UNITED STATES SUPREME COURT
REVIEW-PREVIEW-OVERVIEW

CRIMINAL CASES GRANTED REVIEW AND DECIDED DURING THE OCTOBER 2015-16 TERMS THRU SEPTEMBER 30, 2016

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I. JUDGES

A. **Constitutional Right to Impartial Judge**. *Williams v. Pennsylvania*, 136 S. Ct. ___ (June 9, 2016). Chief Justice Castille of the Pennsylvania Supreme Court refused to recuse himself from a contentious death penalty appeal, in a case in which he had been the elected District Attorney who prosecuted the defendant, had personally authorized the death penalty, and had represented the state on appeal in the case. Moreover, the Chief Justice ran for his judicial position on a law and order campaign, including specific reference to his work in prosecuting the defendant. The pending appeal included significant questions of whether his DA's office committed violations of *Brady v. Maryland*. The trial court granted postconviction relief based on prosecutorial misconduct, including failure to disclose exculpatory evidence. The Pennsylvania Supreme Court overturned this decision, with the Chief Justice in the majority, although he was not the deciding vote. Two weeks later, the Chief Justice retired. The U.S. Supreme Court reversed (5-3) in an opinion authored by Justice Kennedy: "The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge "'is too high to be constitutionally tolerable.'" *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal." The majority opinion pointed to Castille's participation in the decision to seek the death penalty against Williams, and his own comments during the election campaign that made clear his role was not merely ministerial: "Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his

participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.' *Withrow*, 421 U.S., at 47." Having determined that due process was violated, the Court then determined that the error is structural, not subject to harmless error review: "The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett v. United States*, 556 U.S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision making process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. * * * [I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party." Chief Justice Roberts dissented (Alito joining), and Justice Thomas dissented separately.

II. SEARCH & SEIZURE

A. **Motor Vehicles: Criminalizing Refusal to Submit to Warrantless Alcohol Tests.** *Birchfield v. North Dakota,* 136 S. Ct. ___ (June 23, 2016). North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. A consolidated case addressed a Minnesota law making it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. Although the State acknowledges that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a "search incident to arrest." From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The U.S. Supreme Court consolidated the cases of three separate defendants and its decision yielded three results. The U.S. Supreme Court reversed and remanded one North

Dakota decision (*Birchfield*), affirmed the Minnesota conviction (*Bernard*), but vacated and remanded the other North Dakota case (*Beylund*). In an opinion by Justice Alito, the Court held (5-3) that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. A breath test is not very intrusive or embarrassing. Blood tests, though, require piercing the skin and extracting part of the defendant's body. It also gives law enforcement a sample from which they can extract more than BAC, potentially causing anxiety for the tested person. The Court's decision balanced the government's interest in preserving highway safety through incentives for cooperation in taking breath tests, against the impact of those tests on personal privacy. The balance favors the state because the impact of breath tests on personal privacy is slight and the need for BAC testing is great. Thus, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, the driver has no right to refuse, and the government can impose criminal penalties for such refusal. However, this same balance does not apply to blood tests because blood tests are more intrusive. A defendant's refusal to submit to a warrantless blood draw cannot be justified as a search incident to arrest or as based on implied consent. The Court concluded: (1) Birchfield, who refused the blood draw, was threatened with an unlawful search and unlawfully convicted for refusing that search; (2) Bernard could be criminally prosecuted for refusing a breath test because he had no right to refuse; (3) Beylund, who submitted to a blood draw after being told state law required him to submit, had his case remanded to the North Dakota Supreme Court to revisit its conclusion that his consent was voluntary in light of the partial inaccuracy of the officer's advisory. Justice Sotomayor (Ginsburg joined) concurred in part and dissented in part, and Justice Thomas dissented in a separate opinion.

B. **Search Following Unlawful Stop**. *Utah v. Strieff*, 136 S. Ct. ___ (June 20, 2016). Police were surveilling a home based upon an anonymous tip of drug dealing. Streiff was seen leaving the home and stopped by police for questioning. During the stop it was learned that there was an outstanding warrant for his arrest. In a search incident to arrest on the warrant, police found Streiff in possession of meth, a glass pipe, and a mall scale with residue. The Utah Supreme Court determined that the initial stop was unlawful and suppressed the evidence found during the arrest on the pre-existing warrant. The U.S. Supreme Court reversed (5-3) in an opinion by Justice Thomas, which found that the outstanding warrant attenuated the unconstitutional stop such that the exclusionary rule does not apply:

"To enforce the Fourth Amendment's prohibition against 'unreasonable searches and seizures,' this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest." Justice Sotomayor (joined by Ginsburg) filed an unusually strong dissent: "The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant." The dissent was particularly troubled by the prevalence of outstanding warrants for all sorts of minor violations, and it relied in part on Justice Sotomayor's own real world experience. Justice Kagan (joined by Ginsburg) filed a separate dissent: "If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent."

III. RIGHT TO COUNSEL

A. **Right to Use Untainted Funds for Legal Fees.** *Luis v. United States,* 135 S. Ct. ___ (Mar. 30, 2016). Luis is an indicted defendant in a federal criminal case, charged with health care fraud offenses. She

wishes to retain private counsel to defend her in that criminal case. The government estimates a criminal trial lasting 15 days. In this related, contemporaneous civil action brought by the government under 18 U.S.C. § 1345, a federal district judge entered a preliminary injunction prohibiting her from spending any of her own money, including undisputedly untainted funds that she needs to retain counsel in the criminal case. The federal judge in the civil case rejected her argument that the Constitution prohibits the pretrial restraint of untainted assets needed to pay counsel of choice, finding that "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." The Eleventh Circuit affirmed, concluding that the Supreme Court's jurisprudence addressing the pretrial restraint and forfeiture of tainted assets – *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989) – foreclosed a constitutional challenge to the restraint of untainted assets. The Supreme Court vacated the lower court order (5-3) in a plurality decision authored by Justice Breyer: "A federal statute provides that a court may freeze before trial certain assets belonging to a criminal defendant accused of violations of federal health care or banking laws. *See* 18 U.S.C. §1345. Those assets include: (1) property 'obtained as a result of' the crime, (2) property 'traceable' to the crime, and (3) other 'property of equivalent value.' §1345(a)(2). In this case, the Government has obtained a court order that freezes assets belonging to the third category of property, namely, property that is untainted by the crime, and that belongs fully to the defendant. That order, the defendant says, prevents her from paying her lawyer. She claims that insofar as it does so, it violates her Sixth Amendment 'right . . . to have the Assistance of Counsel for [her] defence.' We agree." The plurality of four justices (including C.J. Roberts, and Justices Ginsburg and Sotomayor) used a balancing approach to arrive at its decision: "The constitutional right taken together with the nature of the assets lead to this conclusion." Justice Thomas's concurrence provided the deciding fifth vote: "I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. But I do not agree with the plurality's balancing approach. Rather, my reasoning rests strictly on the Sixth Amendment's text and common-law backdrop." His concurrence is laden with references to Justice Scalia and his originalist thinking. Justice Kennedy dissented, with Alito joining. Justice Kagan dissented separately because, although she is troubled by *Monsanto*, its continuing vitality was not before the court in this case. Moreover, ". . . given that money is fungible, the plurality's approach leads to utterly arbitrary distinctions as among

criminal defendants who are in fact guilty. . . . The thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets is no more deserving of chosen counsel than the one who spends those two pots of money in reverse order. Yet the plurality would enable only the first defendant, and not the second, to hire the lawyer he wants. I cannot believe the Sixth Amendment draws that irrational line, much as I sympathize with the plurality's effort to cabin *Monsanto,* I would affirm the judgment below."

