

UNITED STATES SUPREME COURT
PREVIEW
REVIEW
OVERVIEW

CRIMINAL CASES GRANTED REVIEW
AND DECIDED DURING THE
OCTOBER 2020-22 TERMS
THRU OCTOBER 4, 2022

WITH *Hyperlinks* TO CASE DOCKETS,
DOCUMENTS, ORAL ARGUMENTS
& OPINIONS

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I. FIRST AMENDMENT

- A. **Religion in the Death Chamber.** *Ramirez v. Collier*, No. 21-5592 (Mar. 24, 2022) (OA *transcript* & *audio*). John Ramirez was sentenced to death for murder. In this litigation, Ramirez did not challenge his conviction or sentence. He asked instead that his long-time pastor be allowed to pray with him and lay hands on him while he is being executed. He says that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. §2000cc et seq., requires this accommodation. Ramirez sought a preliminary injunction ordering Texas to permit his religious exercise if the State went forward with his execution. The district court and court of appeals declined to grant such relief. The Supreme Court then stayed the execution and granted certiorari. Ramirez’s certiorari petition asked the Court to determine whether Texas’s restrictions on religious touch and audible prayer violate either RLUIPA or the Free Exercise Clause. But, his merits brief addressed only RLUIPA, so the Court did not consider any standalone argument under the Free Exercise Clause. Thus, “[t]he question is whether Ramirez’s execution without the requested participation of his pastor should be halted, pending full consideration of his claims on a complete record. The parties agree that the relief sought is properly characterized as a preliminary injunction. Under such circumstances, the party seeking relief ‘must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,

and that an injunction is in the public interest.’ *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). **The Court reversed and remanded (8-1), in an opinion authored by Chief Justice Roberts.** “[W]e think Ramirez is likely to succeed in proving that his religious requests are ‘sincerely based on a religious belief.’ *Holt*, 574 U.S., at 360–361. Ramirez seeks to have his pastor lay hands on him and pray over him during the execution. Both are traditional forms of religious exercise. . . . As Ramirez’s grievance states, ‘it is part of my faith to have my spiritual advisor lay hands on me anytime I am sick or dying.’ . . . Pastor Moore, who has ministered to Ramirez for four years, agrees that prayer accompanied by touch is ‘a significant part of our faith tradition as Baptists.’ . . . And neither the District Court nor the Court of Appeals doubted that Ramirez had a sincere religious basis for his requested accommodations.” The Court considered and rejected a raft of state arguments, first rejecting a categorical bar on audible prayer and touching at execution, and then rejecting case-specific claims against relief, such as that the defendant had inequitably delayed making this claim until shortly before execution, that he failed to exhaust remedies, and that preliminary relief is unnecessary because his estate can be compensated if his claim ends in a judgment against the state. “We hold that Ramirez is likely to prevail on the merits of his RLUIPA claims, and that the other preliminary injunction factors justify relief. If Texas reschedules Ramirez’s execution and declines to permit audible prayer or religious touch, the District Court should therefore enter appropriate preliminary relief. The judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.” Justices Sotomayor and Kavanaugh joined in the opinion and concurred in separate opinions detailing their respective thoughts on rules going forward, and Kavanaugh addressed the difficulty of applying the statute’s compelling-interest and least- restrictive-means standards. (Notably, he cited *his own* law review article: “See generally B. Kavanaugh, Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907, 1914– 1919 (2017).” Justice Thomas was the lone dissenter, “[b]ecause I think Ramirez’s claims either do not warrant equitable relief or are procedurally barred.”

II. SECOND AMENDMENT

- A. *New York State Rifle and Pistol Assn., et al. v. Bruen, No. 20-843* (June 23, 2022) (OA [transcript](#) and [audio](#)). New York prohibits its citizens from carrying a handgun outside the home without a license, which requires “special cause.” Despite the law, such licenses are readily

and often granted for a variety of reasons. The Second Circuit affirmed the constitutionality of the New York statutory regime. **The Supreme Court reversed (6-3) in a decision written by Justice Thomas.** “In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a hand-gun for self-defense outside the home. The parties nevertheless dispute whether New York’s licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen’s showing of some additional special need. Because the State of New York issues public- carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.” Concurring opinions were filed by Justices Alito, Kavanaugh (joined by C.J. Roberts), and Barrett. Justice Breyer dissented (joined by Sotomayor and Kagan).

III. FOURTH AMENDMENT – SEARCH & SEIZURE

- A. **Seizure by Excessive Force.** *Torres v. Madrid, No. 19-292* (Mar. 25, 2021) (OA [transcript](#) & [audio](#)). Madrid and Williamson, officers with the New Mexico State Police, arrived at an Albuquerque apartment complex to execute an arrest warrant and approached petitioner Roxanne Torres, then standing near a Toyota FJ Cruiser. The officers attempted to speak with her as she got into the driver’s seat. Believing the officers to be carjackers, Torres hit the gas to escape. The officers fired their service pistols 13 times to stop Torres, striking her twice. Torres managed to escape and drove to a hospital 75 miles away, only to be airlifted back to a hospital in Albuquerque, where the police arrested her the next day. Torres later sought damages from the officers under 42 U.S.C. §1983. She claimed that the officers used excessive force against her and that the shooting constituted an unreasonable seizure under the Fourth Amendment. Affirming the district court’s grant of summary judgment to the officers, the Tenth Circuit held that “a suspect’s continued flight after being shot by police negates a Fourth Amendment excessive-force claim.” The Supreme Court granted cert and reversed. In a 5-3 decision authored by Chief Justice Roberts, the Court held: “The Fourth Amendment prohibits unreasonable ‘seizures’ to

safeguard ‘[t]he right of the people to be secure in their persons.’ Under our cases, an officer seizes a person when he uses force to apprehend her. The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.” The Chief Justice’s opinion relies, in part, on *California v. Hodari D.*, 499 U.S. 621, 624 (1991), in which the Court explained that the common law considered the application of physical force to the body of a person with the intent to restrain to be an arrest—not an attempted arrest—even if the person does not yield. This principle is confirmed, he noted, by review of pertinent English and American decisions, which held that the slightest touching was a constructive detention that would complete the arrest. *See, e.g., Genner v. Sparks*, 6 Mod. 173, 87 Eng. Rep. 928. Justice Gorsuch dissented (joined by Thomas and Alito): “The majority holds that a criminal suspect can be simultaneously seized and roaming at large. On the majority’s account, a Fourth Amendment ‘seizure’ takes place whenever an officer ‘merely touches’ a suspect. It’s a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again. That view is as mistaken as it is novel.” Justice Barrett did not participate in the case.

