “McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State’s psychiatric experts.” McWilliams petitioned for cert, arguing that this meaningless expert assistance violated his rights under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which held that when an indigent defendant’s mental health is a significant factor at trial, the State must “assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” The Supreme Court reversed (5-4), in an opinion authored by Justice Breyer. “We now consider, in this habeas corpus case, whether the Alabama courts’ refusal was ‘contrary to, or involved an unreasonable application of, clearly established Federal law.’ 28 U.S.C. §2254(d)(1). We hold that it was. Our decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively ‘assist in evaluation, preparation, and presentation of the defense.’ *Id.* at 83. Petitioner in this case did not receive that assistance.” The Court noted that *Ake* is triggered by a three-part test that is not disputed in this case: First, McWilliams is and was an “indigent defendant.” Second, his “mental

condition” was “relevant to . . . the punishment he might suffer,” And, third, his “mental condition,” i.e., his “sanity at the time of the offense,” was “seriously in question.” Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with “access to a competent psychiatrist who would conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” 470 U.S., at 83. The Court rejected Alabama’s claim that the State was exempted from its obligations because McWilliams already had the assistance of a volunteer psychologist at the University of Alabama who “volunteer[ed]” to help defense counsel “in her spare time” and suggested the defense ask for further testing. Even if this episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower court has held or suggested that the volunteer was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. The Court also rejected Alabama’s argument that *Ake*’s requirements are irrelevant because McWilliams “never asked for more expert assistance” than he got, “even though the trial court gave him the opportunity to do so.” The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed “to have someone else review” the court-appointed expert’s report and medical records. Justice Alito dissented, joined by C.J. Roberts, and Justices Thomas and Gorsuch.

D. Ineffective Assistance of Counsel as to Structural Error. *Weaver v. Massachusetts*, 137 S. Ct. ___ (June 22, 2017). Because “most constitutional errors can be harmless,” the Supreme Court has “adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction” and instead is subject to a “harmless-error analysis.” *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). At the same time, the Court has identified a category of “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless error’ standards.” *Fulminante*, 499 U.S. at 309. The consequences of such errors are “necessarily unquantifiable and indeterminate” and are therefore not susceptible to a harmless-error inquiry. *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993). Here the question presented was whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel’s ineffectiveness. The underlying structural error was closure of the courtroom to the public during jury

selection because prospective jurors filled all seats -- a matter to which defense counsel did not object and that appellate counsel did not raise on appeal. The juvenile defendant was convicted of murder and sentenced to life in prison. In post-conviction proceedings, the defendant argued that his trial counsel provided ineffective assistance because he did not object to the closure of the courtroom during jury voir dire. In an opinion by Justice Kennedy, the Court affirmed (6-2). The opinion first explained why a violation of the right to a public trial is a structural error, but concluded that “while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant’s standpoint.” In the case of an unpreserved claim of violation of the public trial right, raised in the context of a claim based on ineffective assistance of counsel, “the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or [] to show the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.” In this case, the petitioner failed to meet that burden. The court was careful to note that “[n]either the reasoning nor the holding here calls into question the Court’s precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process.” Justice Thomas, joined by Justice Gorsuch, concurred. Justice Alito also concurred, also joined by Justice Gorsuch. Justice Breyer, joined by Justice Kagan, dissented.

E. Deference to State Court Determinations in Absence of Clearly Established Supreme Court Precedent

1. **“Looking Through” Summary State Decisions.** *Wilson v. Sellers*, 137 S. Ct. ___ (cert. granted Feb. 27, 2017); decision below at 834 F.3d 1227 (11th Cir. 2016) (en banc). Question presented: Did the Supreme Court’s decision in *Harrington v. Richter*, 562 U.S. 86 (2011), silently abrogate the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) that a federal court sitting in habeas proceedings should “look through” a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc Eleventh Circuit held in this case—despite the agreement of both parties that the *Ylst* presumption should continue to apply? Due to the government’s concession, the court has appointed amicus counsel to argue that the *Ylst* rule has been abrogated.

A current edition of the
UNITED STATES SUPREME COURT
REVIEW-PREVIEW-OVERVIEW
is available at
<http://www.rashkind.com>