B. **Uncounseled Tribal Court Predicate Convictions.** *United States v. Bryant*, 136 S. Ct. ___ (June 13, 2016). Title 18 U.S.C. § 117(a) makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic violence offenses. The Ninth Circuit in this case—over the dissent of eight judges from the denial of rehearing en banc—held that 18 U.S.C. § 117(a) is unconstitutional as applied to recidivist domestic-violence offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. The government sought cert, which was granted, to decide whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution. The Supreme Court reversed in a unanimous opinion by Justice Ginsburg. The Court pointed first to historical precedent holding that because tribes are separate sovereigns, there is no Sixth Amendment right to counsel in tribal courts. Congress, through the Indian Civil Rights Act, has accorded procedural protections similar to, but not coextensive with, those contained in the Bill of Rights. Only if the tribal court imposes a sentence in excess of one year must the tribe provide appointed counsel to indigent defendants. In Bryant's case, because his prior tribal convictions for domestic violence resulted in sentences of less than one year, he had no right to counsel under the ICRA. Thus, his prior uncounseled convictions were valid when entered because they comported with the ICRA (and there is no Sixth Amendment right to counsel). As such, these convictions are unlike prior convictions that were invalid because obtained in violation of the Sixth Amendment right to counsel, which the Court held in *Burgett v. Texas* and *United States v. Tucker,* may not be relied on to impose a longer term of imprisonment for a subsequent conviction. Because Bryant's convictions were valid when entered, the Court held, they may be used to establish a prior domestic violence conviction for purposes of 117(a). The ICRA also requires tribes to ensure "due process of law," but the Court rejected that approach, holding that proceedings in

compliance with the ICRA "sufficiently ensure the reliability of tribal-court convictions," and that "the use of those convictions in a federal prosecution does not violate a defendant's right to due process." Justice Thomas concurred in the opinion, given the Court's precedents, but wrote separately to suggest that *Burgett* was wrongly decided and (apparently) that the Sixth Amendment is not implicated when an uncounseled prior conviction is used to enhance a sentence, even if invalid when entered. He also urged the Court to reconsider its precedents regarding tribal sovereignty and Congress' purported plenary power over Indian affairs.

IV. DOUBLE JEOPARDY AND DUAL SOVEREIGNS

A. **Dual Prosecutions in Puerto Rico.** *Puerto Rico v. Sanchez Valle*, 136 S. Ct. ___ (June 9, 2016). In a fractured opinion written by Justice Kagan (6-2, with two concurring opinions), a majority of the Court held that dual prosecutions by Puerto Rico and the U.S. government constitute double jeopardy: "The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the 'same offence.' But under what is known as the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns. To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question. The inquiry does not turn, as the term 'sovereignty' sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course. Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same 'ultimate source.' *United States v. Wheeler*, 435 U.S. 313, 320 (1978). In this case, we must decide if, under that test, Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct. We hold they may not, because the oldest roots of Puerto Rico's power to prosecute lie in federal soil." Justice Ginsburg (joined by Thomas) filed a concurring opinion and Justice Thomas filed his own opinion, concurring in part, and concurring in the judgment. Justice Breyer (joined by Sotomayor) dissented.

V. CRIMES

A. **Proof of Insider Trading.** *Salman v. United States*, 136 S. Ct. ___ (cert. granted Jan. 19, 2016); decision below at 792 F.3d 1087 (9th Cir. 2015). Salman was indicted on four counts of insider trading, and one count of conspiracy, based on a theory that he was a remote tippee.

The government claimed that a Citigroup investment banker passed confidential information to his own brother (who was not an insider), who in turn passed it on to Salman in the form of stock recommendations. Salman then traded on the recommendations in an account he shared with his own brother-in-law. The investment banker and his brother testified for the government at trial: The investment banker testified that he provided inside information to his brother on several occasions, but he did not say that he discussed stocks with Salman, and he denied knowing that his brother was passing the inside information on to others. The brother testified that he told Salman that his investment-banker sibling was the source of the recommendations, but he was heavily impeached and his testimony on this point was uncorroborated. The government also presented what it argued was circumstantial evidence of Salman's knowledge, including the fact that he traded through an account in the name of Salman's brother, rather than in his own name. The jury was given a willful blindness instruction, over defense objection. He was convicted. On appeal, Salman contended that the district court erred in giving the willful blindness instruction, because he did not take "deliberate actions" or "active steps" to avoid knowledge, as the Supreme Court required in *Global-Tech Appliances, Inc. v. SEE S.A.*, 131 S. Ct. 2060 (2011) (willful blindness exists only when the defendant takes "deliberate actions" or "active steps" to avoid knowledge. The Ninth Circuit rejected Salman's contention, holding that "at least under circumstances where a reasonable person would make further inquiries, '[a] failure to investigate can be a deliberate action.'" The panel concluded that a reasonable person in Salman's position would have sought to discover the source of the brother's information, and thus it found the evidence sufficient to warrant a willful blindness instruction. Question presented: Does the personal benefit to the insider that is necessary to establish insider trading under *Dirk s v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied* , No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case? The *Newman* holding is of note: In *Newman* the Second Circuit declared that the personal benefit to the insider necessary for an insider trading conviction requires "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Solicitor General filed a petition for writ of certiorari, highlighting the conflict between *Newman* and the Ninth Circuit's

decision in this case and emphasized the importance of the Second Circuit's decision to the financial markets and the investing public. The respondents argued in opposition that *Newman* presented a poor vehicle for resolving the definition of "personal benefit," because the Second Circuit had rested its decision on an independent ground (the defendants' lack of knowledge of any personal benefit)—so even a ruling in the government's favor would not change the outcome. The Court denied the government's petition. *United States v. Newman*, No. 15-137 (U.S. Oct. 5, 2015). The Salman case, on the other hand, presents another vehicle for resolving the important question on which the Solicitor General sought review in *Newman*. Salman argued in his petition to the Supreme Court that here, unlike in *Newman*, resolution of the question is indisputably outcome-determinative. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses. But if there must be "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange here between the insider and the tippee.