- B. Misdemeanor Pursuit as Basis for Warrantless Entry of Home.** *Lange v. California, No. 20-18* (June 23, 2021) (OA [transcript](#) & [audio](#)). Apparently looking for attention, Arthur Lange was listening to loud music in his automobile with his windows down and repeatedly honked his horn. When he drove past a California highway patrol officer, the officer began to tail Lange, and soon afterward turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange inside the garage and began questioning him. Observing signs of intoxication, the officer put Lange through field sobriety tests, which he failed, and a later blood test showed that his blood-alcohol content was more than three times the legal limit. Lange was charged with the misdemeanor of driving under the influence of alcohol, plus a (lower-level) noise infraction. Lange moved to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry had violated the Fourth Amendment. The State contested the motion. It contended that the officer had probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. And, it argued that the pursuit of a suspected misdemeanant always

qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied Lange’s motion, and its appellate division affirmed. In a somewhat fragmented unanimous decision, Justice Kagan’s opinion for six justices vacated and remanded the California decision, holding that the fleeing felon doctrine may apply to misdemeanor suspects, based on the particular facts of the case, but it does not apply categorically to all misdemeanor cases: “The Fourth Amendment ordinarily requires that police officers get a warrant before entering a home without permission. But an officer may make a warrantless entry when ‘the exigencies of the situation’ create a compelling law enforcement need. *Kentucky v. King*, 563 U.S. 452, 460 (2011). The question presented here is whether the pursuit of a fleeing misdemeanor suspect always—or more legally put, categorically— qualifies as an exigent circumstance. We hold it does not. A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case.” Although pursuing a fleeing misdemeanant does not categorically qualify as an exigent circumstance justifying entry into the home., the majority recognized that flight will, in most cases, create such an exigency. But not in every case involving a fleeing misdemeanant. Thus, courts must assess the totality of the circumstances. Such exigencies may exist when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect’s escape. But, misdemeanors may be minor. When a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. Adding a suspect’s flight does not, alone, justify a categorical rule. When the totality of circumstances, including flight, demonstrate need to act before it is possible to get a warrant, police may act without waiting. If the fleeing suspect is a felon, however, there is a categorical exigency permitting entry into the home. Justices Breyer, Sotomayor, Gorsuch, Kavanaugh, and Barrett joined. Chief Justice Roberts, joined by Justice Alito, concurred in the judgment, opining that hot pursuit itself was an exigent circumstance, regardless of the nature of the underlying offense. Justice Thomas concurred in all but section II—A of the majority opinion, contending that history suggests categorical exceptions to the majority’s general rule, including where a person is arrested and escapes, where the fleeing suspect committed an affray or certain offenses, and where the suspect breached the peace. He also takes the position that the exclusionary rule should not apply to cases involving fleeing suspects because that encourages suspects to flee and rewards their bad conduct. Justice Kavanaugh joined that latter aspect of Justice Thomas’s opinion. And, he concurred to say that there was little practical daylight between the majority opinion and the Chief Justice’s concurrence.

- C. **“Community Caretaking” Exception to Warrant Requirement Does Not Apply to Homes.** *Caniglia v. Strom*, No. 20-157 (May 17, 2021) (OA [transcript](#) & [audio](#)). In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Supreme Court held that police officers did not violate the Fourth Amendment when they searched the trunk of a car that had been towed after an accident. The Court acknowledged that, “except in certain carefully defined classes of cases,” police cannot search private property without consent or a warrant. It emphasized, however, that “there is a constitutional difference between houses and cars.” (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)). “[P]olice officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” The Court thus held that a “caretaking ‘search’ conducted . . . of a vehicle that was neither in the custody nor on the premises of its owner . . . was not unreasonable solely because a warrant had not been obtained.” In the decades since *Cady*, however, the so-called “community caretaking” exception has taken on a life of its own. Courts across the country divided about whether the “community caretaking” exception can justify a warrantless intrusion into a home. Here, Mr. Caniglia’s wife called police because Mr. Caniglia seemed to be acting irrationally and doing so with firearms. After investigating, police found him outside his home and had him involuntarily committed. Police also entered his residence and seized the firearms, without a warrant or court order. Eventually, Mr. Caniglia was released and both husband and wife sought return of the firearms. But police would not return the firearms, so the couple filed a civil suit for their return and for damages against the officers for entering the home and seizing property without a warrant or court order. Both the district court and First Circuit denied relief. Applying the “community caretaking” exception to the home, the First Circuit found that the officers had acted in a “community caretaking” capacity because, rather than investigating a crime, they were responding to an individual whom they understood to be mentally unstable. The officers’ actions, according to the court, were reasonable and consistent with good police practices. “Consequently,” the court held that the warrantless “actions fell under the protective carapace of the community caretaking exception and did not abridge the Fourth Amendment.” The Supreme Court reversed (9-0) in an opinion authored by Justice Thomas: “The question today is whether *Cady*’s acknowledgment of these ‘caretaking’ duties creates a standalone doctrine that justifies warrantless searches and seizures in the home. It

does not.” “Neither the holding nor logic of *Cady* justified [the First Circuit’s] approach. True, *Cady* also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home—‘a constitutional difference’ that the opinion repeatedly stressed. In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car ‘parked adjacent to the dwelling place of the owner.’ (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).” The unanimous opinion concludes: “What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly ‘declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home.’ . . . We thus vacate the judgment below and remand for further proceedings consistent with this opinion.”

- D. Indian Reservation Searches.** *United States v. Cooley, No. 19-1414* (June 1, 2021) (OA [transcript](#) and [audio](#)). Late one night a tribal officer of the Crow Police Department was driving east on United States Highway 212, a public right-of-way within the Crow Reservation, located within the State of Montana. He saw a truck parked on the westbound side of the highway. Believing the occupants might need assistance, the tribal officer approached the truck and spoke to the driver, Joshua James Cooley. The officer noticed that Cooley had watery, bloodshot eyes and appeared to be non-native. He also noticed two semiautomatic rifles lying on the front seat. Eventually fearing violence, the officer ordered Cooley out of the truck and conducted a patdown search. He called tribal and county officers for assistance. While waiting for the officers to arrive, he returned to the truck. He saw a glass pipe and plastic bag that contained methamphetamine. The other officers, including an officer with the federal Bureau of Indian Affairs, then arrived. They directed the detaining tribal officer to seize all contraband in plain view, leading him to discover more methamphetamine. Cooley was taken to the Crow Police Department where federal and local officers questioned him further. Eventually, Cooley was indicted federally on drug and gun offenses, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §924(c)(1)(A). The district court granted Cooley’s motion to suppress the drug evidence that the tribal officer had seized. It reasoned that, as a Crow Tribe police officer, he lacked the authority to investigate nonapparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation. The government appealed, but the Ninth Circuit affirmed. The Ninth Circuit panel wrote that tribes “cannot exclude non-Indians from a state or federal highway” and “lack the ancillary power to investigate non-Indians who are using such public rights-of-way.” It added that a tribal police officer nonetheless could stop (and hold for a reasonable time) a non-Indian suspect, but only if (1) the

officer first tried to determine whether “the person is an Indian,” and, if the person turns out to be a non-Indian, (2) it is “apparent” that the person has violated state or federal law. Non-Indian status, the panel added, can usually be determined by simply asking one question. Because the tribal officer had not initially tried to determine whether Cooley was an Indian, the panel held that the lower court correctly suppressed the evidence. In a unanimous decision written by Justice Breyer, the Supreme Court reversed the Ninth Circuit, holding instead that the search and seizure of a non-Indian traveling on a public road through an Indian reservation is permissible without first fulfilling the preliminary inquiry required by the Court of Appeals. “The question presented is whether an Indian tribe’s police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation. The search and detention, we assume, took place based on a potential violation of state or federal law prior to the suspect’s transport to the proper nontribal authorities for prosecution. We have previously noted that a tribe retains inherent sovereign authority to address ‘conduct [that] threatens or has some direct effect on . . . the health or welfare of the tribe.’ *Montana v. United States*, 450 U.S. 544, 566 (1981) We believe this statement of law governs here. And we hold the tribal officer possesses the authority at issue.” Justice Alito concurred, expressing his view that the question presented by this case is answered more simply: “On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal police officer has the authority to (a) stop a non-Indian motorist if the officer has reasonable suspicion that the motorist may violate or has violated federal or state law, (b) conduct a search to the extent necessary to protect himself or others, and (c) if the tribal officer has probable cause, detain the motorist for the period of time reasonably necessary for a non-tribal officer to arrive on the scene.”