B. **ACCA Elements Under Enumerated Clause: Impermissible Use of Modified Categorical Approach.** *Mathis v. United States*, 136 S. Ct. ___ (June 23, 2016). Mathis pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pre-*Johnson,* the district court found that Mathis's five burglary convictions in Iowa were violent felonies and justified sentencing under the ACCA. The court found that the Iowa burglary statutes in question, Iowa Code §§ 713.1 and 713.5, were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Under *Descamps*, the trial court believed it could use the modified categorical approach to determine the particular elements of the specific burglary provision under which Mathis was convicted. Additionally–in a ruling that cannot survive *Johnson*—the trial court found that the burglaries were violent felonies under the ACCA's residual clause because they were substantially similar to generic burglary and posed the same risk of harm to others. Finally, the court found Mathis's prior conviction in Iowa for interference with official acts inflicting serious injury was also a violent felony for ACCA purposes. As a result of the ACCA enhancement, Mathis was sentenced to the mandatory minimum of 180 months' imprisonment with five years of supervised release. On appeal, Mathis argued that the district court erred by finding that the Iowa burglary statute was divisible and by applying the modified categorical approach to determine the nature of his convictions. This error, Mathis argued, led the district court to

erroneously conclude that his five previous burglary convictions were violent felonies for ACCA purposes. Still pre-*Johnson*, the court of appeals affirmed under 18 U.S.C. § 924(e)(1)(ii) (enumerating burglary), even though the Iowa burglary statute is not generic. In the court's view, the non-generic statute is, however, divisible, which allows a court to utilize the modified categorical approach (using certain documents, such as the charging papers and jury instructions) to determine if the prior convictions are violent felonies. Relying on a jury instruction of a related statute that defined "occupied structure," and the underlying charging documents in Mathis's burglary cases, the court of appeals found that his convictions conformed to generic burglary. Mathis argued that the statute was not divisible because it does not provide alternative elements, but rather alternative means of committing the crime. The Supreme Court reversed (5-3), in an opinion written by Justice Kagan, reaffirming the Court's emphasis on the categorical approach. When a statute defines only one crime, with one set of elements, but which lists alternative means by which a defendant can satisfy those elements, and those means are broader than a qualifying offense, a sentencing court cannot explore the means to determine whether a defendant's conduct qualifies as a prior violent offense for purposes of ACCA. Specifically, Iowa's burglary law was broader than generic burglary because "structures" and "vehicles" were alternative means of fulfilling a single element, and it didn't matter that the defendant's prior offense conduct involved burglarizing a structure. The Court held that the sentencing court is prohibited from using the modified categorical approach when it is "clear" according to "authoritative sources of state law" that each of the alternative terms listed in the relevant statute (in this case, "building, structure, [or] land, water or air vehicle") set forth alternative means and not elements. Because authoritative Iowa law makes clear that the jury need not agree on whether the burgled location was a building, structure, boat or other vehicle in order to convict, the question in Richard Mathis's case was "easy" and his prior conviction for Iowa burglary cannot qualify as a "violent felony." The Court also discussed the types of authoritative law to which a court may make reference under this analysis. As sources of authoritative state law, the majority in Mathis pointed to a state supreme court decision expressly holding that the jury need not agree on the means of commission. The majority also offered that in some cases the statute itself may provide the answer, either by assigning different punishments tied to alternative terms (thus making them elements under *Apprendi*) or by itself identifying which facts must be charged or are merely means of committing the offense. "[I]f state law fails to provide clear answers," the sentencing judge can at that point "peek"

at "the record of a prior conviction itself" to see if the charging document, plea colloquies, plea agreements, or jury instructions reveal that the term is an element or means. In other words, how the prosecutor chose to charge the offense in a particular case may be considered authority for what the prosecutor must charge by law in order to prevail. But even the majority admits that this "sneak peek" may not always make the answer plain, in which case the defendant must prevail due to lack of clarity. Justice Breyer (Ginsburg joining) dissented, as did Justice Alito in a separate opinion.

C. **Hobbs Act: Conspiracy to Commit Extortion.** *Ocasio v. United States*, 136 S. Ct. ___ (May 2, 2016). The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). The Supreme Court has previously held that a public official violates that statute when he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). A jury found Ocasio, a former Baltimore Police officer, guilty of four offenses relating to his involvement in a kickback scheme to funnel wrecked automobiles to a Baltimore auto repair shop in exchange for cash kickbacks. The trial evidence established a wide-ranging kickback scheme involving the Majestic Repair Shop and Baltimore Police officers, who referred accident victims to Majestic for body work, in exchange for kickbacks of $150–$300 per vehicle. Ocasio was convicted on three Hobbs Act extortion counts plus a charge of conspiracy to commit such extortion. On appeal, he maintained that his conspiracy conviction is fatally flawed because the kickbacks were from one co-conspirator to another. The Fourth Circuit affirmed. The Supreme Court granted cert, but affirmed (5-3), holding that Ocasio's argument is contrary to "age old conspiracy law." In an opinion by Justice Alito, the majority held that the person extorting can conspire with the persons extorted to violate the Hobbs Act, with proof that the owner of the property agreed to give it over under color of official right. Justice Breyer concurred, explaining he was bound by the prior precedent of *Evans* – he did not believe that its continuing vitality was included in the question presented or briefed. Justice Thomas dissented, as did Justice Kagan, joined by Chief Justice Roberts. Of interest, cert was granted and oral argument occurred before Justice Scalia's death. During that oral argument, held during the first week of October, Justice Scalia revealed dissatisfaction with the holding of *Evans*. Although cases argued in October are ordinarily decided long before May, this case was not decided for seven months, inferring the case may have originally been decided differently, perhaps with a head-on challenge to the continuing vitality of *Evans*. Justice Thomas' dissent seems as

though it may have been such an opinion: "Today the Court holds that an extortionist can conspire to commit extortion with the person whom he is extorting. *See ante*, at 18. This holding further exposes the flaw in this Court's understanding of extortion. In my view, the Court started down the wrong path in *Evans v. United States*, 504 U. S. 255 (1992), which wrongly equated extortion with bribery. In so holding, Evans made it seem plausible that an extortionist could conspire with his victim. Rather than embrace that view, I would not extend *Evans*' errors further." Assuming Justice Scalia embraced that view – as he intimated during oral argument – Justice Breyer may well have been persuaded that the issue was ripe and joined in this view, forming an entirely different outcome to the case. Since Justice Breyer's concurrence recognizes the strength of the dissent, it is conceivable that a subsequent case that clearly presents the *Evans* case for reconsideration will lead to a different result.

D. **Requisite Proof of Bank Fraud.** *Shaw v. United* States, 136 S. Ct. ___ (Apr. 22, 2016); decision below at 781 F.3d 1130 (9th Cir. 2015). *Loughrin v. United States*, 134 S. Ct. 2384 (2014), left open the question whether a scheme-to-defraud-a-financial-institution under 18 U.S.C. § 1344 requires proof of a specific intent to (1) deceive a bank, AND (2) cheat a bank. Here, it is undisputed that Shaw schemed to steal a bank-customer's money from the customer's bank account by deceiving the bank, BUT Shaw did not intend to steal the bank's money. Shaw argued that a conviction for bank fraud under 18 U.S.C. § 1344(1) required proof both that he deceived the bank and intended to cheat the bank. The Ninth Circuit disagreed, but this decision conflicts with every other circuit. The question presented is whether subsection (1)'s "scheme to defraud a financial institution" requires proof of a specific intent to (1) deceive a bank AND (2) cheat a bank (as opposed to its customer).

E. **Hobbs Act Robbery.** *Taylor v. United States*, 136 S. Ct. ___ (June 20, 2016). Taylor was a member of a local gang that ripped off drug dealers, believing they would not report the robberies. He was nevertheless charged with Hobbs Act robbery in federal court. He contended that the government did not prove the drugs were in interstate commerce and he sought to introduce defense evidence that the objects of the robberies were not in interstate commerce. The district court refused his defense evidence and found that illicit drugs are inherently in interstate commerce. The Supreme Court affirmed (7-1) in an opinion authored by Justice Alito. "The Hobbs Act makes it a crime for a person to affect commerce, or to attempt to do so, by robbery. 18 U.S.C. §1951(a). The Act defines 'commerce' broadly as interstate commerce 'and all other commerce over which the United

States has jurisdiction.' §1951(b)(3). This case requires us to decide what the Government must prove to satisfy the Hobbs Act's commerce element when a defendant commits a robbery that targets a marijuana dealer's drugs or drug proceeds. The answer to this question is straightforward and dictated by our precedent. We held in *Gonzales v. Raich*, 545 U.S. 1 (2005), that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug theft. And since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce 'over which the United States has jurisdiction,' §1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction. In this case, petitioner Anthony Taylor was convicted on two Hobbs Act counts based on proof that he attempted to rob marijuana dealers of their drugs and drug money. We hold that this evidence was sufficient to satisfy the Act's commerce element." Justice Thomas dissented, contending: "The Court's holding creates serious constitutional problems and extends our already expansive, flawed commerce-power precedents. I would construe the Hobbs Act in accordance with constitutional limits and hold that the Act punishes a robbery only when the Government proves that the robbery itself affected interstate commerce."

F. **Federal Bribery, Hobbs Act & Honest Services Fraud.** *McDonnell v. United States*, 136 S. Ct. ___ (June 27, 2016). Robert McDonnell, a former Virginia Governor, and his wife, Maureen, were convicted on federal corruption charges based on a theory that he accepted otherwise-lawful gifts and loans in exchange for taking five supposedly "official acts." Specifically, they were indicted and convicted for honest services fraud and Hobbs Act extortion relating to their acceptance of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office. Williams was the chief executive officer of Star Scientific, a Virginia-based company that had developed Anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped that Virginia's public universities would perform research studies on anatabine, and Williams wanted Governor McDonnell's assistance in obtaining those studies. To convict the McDonnells, the Government was required to show that

Governor McDonnell committed (or agreed to commit) an "official act" in exchange for the loans and gifts. An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. §201(a)(3). According to the Government, Governor McDonnell committed at least five "official acts," including "arranging meetings" for Williams with other Virginia officials to discuss Star Scientific's product, "hosting" events for Star Scientific at the Governor's Mansion, and "contacting other government officials" concerning the research studies. Yet. the McDonnells claimed, those five acts were limited to routine political courtesies: arranging meetings, asking questions, and attending events. It is undisputed that Gov. McDonnell never exercised any governmental power on behalf of his benefactor, promised to do so, or pressured others to do so. Indeed, the only staffer to meet with the alleged bribe-payor during the supposed conspiracy testified that Gov. McDonnell never "interfere[d]" with her office's "decision-making process." The courts below nonetheless reasoned that arranging a meeting to discuss a policy issue, or inquiring about it, is itself "official" action "on" that issue—even if the official never directs any substantive decision. Moreover, the jury was never instructed that, to convict, it needed to find that Gov. McDonnell exercised (or pressured others to exercise) any governmental power. But the panel upheld the instructions as "adequat[e]" because they quoted a statute, while adding a host of improper elaborations that the government aggressively exploited. The Supreme Court reversed in a unanimous decision authored by Chief Justice Roberts, which substantially limted the meaning of "official acts" in §201(a)(3): "According to the Government, 'Congress used intentionally broad language' in § 201(a)(3) to embrace 'any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official's official capacity.' ... The Government concludes that the term 'official act' therefore encompasses nearly any activity by a public official. In the Government's view, 'official act' specifically includes arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject, including a broad policy issue such as Virginia economic development. ... Governor McDonnell, in contrast, contends that statutory context compels a more circumscribed reading, limiting 'official acts' to those acts that 'direct[] a particular resolution of a specific governmental decision,' or that pressure another official to do so. ... He also claims that 'vague corruption laws' such as § 201 implicate serious constitutional

concerns, militating 'in favor of a narrow, cautious reading of these criminal statutes.' ... Taking into account the text of the statute, the precedent of this Court, and the constitutional concerns raised by Governor McDonnell, we reject the Government's reading of § 201(a)(3) and adopt a more bounded interpretation of 'official act.' Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'"

G. **SORNA: International Registration.** *Nichols v. United States*, 136 S. Ct. ___ (Apr. 4, 2016). Title 42 U.S.C. § 16913(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided. Two men lived on opposite sides of the Missouri River in the Kansas City Metropolitan area, one in Missouri within the Eighth Circuit, the other in Kansas within the Tenth Circuit. Both men were convicted of sex offenses before the enactment of the Sex Offender Registration and Notification Act ("SORNA"), but were required to register under SORNA. Both men traveled from their homes to the Kansas City International Airport, flew to the same foreign country—Manila—to reside, and thereafter did not update their registrations in the jurisdictions they had left. On these facts, the Eighth Circuit ruled in *United States v. Lunsford,* 725 F.3d 859 (8th Cir. 2013), that the failure to update a registration does not violate SORNA. The Tenth Circuit came to the opposite conclusion in Nichols' case. The Supreme Court reversed Nichols' conviction in a unanimous decision authored by Justice Alito. The decision reasons that "[a] person who moves from Leavenworth to Manila no longer 'resides' (present tense) in Kansas," thus SORNA "did not require Nichols to update his registration in Kansas once he no longer resided there."

VI. TRIAL AND PLEA

A. Jurors

1. ***Batson* Jury Challenges.** *Foster v. Chatman*, 136 S. Ct. ___ (May 23, 2016). In this capital case involving a black defendant and a white victim, Georgia struck all four black prospective jurors and provided roughly a dozen "race-neutral" reasons for each of the four strikes. The prosecutor later argued that the jury should impose a death sentence to "deter other people out there in the projects." At the trial level and on direct appeal, Georgia's courts denied the defendant's claim of race discrimination under *Batson v. Kentucky*, 4 76 U.S. 79 (1986). In habeas proceedings, the defendant obtained the prosecution's

notes from jury selection, which were previously withheld. The notes reflect that the prosecution (1) marked the name of each black prospective juror in green highlighter on four different copies of the jury list; (2) circled the word "BLACK"' next to the "Race" question on the juror questionnaires of five black prospective jurors; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors;" and (5) created strike lists that contradict the "race-neutral" explanation provided by the prosecution for its strike of one of the black prospective jurors. The Georgia courts again declined to find a *Batson* violation. The Supreme Court granted cert and reversed (7-1) in an opinion authored by Chief Justice Roberts. The Court held that (1) the Supreme Court had jurisdiction to hear the claim as a federal question, even though it was unable to ascertain if Georgia's unelaborated judgment might possibly have rested on an independent state ground; and (2) the Georgia decision that Foster failed to show purposeful discrimination was clearly erroneous. To this end, the Court held that under *Batson*'s step 3 the challenged party must respond with race-neutral reasons but here the record belies much of the prosecution's reasoning as to two of its strikes, and undermined the justification given for a third juror. Justice Thomas dissented because the Court did not seek to clarify whether a federal question was involved.

2. **Post-Trial Inquiry of Prejudice**. *Pena-Rodriguez v. Colorado*, 136 S. Ct. ___ (cert. granted Apr. 4, 2016); decision below at 350 P.3d 287 (Col. 2015). 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 a bare majority of the Colorado Supreme Court–deepening a conflict over the issue–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.