- E. Prerequisite to 1983 Suit for Unreasonable Seizure.** *Thompson v. Clark, No. 20-659* (Apr. 4, 2022) (OA [transcript](#) & [audio](#)). Thompson was charged and detained in state criminal proceedings, but the charges were dismissed before trial without any explanation by the prosecutor or judge. After the dismissal, Thompson alleged that the police officers who initiated the criminal proceedings had “maliciously prosecuted” him without probable cause. He sued and sought money damages from those officers in federal court, advancing a Fourth Amendment claim under 42 U.S.C. §1983 for malicious prosecution. To maintain that Fourth Amendment claim under §1983, a plaintiff such as Thompson must demonstrate, among other things, that he obtained a favorable termination of the underlying criminal prosecution. *Cf. Heck v. Humphrey*, 512 U.S. 477, 484, and n.4 (1994). What is a favorable

termination? Does it suffice for a plaintiff to show that his criminal prosecution ended without a conviction? Or must the plaintiff also demonstrate that the prosecution ended with some affirmative indication of his innocence, such as an acquittal or a dismissal accompanied by a statement from the judge that the evidence was insufficient? **In a 6-3 decision authored by Justice Kavanaugh, the Court ruled that the former is sufficient, holding that “a Fourth Amendment claim under §1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence.** A plaintiff need only show that the criminal prosecution ended without a conviction.” The case was remanded for further proceedings below. Justice Alito dissented, joined by Thomas and Gorsuch.

IV. FIFTH AMENDMENT

- A. **Grand Jury Subpoena for Attorney-Client Privileged Communications.** *In re Grand Jury, No. 21-1397* (cert. granted Oct. 3, 2022); decision below at 23 F.4th 1088 (9th Cir. 2022). Petitioner is a law firm that specializes in international tax issues, including the practice of advising clients on the tax consequences of expatriation. Upon expatriation, most individuals are subject to an “exit tax.” 26 U.S.C. 877A. Expatriation gives rise to complex legal questions, including how transactions and investments should be characterized for tax reporting purposes and what assets must be reported to the Internal Revenue Service. Petitioner provided legal advice to one of its clients regarding the tax consequences of their anticipated expatriation, and prepared several of the client’s individual income tax returns and their Form 8854, to certify their compliance with expatriation tax requirements, for the year of their expatriation. Thereafter, petitioner and two of its employees were served with grand jury subpoenas seeking documents related to a criminal investigation of the client. The subpoenas sought communications and other materials related to the client’s expatriation and tax return preparation. In response to the subpoenas, petitioner produced over 1,700 records, exceeding 20,000 pages, but withheld others on the basis of attorney-client privilege and work-product doctrine. Petitioner contends that clients routinely seek advice from lawyers with multiple goals in mind. As a result, lawyers often give advice that is both legal and non-legal in nature. The attorney-client privilege protects from disclosure confidential communications between attorneys and their clients made for the purpose of obtaining or providing legal advice. But the circuits are split as to when a communication made for multiple purposes—some legal and others not—is privileged. Three circuits have announced different and in-compatible tests for these so-called “dual-

purpose” communications. In the D.C. Circuit, such a communication is privileged whenever it has a significant legal purpose. The Ninth Circuit in this case held that courts must weigh all of the purposes for a communication and that a communication is privileged only where a legal purpose is at least as significant as any non-legal purpose. And, in the Seventh Circuit, dual-purpose communications are never privileged no matter how significant the legal purpose, at least in cases, like the present one, involving tax returns. **Question presented: Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication.**

- B. Double Jeopardy—Dual Sovereignty Doctrine.** *Denezpi v. United States, No. 20-7622* (June 13, 2022) (OA [transcript](#) and [audio](#)). Denezpi was arrested and charged by complaint in the Court of Indian Offenses of Ute Mountain Ute Agency, “a CFR Court,” which is a court governed by regulations found in the Code of Federal Regulations, 25 C.F.R. 11.100 et seq. He was charged with three offenses: terroristic threats, contrary to 25 C.F.R. § 11.402; false imprisonment, contrary to 25 C.F.R. § 11.404; and assault and battery, contrary to 6 Ute Mountain Ute Code (UMUC). The caption on the Complaint is “United States of America, Plaintiff vs. Merle Denezpi[, Defendant.]” Indeed, all pleadings in that court are likewise captioned. The charges against Mr. Denezpi stemmed from a sexual encounter with V.Y., a fellow member of the Navajo Nation. The encounter occurred within the exterior boundaries of the Ute Mountain Ute Reservation. Mr. Denezpi asserted that the sexual encounter was consensual, whereas V.Y. asserted it was not. He entered an *Alford* plea to the assault and battery charge in exchange for which the prosecutor agreed to dismiss the terroristic threats and false imprisonment charges. The CFR Court sentenced Denezpi to 140 days’ incarceration. Six months after Denezpi completed his sentence, he was charged by indictment in the United States District Court for the District of Colorado with violating 18 U.S.C. §§ 2241(a)(1) and (2), 1153(a). The charge is based on the same conduct underlying the charges in the CFR Court. The caption on the Indictment is “United States of America, Plaintiff vs. Merle Denezpi, Defendant.” All pleadings in the case are likewise captioned. Prior to trial, Denezpi filed a motion to dismiss the indictment on double jeopardy grounds. He argued that his conviction in the CFR Court for the same conduct underlying the charge in the district court violated his Fifth Amendment right to be free from double jeopardy. Denezpi argued that a CFR Court, which was created to fill a void in areas of Indian Country without a tribal court system, is an arm of the federal government and thus double jeopardy principles prohibit a

subsequent prosecution in a district court following a prosecution in a CFR court. The district court denied his motion. Following a jury trial, Mr. Denezpi was convicted of aggravated sexual assault. The district court sentenced Mr. Denezpi to 360 months incarceration. **The Supreme Court affirmed his conviction in a 6-3 decision authored by Justice Barrett.** “The Double Jeopardy Clause protects a person from being prosecuted twice ‘for the same offence.’ An offense defined by one sovereign is necessarily different from an offense defined by another, even when the offenses have identical elements. Thus, a person can be successively prosecuted for the two offenses without offending the Clause. We have dubbed this the ‘dual- sovereignty’ doctrine.” Premised on this very broad view of the doctrine, the Court proceeded to find no Double Jeopardy concerns here, even though the federal government prosecuted both cases. “This case presents a twist on the usual dual-sovereignty scenario. The mine run of these cases involves two sovereigns, each enforcing its own law. This case, by contrast, arguably involves a single sovereign (the United States) that enforced its own law (the Major Crimes Act) after having separately enforced the law of another sovereign (the Code of the Ute Mountain Ute Tribe). Petitioner contends that the second prosecution violated the Double Jeopardy Clause because the dual-sovereignty doctrine requires that the offenses be both enacted and enforced by separate sovereigns. We disagree. By its terms, the Clause prohibits separate prosecutions for the same offense; it does not bar successive prosecutions by the same sovereign. So even assuming that petitioner’s first prosecutor exercised federal rather than tribal power, the second prosecution did not violate the Constitution’s guarantee against double jeopardy.” Justice Gorsuch dissented (joined in large part by Sotomayor and Kagan).