VII. SENTENCING

A. **Speedy Trial Right at Sentencing.** *Betterman v. Montana*, 136 S. Ct. ___ (May 19, 2016). Betterman missed a court date on a domestic assault charge. He turned himself in and was sentenced to 5 years imprisonment on that charge. He was also charged with bail jumping, to which he pleaded guilty, but was not sentenced for over 14 months. In the interim, he was kept at a local jail so he was denied early release and programs offered only in prison. He made repeated requests to be sentenced, but the trial judge refused to do so. When eventually sentenced on the bail jumping charge, he received an additional 7 year sentence. On appeal, he argued he was denied a speedy trial as to sentencing, but the Montana courts ruled that the speedy trial right does not extend to sentencing. The Supreme Court granted cert and affirmed, in an opinion written by Justice Ginsburg,

which concluded: "the Sixth Amendment's speedy trial guarantee . . . does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges." "[B]etween conviction and sentencing, the Constitution's presumption-of-innocence-protective speedy trial right is not engaged." The Court left open the possibility that a defendant who suffers inordinate delay "may have other recourse, including, in appropriate circumstances, tailored relief under the Due Precess Clauses of the Fifth and Fourteenth Amendments." Because no due process claim was raised with the Court in this case, the majority "express[ed] no opinion on how he might fare under that more pliable standard," though a footnote indicated that relevant considerations for such a claim "may include the length of and reasons for the delay, the defendant's diligence in requesting expeditions sentencing, and prejudice." The majority also "reserve[d] the question [of] whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage facts that could increase the prescribed sentencing range are determined" as well as the question of "whether the right reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence." Justice Sotomayor, concurred separately to emphasize that the question of the standard to apply to a due process claim for delayed sentencing "is an open one." But she suggested that the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) may be appropriate: the "factors capture many of the concerns posed in the sentencing delay context" and "because the test is flexible it will allow courts to take account of any differences between trial and sentencing delays." Justices Thomas and Alito, also concurred, but wrote separately to argue against "prejudg[ing]" whether the Barker factors are the correct test for a due process claim relating to a delayed sentencing.

B. **Statutory Construction: Rule of Last Antecedent**. *Lockhart v. United States*, 136 S. Ct. ___ (Mar. 1, 2016). Defendants convicted of possessing child pornography in violation of 18 U.S.C. §2252(a)(4) are subject to a 10-year mandatory minimum sentence and an increased maximum sentence if they have "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." §2252(b)(2). The question before the Court was whether the phrase "involving a minor or ward" modifies all items in the list of predicate crimes ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct") or only the one item that immediately precedes it ("abusive sexual conduct"). The Second Circuit joined several other circuits in holding that it modifies only "abusive sexual conduct." The Eighth Circuit reached the contrary result. Relying on "the rule of the last antecedent," the

Supreme Court resolved the split by affirming the Second Circuit's holding. In an opinion by Justice Sotomayor, the Court ruled (6-2) that the phrase "involving a minor or ward" in §2252(b)(2) modifies only "abusive sexual conduct," not the two earlier items on the list. Justice Kagan dissented, joined by Breyer. The dissent found plain English generally regards all items in a list to be modified by the last antecedent, and argued that this interpretation is supported by legislative history, or in the alternative, the rule of lenity.

C. **Recklessness Misdemeanor as Crime of Domestic Violence under 922(g)(9).** *Voisine v. United States*, 136 S. Ct. ___ (June 27, 2016). Two defendants, Armstrong and Voisine, were convicted of misdemeanor assault crimes of domestic violence in violation of Maine state law. Both were subsequently charged with possession of a firearm or ammunition by a prohibited person in violation of 18 U.S.C. § 922(g)(9). Both Armstrong and Voisine moved to dismiss, arguing that their indictment and information did not charge a federal offense and that § 922(g)(9) violated the Constitution. The district court denied the motions, and both defendants entered guilty pleas conditioned on the right to appeal the district court's decision. The defendants argued that a misdemeanor assault on the basis of offensive physical contact, as opposed to one causing bodily injury, is not a "use of physical force," and, concordantly, not a "misdemeanor crime of domestic violence." They also made a Second Amendment challenge. The First Circuit consolidated their cases and affirmed. The defendants petitioned for certiorari in 2014 (cert I), which the Supreme Court granted, vacating the court of appeals' decision, and remanding for reconsideration in light of *United States v. Castleman*, 134 S. Ct. 1405 (2014). *Castleman* held that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" Thus, the "physical force" in § 921(a)(33)(A) required violence or could be satisfied by offensive touching. *Castleman* left open whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate. On remand, the First Circuit again affirmed, basing its decision on a categorical approach to the statute. Again, the defendants petitioned for cert, in 2015 (cert II), which the Supreme Court granted, to answer the question left open in *Castleman*. In a 6-2 decision authored by Justice Kagan, the Court held that for purposes of determining whether a prior conviction qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), the phrase "use . . . of physical force" in §921(a)(33)(A) includes acts of force undertaken recklessly, "i.e., with conscious disregard of a substantial risk of harm." In footnote 4, however, the Court was careful to point out that its interpretation of

"use of force" in this context "does not resolve" whether reckless behavior is encompassed by 18 U.S.C. § 16, and that courts of appeals have "usually read the same term in § 16 to reach only 'violent force,'" i.e., intentional force. The Court's more expansive reading of § 921(a)(33)(A) "do[es] not foreclose the possibility" that § 16 excludes reckless conduct "in light of differences in their contexts and purposes." Justice Thomas (Sotomayor joining in part) dissented, discussing the concepts of "use," transferred intent, and "volition" in the context of the hypothetical Angry Plate Thrower, the Door Slammer, the Text-Messaging Dad, the Reckless Policeman, the Soapy-Handed Husband, and the Chivalrous Door Holder. The dissenters would hold that the "use of physical force" in 921(a)(33)(A) is narrower than most state assault statutes. Justice Thomas separately expresses concerns about the permanent deprivation of the Text-Messaging Dad's right to bear arms, should he be prosecuted for recklessly causing injury to a family member by getting into a car accident.

VIII. CAPITAL PUNISHMENT

A. **Florida's Capital Scheme Unconstitutional.** *Hurst v. Florida*, 136 S. Ct. ___ (Jan. 12, 2016). The Supreme Court held (8-1) that Florida's capital sentencing scheme violates the Sixth Amendment, in light of *Ring v. Arizona*, 536 U.S. 584 (2002), because it authorizes a judge – not the jury – to make the critical findings necessary to impose the death penalty. The Court held that the fact that Florida provides an advisory jury is immaterial. *Ring* requires the jury to make the necessary factual finding. The Court expressly overruled its prior precedent that had held that the Sixth Amendment does not require that the jury make the specific findings authorizing the imposition of the sentence of death because that conclusion is "irreconcilable with *Apprendi*." "Time and subsequent cases have washed away the logic [of prior precedent]." The Court did not reach Florida's argument that the error was harmless. (Alito, J., dissenting, argued that the error was harmless because the jury, though not told its recommendation was binding, found two aggravating factors warranting the imposition of the death penalty, and the evidence supporting these factors was "overwhelming."). Also left undecided is the constitutionality of Florida's unusual allowance of a non-unanimous jury finding in the penalty phase.

B. **Kansas Challenges – Burden of Proof on Mitigators and Right to Sever Defendants at Sentencing.** *Kansas v. Carr*, 136 S. Ct. ___ (Jan. 20, 2016). "The Supreme Court of Kansas vacated the death sentences of Sidney Gleason and brothers Reginald and Jonathan

Carr. Gleason killed one of his co-conspirators and her boyfriend to cover up the robbery of an elderly man. The Carrs' notorious Wichita crime spree culminated in the brutal rape, robbery, kidnaping, and execution-style shooting of five young men and women." In an 8-1 decision authored by Justice Scalia, the Supreme Court reversed, holding, (1) sentencing courts are not required by the Eighth Amendment to instruct juries that mitigating circumstances need not be proved beyond a reasonable doubt, and (2) the Constitution does not require the severance of the Carrs' joint sentencing proceedings, even where, as here, the testimony of one brother implicated the other as the corrupting older brother, and cross-examination of a sister by one brother revealed an equivocal confession. Justice Sotomayor dissented because she did not believe that the Supreme Court should have intervened in the decision of the Kansas Supreme Court: "I respectfully dissent because I do not believe these cases should ever have been reviewed by the Supreme Court. I see no reason to intervene in cases like these—and plenty of reasons not to. Kansas has not violated any federal constitutional right. If anything, the State has overprotected its citizens based on its interpretation of state and federal law. For reasons ably articulated by my predecessors and colleagues and because I worry that cases like these prevent States from serving as necessary laboratories for experimenting with how best to guarantee defendants a fair trial, I would dismiss the writs as improvidently granted." The majority rejected this view, asserting that the Kansas decision rested on federal constitutional grounds.

IX. APPEALS

A. **Perfecting Appeal of Deferred Restitution Judgment.** *Manrique v. United States*, 136 S. Ct. ___ (cert. granted Apr. 22, 2016); decision below at 618 F. App'x 579 (11th Cir. 2015). Fed. R. App. P. 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment – is treated as filed on the date of and after entry." The rule incorporates the Supreme Court's decision in *Lemke v. United States*, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits that a premature notice of appeal matures or springs forward when the judgment under review is entered. The interaction of this rule with deferred restitution judgments has become a source of circuit conflict, particularly following this Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010), which allows a sentencing court to retain jurisdiction after sentencing to award restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5). At the time *Dolan* was decided, the Court acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have

consequences", but it "le[ft] all such matters for another day." 560 U.S. at 618. The *Manrique* decision, below, exemplifies those consequences and highlights the significant circuit split that exists concerning the jurisdictional prerequisites for appealing a deferred restitution award. At Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that "restitution is mandatory." The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second final judgment was entered, identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award. The Court of Appeals ruled, *sua sponte*, that it did not have jurisdiction over the restitution award because Manrique did not file a second notice of appeal designating the amended judgment setting forth the restitution amount. The Eleventh Circuit's decision conflicts with the Court's decision in *Lemke*, the ripening clause of Rule 4(b)(2), and the jurisdictional determinations of the First, Second, Sixth and Ninth Circuits. Confusing that circuit split, two of the four circuits that acknowledge their jurisdiction over deferred restitution judgments have failed to give effect to the ripening clause of Rule 4(b)(2). Uncertain about the interaction of appellate rules, the First Circuit recommends, prospectively, that a second notice of appeal should be filed as to restitution awards, while the Ninth Circuit will dismiss such an appeal if the government simply objects to the timeliness of the premature notice. Question presented: Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in *Dolan v. United States*, 560 U.S. 605, 618 (2010)? [Disclosure – The Office of the Federal Public Defender for the Southern District of Florida serves as counsel for Mr. Manrique.]

B. **Double Jeopardy Following Successful Appeal.** *Bravo-Fernandez v. United States,* 1360 S. Ct. ___ (cert. granted Mar. 28, 2016); decision below at 722 F.3d 1 (1st Cir. 2013). 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 question here is whether, for purposes of *Ashe*'s collateral estoppel analysis, a vacated conviction that is logically inconsistent with an accompanying acquittal is more like the valid conviction in *Powell* or the hung count in *Yeager*. Here, the defendants 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 petitioners 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. Widening an acknowledged split, the First Circuit held that the acquittals have no preclusive effect under *Ashe* because they were inconsistent with the vacated, unlawful convictions. The First Circuit distinguished *Yeager v. United States*, 557 U.S. 110 (2009), which held that an acquittal retains its preclusive effect even when it is inconsistent with a hung count, on the theory that juries "speak" through vacated convictions, but not through hung counts. Of the two questions presented, the Supreme Court granted review on only the first: (1) 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. The second question presented (on which cert was not granted) was: (2) Whether, under *Evans v. Michigan*, 133 S. Ct. 1069 (2013), the Double Jeopardy Clause permits a district court to retract its "judgment of acquittal" entered on remand as an interpretation of the Court of Appeals mandate.

C. **Law of the Case; Limitations Not Plain Error.** *Musacchio v. United States,* 136 S. Ct. ___ (Jan. 25, 2016). This is a case about the failure of the parties to pay attention. The government failed to object to a jury instruction that erroneously added an element that it had to prove. Mussachio, on the other hand, failed to press a statute-of limitations defense until his appeal. Also on appeal, Mussachio wanted his sufficiency-of-evidence challenge decided under the erroneous instruction, which held the government to an additional element of proof. In a unanimous opinion written by Justice Thomas, the Court addressed both instances of the parties' failures to raise timely challenges, ruling in favor of the government on both points. First, the Court held that the sufficiency of the evidence should be assessed against the elements of the charged crime, not the erroneous

instruction that erroneously added an element. Second, the Court held that a statute of limitations defense not raised before the trial court may not be raised for the first time on appeal because it can never be a plain error. This is because, the Court says, when the defendant does not press the defense, the government is not put to the burden of proving that it filed a timely indictment, so there is no error for an appellate court to correct, much less plain error

D. **Sentence Based on Erroneous Guideline Calculation as Plain Error.** *Molina-Martinez v. United* States, 136 S. Ct. ___ (Apr. 20, 2016). In sentencing the defendant, the district court applied a Guidelines range higher than the applicable one. The error went unnoticed by the court and the parties, so no timely objection was entered. The error was first noted when, during briefing to the Court of Appeals for the Fifth Circuit, petitioner himself raised the mistake. The Fifth Circuit refused to correct the error because, in its view, petitioner could not establish a reasonable probability that but for the error he would have received a different sentence. Under that court's decisions, if a defendant's ultimate sentence falls within what would have been the correct Guidelines range, the defendant, on appeal, must identify "additional evidence" to show that use of the incorrect Guidelines range did in fact affect his sentence. Absent that evidence, in the Court of Appeals' view, a defendant who is sentenced under an incorrect range but whose sentence is also within what would have been the correct range cannot demonstrate he has been prejudiced by the error. The Supreme Court reversed, unanimously (with concurrences), overruling the Fifth Circuit's categorical rule. In an opinion by Justice Kennedy (joined by Roberts, Ginsburg, Breyer, Sotomayor and Kagan), the Court held that "courts reviewing sentencing errors cannot apply a categorical rule requiring additional evidence in cases, like this one, where the district court applied an incorrect range but nevertheless sentenced the defendant within the correct range. . . . [A] defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights." The majority opinion reasoned: "From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used. In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." In other words: "When a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range – the

error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." The Government, however, remains free to point to statements by the sentencing court that the sentence it chose was appropriate irrespective of the Guidelines range. Two justices concurred, limiting the reach of the "reasonable probability" formulation. Justice Alito (joined by Thomas), agreed with the result and that the Fifth Circuit's "rigid approach" is incorrect, but took issue with the majority's "speculat[ion]" about "how often the reasonable probability test will be satisfied in future cases." The concurrence explained: "The Court's predictions . . . are predicated on the view that sentencing judges will continue to rely very heavily on the Guidelines in the future, but that prediction may not turn out to be accurate."