- C. **No § 1983 Suit for Violation of *Miranda* Rights. *Vega v. Tekoh*, No. 21-499** (June 23, 2022). LA County Sherriff’s deputy Carlos Vega questioned Terrence Tekoh at his place of employment and did not give him a *Miranda* warning. Tekoh was prosecuted, and his confession was admitted into evidence, but the jury returned a verdict of not guilty. Tekoh then sued Vega under Rev. Stat. §1979, 42 U.S.C. §1983, based on the allegedly improper admission of his “un-*Mirandized*” statement in a criminal prosecution. The Ninth Circuit held that the use of Tekoh’s un-*Mirandized* statement provided a valid basis for a §1983 claim against Vega. **In a 6-3 decision, with an opinion authored by Justice Alito, the Court rejected this extension of its *Miranda* case law.** “The question we must decide is whether a violation of the *Miranda* rules provides a basis for a claim under §1983. We hold that it does not. If a *Miranda* violation were tantamount to a violation of the Fifth Amendment, our answer would of course be different. The Fifth

Amendment, made applicable to the States by the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” This Clause ‘permits a person to refuse to testify against himself at a criminal trial in which he is a defendant’ and ‘also “privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”’ *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). In addition, the right bars the introduction against a criminal defendant of out-of-court statements obtained by compulsion. *See, e.g., Bram v. United States*, 168 U.S. 532, 565 (1897); *Miranda*, 384 U.S., at 466; *Michigan v. Tucker*, 417 U.S. 433, 440–442 (1974).” But, the majority ruled, “*Miranda* itself and our subsequent cases make clear that *Miranda* imposed a set of prophylactic rules. Those rules, to be sure, are ‘constitutionally based,’ *Dickerson [v. United States]*, 530 U.S. 428,] at 440 [(2000)], but they are prophylactic rules nonetheless.” Thus, violation of *Miranda* is not, according to the majority, a violation of the Fifth Amendment. Justice Kagan dissented, joined by Breyer and Sotomayor.

V. SIXTH AMENDMENT

- A. **“Opening the Door” Doesn’t Forfeit Confrontation Rights.** *Hemphill v. New York*, **No. 20-637** (Jan. 20, 2022) (OA [transcript](#) & [audio](#)). In 2006, a stray 9-millimeter bullet killed a 2-year-old child in the Bronx. The state charged Nicholas Morris with the murder, but after trial commenced, it offered him a plea deal for a lesser charge. The State specifically required Morris to admit to a new charge of possession of a .357-magnum revolver, not the 9-millimeter handgun originally charged in the indictment and used in the killing. Years later, the state prosecuted Darrell Hemphill for the same murder. At his trial, Hemphill blamed Morris, and he elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris’ nightstand. Morris was outside the United States and not available to testify. The trial court allowed the state to introduce parts of the transcript of Morris’ plea allocution as evidence to rebut Hemphill’s theory that Morris committed the murder. The court reasoned that Hemphill’s arguments and evidence had “open[ed] the door” to the introduction of these testimonial out-of-court statements, not subjected to cross-examination, because they were “‘reasonably necessary’” to “‘correct’” the “‘misleading impression’” Hemphill had created. (citing *People v. Reid*, 19 N.Y.3d 382, 388, 971 N.E.2d 353, 357 (2012)). Hemphill was convicted and his conviction was affirmed on appeal. **The Supreme Court granted cert and reversed (8-1) in an opinion**

authored by Justice Sotomayor. “The question is whether the admission of the plea allocution under New York’s rule in *People v. Reid* violated Hemphill’s Sixth Amendment right to confront the witnesses against him. The Court holds that it did. Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense.” The Court first rejected the state’s argument that Hemphill had not preserved the issue for review, then rejected its attempt to allow state rules of procedure to override the Sixth Amendment right of Confrontation and the holding of *Crawford v. Washington*, 541 U.S. 36 (2004). “It is true that the Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules governing the exercise of a defendant’s right to confrontation. For example, ‘States are free to adopt procedural rules governing objections,’ including contemporaneous objection requirements and, in the context of forensic evidence, ‘notice-and- demand statutes.’ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009). In addition, the Confrontation Clause will not bar a defendant’s removal from a courtroom if, despite repeated warnings, he ‘insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.’ *Illinois v. Allen*, 397 U. S. 337, 343 (1970). The door-opening principle incorporated in [*People v.*] *Reid*, however, is not a member of this class of procedural rules. Rather, it is a substantive principle of evidence that dictates what material is relevant and admissible in a case. . . . As this case illustrates, the principle requires a trial court to determine whether one party’s evidence and arguments, in the context of the full record, have created a ‘misleading impression’ that requires correction with additional material from the other side. Moreover, the State’s argument would negate *Crawford*’s emphatic rejection of the reliability-based approach of *Ohio v. Roberts*. If *Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees. The Clause ‘commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.’ *Crawford*, 541 U.S., at 61. It ‘thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.’ *Ibid.* ‘[A] mere judicial determination’ regarding the reliability of evidence is no substitute for the ‘constitutionally prescribed method of assessing reliability.’ *Id.*, at 62. The upshot is that the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution’s procedures for testing the reliability of that evidence are followed. The trial court here violated this principle by admitting

unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause." Justice Alito concurred (Kavanaugh joined). Justice Thomas dissented.

B. Unanimous Verdicts; Retroactivity of *Ramos v. Louisiana*. *Edwards v. Vannoy, Warden, No. 19-5807* (May 17, 2021) (OA [transcript](#) & [audio](#)). Last Term in *Ramos v. Louisiana*, 590 U.S. (2020), the Court held that a state jury must be unanimous to convict a criminal defendant of a serious offense. *Ramos* repudiated the Court's 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404, which had allowed non-unanimous juries in state criminal trials. The question in this case was whether the new rule of criminal procedure announced in *Ramos* applies retroactively to overturn final convictions on federal collateral review. Under the Supreme Court's landmark retroactivity decision, *Teague v. Lane*, a new rule of criminal procedure is not ordinarily applied retroactively, unless it is a watershed rule of criminal procedure, such as was the case in *Gideon v. Wainwright*, in which the right to counsel was applied to the states. Since *Teague* was decided 32 years ago, the Court has announced many rules of criminal procedure, but has not once deemed such a rule to be a watershed rule. In a 6-3 decision authored by Justice Kavanaugh, the Supreme Court held here that the *Ramos* decision is not retroactively applicable: "In light of the Court's well-settled retroactivity doctrine, we conclude that the *Ramos* jury-unanimity rule likewise does not apply retroactively on federal collateral review." For good measure, Justice Kavanaugh's majority opinion *sua sponte* overruled and jettisoned the *Teague* rule's retroactivity exception for watershed rules of criminal procedure (even though the parties never briefed that issue). "This Court has stated that the watershed exception is 'extremely narrow' and applies only when, among other things, the new rule alters 'our understanding of the bedrock procedural elements essential to the fairness of a proceeding.' ... In the abstract, those various adjectives—watershed, narrow, bedrock, essential—do not tell us much about whether a particular decision of this Court qualifies for the watershed exception. In practice, the exception has been theoretical, not real. The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court's landmark