X. IMMIGRATION

A. **Removal Based on State Arson Crime as Aggravated Felony.** *Luna Torres v. Lynch*, 135 S. Ct. ___ (May 19, 2016). After records disclosed that Torres, an alien, had been convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 and 150.10, the Department of Homeland Security instituted removal proceedings against him. An immigration judge found that Torres was inadmissible to enter the country based on his conviction and that his conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. The Board of Immigration Appeals affirmed that ruling, and the court of appeals upheld the Board's decision. Luna Torres contended that a state offense, such as arson, does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43), as "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks. The Supreme Court disagreed with Luna Torres and affirmed (5-3) in an opinion authored by Justice Kagan. The majority opinion holds that a state offense counts as a §1101(a)(43) "aggravated felony" when it has every element of a listed federal crime except one requiring a connection to interstate or foreign commerce. Justice Sotomayor (joined by Thomas and Breyer) dissented: "There is one more element in the federal offense than in the state offense—(5), the interstate or foreign commerce element. Luna thus was not convicted of an offense 'described in' the federal statute. Case closed."

B. **Derivative Citizenship.** *Lynch v. Morales*-Santana, 136 S. Ct. ___ (cert. granted June 28, 2016); decision below at 804 F.3d 520 (2d Cir. 2015). 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. Here, the government petitioned for cert after the court of appeals held that, despite the statutory requirement, the Equal Protection clause requires citizenship be conferred on the foreign-born child of an unwed citizen mother. The questions presented are: (1) Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection; (2) Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory.

C. **Unconstitutional Vagueness of 18 U.S.C. §16(b).** *Lynch v. Dimaya*, ___ S. Ct. ___ (cert. granted Sept. 29, 2016); decision below at 803 F.3d 1110 (2d Cir. 2016). 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 a 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 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.

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

A. ***Johnson* is Retroactively Applicable.** *Welch v. United States*, 136 S. Ct. ___ (Apr. 18, 2016). Welch was sentenced to 15 years imprisonment under the ACCA, pre-*Johnson*. He had entered a conditional plea, reserving his right to challenge reliance on one of his prior convictions. His sentence was affirmed on appeal. After the Supreme Court's decision in *Johnson* struck down ACCA's residual clause as unconstitutionally vague, he filed a 2255 proceeding challenging his sentence under ACCA, but the district court denied relief and Certificate of Appealability. The Eleventh Circuit also refused to grant a COA on this first 2255 because the Eleventh Circuit held that *Johnson* is not retroactively applicable in collateral review, a position at variance with most other circuits. The Supreme Court reversed 7-1, in an opinion written by Justice Kennedy, holding that

Johnson is retroactively applicable on collateral review because it is a new rule of substantive law under *Teague v.* Lane, 489 U.S. 288 (1989), rather than a procedural rule. The ruling in *Johnson* alters "the range of conduct or the class of persons that the law punishes." It is not procedural because procedural rules "regulate only the manner of determining the defendant's culpability," and Johnson "had nothing to do with that." The decision does not comment on whether the *Johnson* decision applies retroactively to the guidelines or any other statute. Justice Thomas dissented.

B. **Application and Retroactive Application of *Johnson* to Federal Sentencing Guidelines.** *Beckles v. United States*, 136 S. Ct. ___ (cert. granted June 27, 2016); decision below at 616 Fed. Appx. 415 (11th Cir. 2015). *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"). The questions presented are: (1) Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)? (2) Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review? (3) Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*? Justice Kagan has recused herself from participation in this case. [Disclosure – The Office of the Federal Public Defender for the Southern District of Florida serves as counsel for Mr. Beckles.]

C. **Juveniles: Retroactivity of *Miller*.** *Montgomery v. Louisiana*, 136 S. Ct. ___ (Jan. 25, 2016). Henry Montgomery has been incarcerated since 1963, serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age. Montgomery filed a state district court motion to correct his illegal sentence in light of *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), which holds that mandatory sentencing schemes "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole" . . . violate the Eighth Amendment's ban on cruel and unusual punishment. The Louisiana state courts denied Montgomery relief, relying on *State v. Tate*, 2012-2763 (La. 11/5/13), cert. denied, 134 S. Ct. 2663 (2014), which held that *Miller* is not retroactive on collateral review to those incarcerated in Louisiana.

The Supreme Court reversed in a 6-3 decision, authored by Justice Kennedy, holding that *Miller* is a substantive rule to which federal and state courts must both apply retroactively. The Court reaffirmed that "substantive" rules are not subject to the bar of *Teague v. Lane*, and that "substantive" rules "include" those that forbid "criminal punishment of certain primary conduct" or prohibit "a certain category of punishment for a class of defendants because of their status or offense." The fact that a rule has a procedural component (in this case, the fact that "Miller requires a sentencer to consider a juvenile's youth and attendant characteristics before determining that life without parole is a proportionate sentence") does not transform the substantive change in the law into a procedural rule. Here, it merely "gives effect to Miller's substantive holding," which "rendered life without parole an unconstitutional penalty for a 'class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Nor is Miller's rule procedural because a court could, in the uncommon case, lawfully impose life without parole on a juvenile convicted of a homicide offense, after proper consideration of the relevant factors. The rule in Miller "raises a grave risk that many are being held in violation of the Constitution. Justice Scalia dissented, joined by Justices Thomas and Alito. Justice Thomas also wrote a separate dissenting opinion.

D. **Prosecution Failure to Disclose Exculpatory Evidence.** *Wearry v. Cain*, 136 S. Ct. ___ (Mar. 7, 2016) (per curiam). Wearry was on Louisiana's death row, convicted of murder following a trial that relied heavily on a jail-house snitch, Sam Scott, who told multiple conflicting tales. Wearry's alibi defense was rejected by the jury. After his conviction became final, it emerged that the prosecution had withheld three pieces of exculpatory evidence: (1) Undisclosed police reports revealed that two of Scott's fellow inmates made statements casting doubt on Scott's credibility – he told one inmate he wanted to "make sure [Wearry] gets the needle because he jacked over me"; he unsuccessfully tried to orchestrate another inmate to lie about Weaary at trial; (2) Police failed to disclose that Scott had sought a plea deal seeking to reduce his sentence in return for testimony; and (3) Medical evidence undermined Scott's testimony about the way the crime occurred – a knee injury and recent surgery to an alleged accomplice made it impossible for the accomplice to have run, lifted substantial weight, and crawled into a space, as Scott claimed. Based on this new evidence, Wearry alleged violations of his due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and of his Sixth Amendment right to effective assistance of counsel. Acknowledging that the State "probably ought to have" disclosed the withheld evidence, and that Wearry's counsel provided "perhaps not the best