decision in *Gideon v. Wainwright*, 372 U. S. 335, 344–345 (1963). The Court has never identified any other pre-*Teague* or post-*Teague* rule as watershed. None. Moreover, the Court has flatly proclaimed on multiple occasions that the watershed exception is unlikely to cover any more new rules.” With that, the majority killed the watershed rule forevermore: “If landmark and historic criminal procedure decisions— including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts. In *Teague* itself, the Court recognized that the purported exception was unlikely to apply in practice, because it was ‘unlikely’ that such watershed ‘components of basic due process have yet to emerge.’ 489 U.S., at 313 (plurality opinion). The Court has often repeated that ‘it is unlikely that any of these watershed rules has yet to emerge.’ ... And for decades, the Court has rejected watershed status for new procedural rule after new procedural rule, amply demonstrating that the purported exception has become an empty promise. Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time— probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must ‘be regarded as retaining no vitality.’ *Herrera v. Wyoming*, 587 U.S. ___, ___, (2019) (slip op., at 11) (internal quotation marks omitted).” Justices Thomas and Gorsuch concurred, both together and in separate opinions. Justice Kagan dissented, joined by Breyer and Sotomayor. They argued that the jury right recognized in *Ramos* certainly qualifies as a watershed rule and accuses the majority of overturning the watershed portion of *Teague* precisely because the majority could not justify its decision with the watershed rule in place. “[E]verything rests on the majority’s last move—the overturning of *Teague*’s watershed exception. If there can never be any watershed rules—as the majority here asserts out of the blue—then, yes, jury unanimity cannot be one. The result follows trippingly from the premise. But adopting the premise requires departing from judicial practice and principle. In overruling a critical aspect of *Teague*, the majority follows none of the usual rules of *stare decisis*. It discards precedent without a

party requesting that action. And it does so with barely a reason given, much less the ‘special justification ‘our law demands.’” The dissent is extensive, effective and worth a read – far more than simply an obituary for the watershed rule.

VI. CRIMES

- A. **Federal Jurisdiction Over Foreign Sovereigns.** *Turkiye Halk Bankasi A.S. v. United States, No. 21-1450* (cert. granted Oct. 3, 2022); decision below at 16 F.4th 336 (2d Cir. 2021). Halkbank is a bank that is majority owned by Turkey. The U.S. government alleges that in 2012, Turkish-Iranian businessman Reza Zarrab hatched a scheme to divert funds at Halkbank to uses not permitted by U.S. sanctions against Iran. According to the government, Zarrab approached Turkey’s Minister of Economy—Halkbank’s governor—who in turn “directed that the . . . scheme should be conducted through Halkbank.” The government claims that senior “Turkish government officials” at various times directed Halkbank to continue and accelerate the scheme. At Zarrab’s direction, Halkbank employees allegedly helped Zarrab transfer funds *within Halkbank* from Iranian accounts to accounts belonging to Zarrab or his front companies. Zarrab then transferred the money out of Halkbank to “exchange houses and front companies” in Turkey. Zarrab used the funds to purchase gold in Turkey, which was then transported to Dubai. Once in Dubai, the gold “could be converted into cash or currency and remitted to Iran or used to conduct international financial transfers on behalf of Iranian persons and entities.” When regulations no longer allowed the purchase of gold, Zarrab implemented a similar scheme designed to take advantage of exempt humanitarian trade. At bottom, the government alleges that the scheme’s purpose was to “create a pool of Iranian oil funds in Turkey and the United Arab Emirates” that could be used for Iran’s benefit. In 2017, Zarrab pleaded guilty and turned government witness. The government indicted three former Halkbank executives, one of whom stood trial and was convicted. The government then set its sights on Halkbank. In October 2019, federal prosecutors in the Southern District of New York obtained a six- count indictment against Halkbank. Halkbank moved to dismiss, invoking sovereign immunity. Halkbank argued that, as a sovereign instrumentality of Turkey, no statute provides criminal jurisdiction over it. Halkbank alternatively argued that if the exceptions to immunity contained in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602, apply to criminal cases, no exception authorizes jurisdiction here. The district court denied the motion to dismiss. The court asserted that sovereign immunity only applies in civil cases, and thus that foreign sovereigns stand like private persons in criminal cases, with no immunity under either the FSIA or the

common law. In the alternative, the court held that the FSIA's commercial activities exception would overcome any immunity in this case. The Second Circuit allowed an immediate appeal, but affirmed, holding (a) subject matter jurisdiction existed under 18 U.S.C. § 3231's general grant of jurisdiction (b) if foreign states are entitled to sovereign immunity from criminal jurisdiction, the FSIA's exceptions limit that immunity, particularly under the commercial activities exception; (c) foreign states lack criminal immunity under the common-law. The circuits are split 3-1 on whether district courts have criminal jurisdiction over foreign sovereigns. Although the split originally arose in the context of grand jury subpoenas and civil RICO claims, Halkbank argues that the Second Circuit's holding has upped the ante by squarely presenting the issue of whether foreign sovereigns can be criminally indicted, tried, and sentenced. **Question presented: Whether U.S. district courts may exercise subject-matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611.**

- B. State Jurisdiction Over Crimes in Indian Country.** *Oklahoma v. Castro-Huerta*, No. 21-429 (June 29, 2022). The State charged Castro-Huerta with child neglect. His alleged crime occurred in Indian Country, but Castro-Huerta is not an Indian, as defined by the federal Major Crimes Act, which limits a state's right to charge and try Indians in state court. After a jury trial, he was convicted and sentenced to 35 years of imprisonment. He appealed to the Oklahoma Court of Criminal Appeals, arguing that the State lacked jurisdiction to prosecute his case. During briefing on the appeal, the U.S. Supreme Court decided *McGirt v. Oklahoma*, holding that the historical Creek territory constitutes Indian country for purposes of the federal Major Crimes Act, giving the federal government exclusive authority to prosecute the crimes enumerated in that statute. The Court of Criminal Appeals then remanded the defendant's case to the trial court in light of *McGirt*. The Court of Criminal Appeals directed the trial court to determine whether the defendant's stepdaughter was an Indian and whether his crime occurred in Indian country. On remand, the parties agreed by stipulation that the victim had some degree of Indian blood; that she was an enrolled member of the Eastern Band of Cherokee Indians at the time of his crime; and that the Eastern Band of Cherokee Indians was a federally recognized tribe based in North Carolina. The parties also agreed that the defendant's crime occurred within the area historically designated to the Cherokee Nation by certain treaties. The trial court accepted the parties' stipulations and, in the wake of *McGirt*, concluded that Congress never disestablished the Cherokee Reservation. The trial court therefore

determined that the defendant's crime was committed within Indian country. During the remand proceedings, the State argued that it retained concurrent jurisdiction over all crimes committed by non-Indians within the State, regardless of whether the crime occurred in Indian country. The trial court declined to hear argument or reach a conclusion on that issue, but it allowed the State to preserve the argument. The Court of Criminal Appeals affirmed, holding that "the ruling in *McGirt* governs this case." **The Supreme Court reversed 5-4, in an opinion authored by Justice Kavanaugh.** "This case presents a jurisdictional question about the prosecution of crimes committed by non-Indians against Indians in Indian country: Under current federal law, does the Federal Government have *exclusive* jurisdiction to prosecute those crimes? Or do the Federal Government and the State have concurrent jurisdiction to prosecute those crimes? We conclude that the Federal Government and the State have *concurrent* jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country." The ruling undermines the *McGirt* decision and reverses nearly two centuries of Supreme Court jurisprudence dating back to *Worcester v. Georgia*, 6 Pet. 515, 561 (1832) (overturning Georgia's attempt to arrest and prosecute a white missionary for preaching to the Cherokee on tribal lands), forcefully explained in Justice Gorsuch's dissent (joined by Breyer, Sotomayor and Kagan).

C. ACCA

1. **Recklessness Not a "Violent Felony."** *Borden v. United States*, No. 19-5410 (June 10, 2021)(OA [transcript](#) & [audio](#)). Borden pled guilty to being a felon in possession of a firearm, retaining his right to appeal if the district court applied the ACCA. His PSI contended Borden qualified for the enhanced sentencing provisions of the ACCA based on four sets of criminal convictions: three for Tennessee aggravated assault and one for Tennessee promotion of methamphetamine manufacture. This established a guideline range of 180 to 210 months, but without the ACCA his guidelines would have been 77 to 96 months. Tennessee aggravated assault can be committed recklessly. The district court sentenced Borden as an Armed Career Criminal based on the reckless aggravated assault convictions. The Sixth Circuit affirmed, holding that the Tennessee reckless aggravated assault conviction qualifies as an ACCA predicate under the ACCA's force clause, 18 U.S.C. § 924(e)(2)(B)(i). Cert was granted and the Sixth Circuit decision was reversed in 4-1-4 decision, with a plurality opinion authored by Justice Kagan (joined by Breyer, Sotomayor & Gorsuch): "The question here is whether a criminal offense can count as a 'violent

felony’ if it requires only a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge. We hold that a reckless offense cannot so qualify” The plurality reviewed the states of mind relevant to criminal law: “We begin by setting out four states of mind, as described in modern statutes and cases, that may give rise to criminal liability. Those mental states are, in descending order of culpability: purpose, knowledge, recklessness, and negligence. . . . Purpose and knowledge are the most culpable levels in the criminal law’s mental-state ‘hierarchy.’” As to the lesser two, the plurality observed: “Recklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury. A person acts recklessly, in the most common formulation, when he ‘consciously disregards a substantial and unjustifiable risk’ attached to his conduct, in ‘gross deviation’ from accepted standards. Model Penal Code §2.02(2)(c); see *Voisine v. United States*, 579 U.S. 686, (2016) (slip op., at 4). That risk need not come anywhere close to a likelihood. Speeding through a crowded area may count as reckless even though the motorist’s ‘chances of hitting anyone are far less [than] 50%.’ 1 W. LaFave, *Substantive Criminal Law* §5.4(f) (2018) (citing cases involving low-probability events). Similarly (though one more step down the mental-state hierarchy), a person acts negligently if he is not but ‘should be aware’ of such a ‘substantial and unjustifiable risk,’ again in ‘gross deviation’ from the norm. Model Penal Code §2.02(2)(d). There, the fault lies in the person’s simple ‘failure to perceive’ the possible consequence of his behavior.” In sum, the plurality held: “Today, we reach the question we reserved in both *Leocal v. Ashcroft* and *Voisine*. We must decide whether the elements clause’s definition of ‘violent felony’—an offense requiring the ‘use of physical force against the person of another’—includes offenses criminalizing reckless conduct. We hold that it does not. The phrase ‘against another, when modifying the ‘use of force,’ demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner. Our reading of the relevant text finds support in its context and purpose. The treatment of reckless offenses as ‘violent felonies’ would impose large sentencing enhancements on individuals (for example, reckless drivers) far afield from the ‘armed career criminals’ ACCA addresses—the kind of offenders who, when armed, could well ‘use [the] gun deliberately to harm a victim.’ *Begay v. United States*, 553 U.S., at 145. And *contra* the Government (and dissent), *Voisine* says nothing to the contrary.” A majority decision was formed with Justice Thomas’ reluctant concurrence, lamenting existing precedent: “This case forces us to choose between aggravating a past error and committing a new one.

I must choose the former. Although I am ‘reluctant to magnify the burdens that our [erroneous] jurisprudence imposes,’ *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring), I conclude that the particular provision at issue here does not encompass petitioner’s conviction for reckless aggravated assault, even though the consequences of today’s judgment are at odds with the larger statutory scheme. The need to make this choice is yet another consequence of the Court’s vagueness-doctrine cases like *Johnson v. United States*, 576 U.S. 591 (2015).” Unlike the plurality opinion, he does not rely on *Voisine* (from which he dissented), instead relying on his own dissenting opinion in that case, “A crime that can be committed through mere recklessness does not have as an element the ‘use of physical force’ because that phrase ‘has a well-understood meaning applying only to intentional acts designed to cause harm.’” His concurrence calls for *Johnson* to be overruled. Justice Kavanaugh dissented, joined by Chief Justice Roberts, justices Alito and Barrett. The lengthy dissent concludes: “[T]he text of ACCA’s use-of-force clause encompasses reckless offenses, such as reckless assault and reckless homicide. Contrary to the plurality’s conclusion today, the phrase ‘against the person of another’ reflects a centuries-old term of art for classifying crimes and has zero to do with *mens rea*. Even setting aside that longstanding usage, the plurality’s interpretation of the phrase ‘use of physical force against the person of another’ fails as a matter of ordinary meaning and precedent.”