defense that could have been rendered," the postconviction court denied relief. Even if Wearry's constitutional rights were violated, the court concluded, he had not shown prejudice. In turn, the Louisiana Supreme Court also denied relief. The U.S. Supreme Court reversed (6-2) in a per curiam disposition based solely on the *Brady/Giglio* violations. Procedurally the case is interesting because it directly and summarily reversed the state court's decision denying habeas relief – before the commencement of federal habeas corpus proceedings – noting that the Supreme Court has jurisdiction over final judgments of state postconviction courts, *see* 28 U.S.C. § 1257(a) and has used that authority in another case this Term, *Foster v. Chatham* (raising *Batson* claim). The merits of the decision reiterate the standard for reversal based on *Brady/Giglio* violations, which is much more favorable to the accused than traditional ineffective-assistance-of-counsel review. "Because we conclude that the Louisiana courts' denial of Wearry's *Brady* claim runs up against settled constitutional principles, and because a new trial is required as a result, we need not and do not consider the merits of his ineffective-assistance-of-counsel claim. '[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, *supra*, at 87. *See also Giglio* v. *United States*, 405 U.S. 150, 153–154 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility). Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." *Giglio*, *supra*, at 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. *Smith* v. *Cain*, 565 U.S. 73, ___–___ (2012) (slip op., at 2–3) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict. *Ibid.* Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi. *See United States* v. *Agurs*, 427 U.S. 97, 113 (1976) ('[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.')." In a footnote, the Court held: "Given this legal standard, Wearry can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury's verdict." In another footnote, the Court reminded that *Brady* requires disclosure even if the prosecution is unaware of evidence in the possession of police: "'*Brady* suppression occurs when the government

fails to turn over even evidence that is known only to police investigators and not to the prosecutor.' *Youngblood* v. *West Virginia*, 547 U.S. 867, 869–870 (2006) (*per curiam*) (internal quotation marks omitted). *See also Kyles* v. *Whitley*, 514 U.S. 419, 438 (1995) (rejecting Louisiana's plea for a rule that would not hold the State responsible for failing to disclose exculpatory evidence about which prosecutors did not learn until after trial when that evidence was in the possession of police investigators at the time of trial)." Justice Alito dissented, joined by Thomas, due to the summary nature of the decision, arguing that the state did not have a fair opportunity to fully brief the issues.

XII. AEDPA

A. **Certificate of Appealability Standard for IAC Claim in Death Penalty Case.** *Buck v. Stephens*, 136 S. Ct. ___ (cert. granted June 6, 2016); decision below at 623 Fed. Appx 668 (5th Cir. 2016). Question presented: "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?"

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

1. **Exclusion of Juror as Sixth Amendment Violation.** *White v. Wheeler*, 136 S. Ct. ___ (Dec. 14, 2015) (per curiam). A death sentence imposed by a Kentucky trial court and affirmed by the Kentucky Supreme Court was overturned on habeas corpus review by the Sixth Circuit. During the jury selection process, the state trial court excused a juror after concluding he could not give sufficient assurance of neutrality or impartiality in considering whether the death penalty should be imposed. "The Sixth Circuit, despite the substantial deference it must accord to state-court rulings in federal habeas proceedings, determined that excusing the juror in the circumstances of this case violated the Sixth and Fourteenth Amendments. That ruling contravenes controlling precedents from this Court, and it is now necessary to reverse the Court of Appeals by this summary disposition."

The Supreme Court's per curiam opinion reiterated that AEDPA deference applies even in death penalty cases (a caution that seems unnecessary considering that the acronym stands in part for "Effective Death Penalty Act"), expressing continuing frustration with what it sees as the Sixth Circuit's cavalier approach to AEDPA deference: "As a final matter, this Court again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty. See, *e.g., Parker* v. *Matthews*, 567 U.S. ___ (2012) (*per curiam*); *Bobby* v. *Dixon*, 565 U.S. ___ (2011) (*per curiam*); *Bobby* v. *Mitts*, 563 U. S. 395 (2011) (*per curiam*); *Bobby* v. *Van Hook*, 558 U.S. 4 (2009) (*per curiam*).

2. **Ineffective Assistance of Counsel.** *Woods v. Etherton*, 136 S. Ct. ___ (Apr. 4, 2016) (per curiam). Law enforcement received an anonymous tip that two white males were traveling on I–96 between Detroit and Grand Rapids in a white Audi, possibly carrying cocaine. Officers spotted a vehicle matching that description and pulled it over for speeding. Etherton was driving; Pollie was in the passenger seat. A search of the car uncovered 125.2 grams of cocaine in a compartment at the bottom of the driver side door. Both Etherton and Pollie were arrested. Etherton was tried in state court on a single count of possession with intent to deliver cocaine. At trial the facts reflected in the tip were not contested. The central point of contention was instead whether the cocaine belonged to Etherton or Pollie. Pollie testified for the prosecution pursuant to a plea agreement. He claimed that he had accompanied Etherton from Grand Rapids to Detroit, not knowing that Etherton intended to obtain cocaine there. According to Pollie, once the pair arrived in Detroit, Etherton left him alone at a restaurant and drove off, returning some 45 minutes later. It was only after they were headed back to Grand Rapids that Etherton revealed he had obtained the drugs. The prosecution also called several police officers to testify. Three of the officers described the content of the anonymous tip leading to Etherton's arrest. On the third recounting of the tip, trial counsel objected based on hearsay, but the objection was not resolved because the prosecutor agreed to move on. Etherton was convicted. In postconviction proceedings, in state and federal court, Etherton argued that admission of the anonymous tip violated his Confrontation Clause rights under the Sixth Amendment, and that his trial and appellate counsel were ineffective for not objecting or appealing that issue. The state courts rejected his

claims (on procedural and substantive grounds), as did the federal district court. But the Sixth Circuit reversed, finding that Etherton's Confrontation right had been violated and he was prejudiced by his counsels' failures to object or appeal the issue. The Supreme Court reversed, in a per curiam opinion, finding that the Sixth Circuit violated the limited standard of review allowed by AEDPA. "Etherton's underlying complaint is that his appellate lawyer's ineffectiveness meant he had 'no prior opportunity to cross-examine the anonymous tipster.' . . . But it would not be objectively unreasonable for a fairminded judge to conclude—especially in light of the deference afforded *trial* counsel under *Strickland*— that the failure to raise such a claim was not due to incompetence but because the facts in the tip were uncontested and in any event consistent with Etherton's defense. *See Harrington[v. Richter]*, 562 U.S., at 105 ('Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.'). A fairminded jurist could similarly conclude, again deferring under *Strickland*, that *appellate* counsel was not incompetent in drawing the same conclusion. And to reach the final point at issue before the Sixth Circuit, a fairminded jurist—applying the deference due the *state court* under AEDPA— could certainly conclude that the court was not objectively unreasonable in deciding that appellate counsel was not incompetent under *Strickland*, when she determined that trial counsel was not incompetent under *Strickland*. Given AEDPA, both Etherton's appellate counsel and the state habeas court were to be afforded the benefit of the doubt. *Burt [v. Titlow]*, [571 U.S.] *supra*, at ___. Because the Sixth Circuit failed on both counts, we grant the petition for certiorari and reverse the judgment of the Court of Appeals."