2. **Sequential Offenses Not Necessarily Separate ACCA Predicates.** *Wooden v. United States*, No. 20-5279 (Mar. 7, 2022) (OA [transcript](#) & [audio](#)). Wooden was convicted by a federal jury of one count of possessing a firearm as a felon, in violation of 18 U.S.C. §§922(g)(1) and 924(e)(1) (2012). The district court sentenced him under the Armed Career Criminal Act to 188 months of imprisonment, followed by three years of supervised release. Wooden’s ACCA status was based on ten Georgia convictions for burglary: On one occasion in 1997 he broke into a mini-storage facility, entering ten units during the course of the crime. He later pleaded guilty to ten counts of burglary. Were these burglaries committed “on occasions different from one another” as required by the terms of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)? The answer dictates a difference of 15 years in federal prison. If the answer is no, Wooden’s sentence for possessing a firearm as a felon would have been only 21 to 26 months, ending in 2016. Otherwise, he faced an additional minimum punishment of 15 years. On appeal, he argued that his ten burglaries were

committed on the same occasion: He burgled all ten units at the mini-storage facility in a single criminal episode that flowed from the same opportunity; no intervening change in circumstances made his entry into the first storage unit any different from his entry into the second or third (or tenth). Wooden's offenses, accordingly, took place on the same "occasion" under § 924(e)(1). The Sixth Circuit disagreed, instead affirming the harsh mandatory minimum sentence. **In a unanimous decision authored by Justice Kagan, the Supreme Court held no, these burglaries were not committed on different occasions:** "In the course of one evening, William Dale Wooden burglarized ten units in a single storage facility. He later pleaded guilty, for that night's work, to ten counts of burglary—one for each storage unit he had entered. Some two decades later, the courts below concluded that those convictions were enough to subject Wooden to enhanced criminal penalties under the Armed Career Criminal Act (ACCA). That statute mandates a 15-year minimum sentence for unlawful gun possession when the offender has three or more prior convictions for violent felonies like burglary "committed on occasions different from one another." 18 U.S.C. §924(e)(1). The question presented is whether Wooden's prior convictions were for offenses occurring on different occasions, as the lower courts held, because the burglary of each unit happened at a distinct point in time, rather than simultaneously. The answer is no. Convictions arising from a single criminal episode, in the way Wooden's did, can count only once under ACCA." Justice Kagan's opinion relied on the plain language of the "Occasions Clause," and, in part on a concession by the Solicitor General in the prior case of *United States v. Petty*, 481 U.S. 1034, 1034–1035 (1987), on which Congress relied when it amended the ACCA to add the Occasions Clause. The somewhat limited nature of the holding is stressed in a concurrence by Justice Gorsuch: "What do we resolve? The Court rejects the Sixth Circuit's rule that crimes occurring sequentially always occur on different occasions. Sometimes, the Court holds, crimes committed one after another can take place on a single occasion. No one doubts that William Wooden had to break through wall after wall dividing 10 separate storage units to complete his crimes. Or that, by the end of it all, he committed 10 distinct criminal offenses. But, the Court explains, none of this automatically dictates the conclusion that his crimes occurred on different occasions. . . . Beyond that clear holding, however, lies much uncertainty. Rather than simply observe that sequential crimes can occur on one occasion and return this case to the Court of Appeals for resolution, the Court ventures further. It directs

lower courts faced with future Occasions Clause cases to employ a ‘multi-factored’ balancing test in which ‘a range of circumstances may be relevant.’” Although the Court’s decision is unanimous, it is accompanied by a host of concurrences that do nothing to alter the outcome of Wooden’s case. Justices Gorsuch (joined in part by Sotomayor) and Kavanaugh debated the role of the rule of lenity – even though it played no part in this decision; Kavanaugh thinks we should see less use of the rule and instead examine the *mens rea* of a statute; Gorsuch argues the rule of lenity’s application has been incorrectly limited. More broadly, Justice Gorsuch sees a place for the rule in post-*Wooden* applications: “The rule of lenity has a critical role to play in cases under the Occasions Clause. The statute contains little guidance, and reasonable doubts about its application will arise often. When they do, they should be resolved in favor of liberty. Today, the Court does not consult lenity’s rule, but neither does it forbid lower courts from doing so in doubtful cases. That course is the sound course. Under our rule of law, punishments should never be products of judicial conjecture about this factor or that one.” Justice Barrett agreed with the decision, based on plain language, but had a *Petty* objection to the majority opinion. She disagreed that the Congressional amendment adding the Occasions Clause was due solely to the Solicitor General’s reasoning in its concession brief in *Petty*. Note: Although *amici curiae* argued that the occasions inquiry is subject to constitutional constraints requiring a jury finding beyond a reasonable doubt, the question was left undecided since Wooden, himself, had not raised it: “A constitutional question simmers beneath the surface of today’s case. The Fifth and Sixth Amendments generally require the government in criminal cases to prove every fact essential to an individual’s punishment to a jury beyond a reasonable doubt. See *United States v. Haymond*, 588 U. S._____,_____-_____(2019) (plurality opinion) (slip op., at 5–6). In this case, however, only judges found the facts relevant to Mr. Wooden’s punishment under the Occasions Clause, and they did so under only a preponderance of the evidence standard. Because Mr. Wooden did not raise a constitutional challenge to his sentence, the Court does not consider the propriety of this practice. But there is little doubt we will have to do so soon. See *United States v. Dudley*, 5 F. 4th 1249, 1273– 1278 (CA11 2021) (Newsom, J., concurring in part and dissenting in part) (questioning whether the Occasions Clause inquiry can be squared with the Constitution); *United States v. Perry*, 908 F. 3d 1126, 1134–1136 (CA8 2018) (Stras, J., concurring) (same); *United States v. Thompson*, 421 F. 3d 278, 287–295 (CA4 2005) (Wilkins, C. J., dissenting) (same). And it is

hard not to wonder: If a jury must find the facts supporting a punishment under the Occasions Clause beyond a reasonable doubt, how may judges impose a punishment without equal certainty about the law's application to those facts?"

3. **Attempted Hobbs Act Robbery not a Crime of Violence.** *United States v. Taylor, No. 20-1459* (June 21, 2022) (OA [transcript](#) & [audio](#)). Taylor was charged with seven counts, including separate counts of conspiring and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), as well as using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). The predicates for the 924(c) count were both the conspiracy and attempted robbery counts. Pursuant to a plea agreement, he pleaded guilty to conspiring to commit Hobbs Act robbery and the 924(c) violation; neither the plea agreement nor colloquy specified which predicate applied to that count. He was sentenced to 360 months of imprisonment, followed by three years of supervised release. Later, following intervening decisions that held that conspiracy to commit Hobbs Act robbery is not a crime of violence, Taylor collaterally challenged his conviction and sentence. This matters because Hobbs Act Robbery alone has a maximum penalty of 20 years, but under § 924(c)(3)(A), the same individual may face a second felony conviction and years or decades of further imprisonment. The district court acknowledged that conspiracy to commit Hobbs Act robbery no longer qualifies as a “crime of violence” under Section 924(c) after the invalidation of Section 924(c)(3)(B) and the Fourth Circuit’s holding in *United States v. Simms*, that conspiracy to commit Hobbs Act robbery does not constitute a “crime of violence” under Section 924(c)(3)(A). The district court explained, however, that attempted Hobbs Act robbery remained a “crime of violence” under Section 924(c)(3)(A), because it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” The district court therefore determined that Taylor’s section 924(c) conviction remained valid. The Fourth Circuit reversed, holding that the offense of attempted Hobbs Act robbery does not qualify as a “crime of violence” under Section 924(c)(3)(A). **The Supreme Court affirmed, in a 7-2 decision authored by Justice Gorsuch.** “[T]o win a conviction for a completed [Hobbs Act] robbery the government must show that the defendant engaged in the ‘unlawful taking or obtaining of personal property from the person . . . of another, against his will, by means of actual or threatened force.’ § 1951(b). From this, it follows that to win a case

for attempted Hobbs Act robbery the government must prove two things: (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a ‘substantial step’ toward that end. *See, e.g., United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007).” “Whatever one might say about completed Hobbs Act robbery, attempted Hobbs Act robbery does not satisfy the elements clause. Yes, to secure a conviction the government must show an intention to take property by force or threat, along with a substantial step toward achieving that object. But an intention is just that, no more. And whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property.” Justice Gorsuch gave a hypothetical to illustrate his reasoning: “Suppose Adam tells a friend that he is planning to rob a particular store on a particular date. He then sets about researching the business’s security measures, layout, and the time of day when its cash registers are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car. Finally, he drafts a note—‘Your money or your life’—that he plans to pass to the cashier. The note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the store, the police immediately arrest him. It turns out Adam’s friend tipped them off. There is little question the government could win a lawful conviction against Adam for attempted Hobbs Act robbery. After all, he intended to take property against the cashier’s will by threat of force, and his actions constituted a substantial step toward that goal. At the same time, this example helps show why attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause. Adam did not ‘use’ physical force. He did not ‘attempt’ to use such force—his note was a bluff and never delivered. And he never even got to the point of threatening the use of force against anyone or anything. He may have intended and attempted to do just that, but he failed. Simply put, no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.” Justices Thomas and Alito dissented.

D. **Physician’s Criminal Liability for Controlled Substance Prescriptions.** *Ruan v. United States*, No. 20-1410 and *Kahn v. United States*, No. 21-5261 (June 27, 2022) (OA [transcript](#) and [audio](#)). A physician otherwise authorized to prescribe controlled substances may be convicted of unlawful distribution under 21 U.S.C. § 841(a)(1) if his prescriptions “fall outside the usual course of professional practice.” *United States v. Moore*, 423 U.S. 122, 124 (1975). To ensure that physicians are not convicted for merely negligent conduct, however, the federal courts generally permit doctors to advance a “good faith” defense. In this case, the Court decided which party has the burden of proving good faith. **In a unanimous decision authored by Justice Breyer (with Alito concurring in the judgment, joined in part by Thomas and Barrett), the Court held the government has the burden to rebut evidence of good faith beyond a reasonable doubt.** “A provision of the Controlled Substances Act, codified at 21 U.S.C. §841, makes it a federal crime, “[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance,” such as opioids. 84 Stat. 1260, 21 U. S. C. §841(a) (emphasis added). Registered doctors may prescribe these substances to their patients. But, as provided by regulation, a prescription is only authorized when a doctor issues it “for a legitimate medical purpose . . . acting in the usual course of his professional practice.” 21 CFR §1306.04(a) (2021). In each of these two consolidated cases, a doctor was convicted under §841 for dispensing controlled substances not “as authorized.” The question before us concerns the state of mind that the Government must prove to convict these doctors of violating the statute. We hold that the statute’s “knowingly or intentionally” *mens rea* applies to authorization. After a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so.” To arrive at this conclusion, the Breyer opinion uses a four-part test to conclude that the exception is sufficiently like an element to be treated as such in the context of burden-of-proof. Justice Alito’s concurrence quibbles on technical grounds, claiming the decision confuses elements of a crime and affirmative defenses, arguing that the majority decision creates a new hybrid between the two. His contention, shared by two other justices, offers valuable fodder in the context of other crimes: “The Court does not claim that the “[e]xcept as authorized” proviso actually constitutes an element of dispensing or distributing a controlled substance. But it concludes, based on a vague four-part test, that the proviso is “sufficiently like an element in respect to the matter at issue here as to warrant similar treatment.” ... **How many other affirmative defenses might warrant similar treatment, the Court does not say. It**

leaves prosecutors, defense attorneys, and the lower courts in the dark. I cannot accept this cavalier treatment of an important question.”

E. Federal Wire Fraud and Bribery

1. **Lobbyists.** *Percoco v. United States, No. 21-1158* (cert. granted June 30, 2022); decision below at 13 F.4th 180 (2d Cir. 2021). Question presented: Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decision-making, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?
2. **Bribe Beneficiaries.** *Ciminelli v. United States, No. 21-1170* (cert. granted June 30, 2022); decision below 13 F.4th 158 (2d Cir. 2021). Question presented: Whether the Second Circuit’s “right to control” theory of fraud — which treats the deprivation of complete and accurate information bearing on a person’s economic decision as a species of property fraud — states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343?

- F. Computer Fraud and Abuse Act.** *Van Buren v. United States, No. 19-783* (June 3, 2021) (OA [transcript](#) & [audio](#)). A defendant is guilty under the Computer Fraud and Abuse Act if he “accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer.” 18 U.S.C. § 1030(a)(2)(C). Under the Act, to “exceed[] authorized access” means “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.” *Id.* § 1030(e)(6). Van Buren was a police sergeant in Cumming, Georgia, a small town in the northern part of the state. He knew a local man named Andrew Albo allegedly paid prostitutes to spend time with him and then called the police to accuse the women of stealing the money he gave them. Claiming to fear retaliation from these women, he sometimes also asked officers to run searches of allegedly suspicious license plate tags. Sgt. Van Buren was struggling financially and asked Albo for a loan. Albo secretly recorded their conversations. Albo shared the recordings with the state sheriff’s office, which referred the matter to the local police, which in turn referred the matter to the FBI. The FBI devised a sting operation to test how far Van Buren was willing to go for money. To set up the operation, the FBI invented a favor for Albo to request of Van Buren in exchange for the loan: the FBI instructed Albo to ask him to run a computer search for the supposed license plate number of a dancer at a local strip club. It directed Albo to say that he

liked her and wanted to know if she was an undercover officer before he would pursue her further. Van Buren agreed to complete the search. When Albo gave him \$5,000 in return, he offered to pay Albo back, but Albo waved that off. Still, Van Buren insisted, “I’m not charging for helping you out.” Several days later, Albo followed up on the request, bringing him an additional \$1,000 and the fake license plate number created by the FBI. After that meeting, Van Buren accessed the Georgia Crime Information Center (GCIC) database, which contains license plate and vehicle registration information. As a law enforcement officer, he was authorized to access this database “for law- enforcement purposes.” He ran a search for the license plate number that Albo had given him. He then texted Albo that he had information to provide. Van Buren was arrested and the federal government charged him with, *inter alia*, felony computer fraud, in violation of 18 U.S.C. § 1030. The indictment alleged he violated the “exceeds authorized access” clause of §1030(a)(2). The trial evidence showed that Van Buren had been trained not to use the law enforcement database for “an improper purpose,” defined as “any personal use.” Van Buren therefore knew that the search breached department policy. And according to the government, that violation of department policy also violated the CFAA. He moved for a judgment of acquittal at trial, arguing that accessing information for an improper or impermissible purpose does not exceed authorized access as meant by Section 1030(a)(2). But the district court denied the motion. He was convicted and sentenced to 18 months imprisonment. Although the government acknowledged a circuit split on the issue, both in the district court and on appeal, the Eleventh Circuit affirmed the conviction, based on binding circuit precedent, holding that it was sufficient that Van Buren ran the tag search for “inappropriate reasons.” The Supreme Court reversed the Eleventh Circuit (6-3) in a majority opinion authored by Justice Barrett, ruling instead that Van Buren did not violate the Computer Fraud and Abuse Act of 1986. The majority opinion distinguished between the initial authority to obtain the information from a computer, as opposed to how that information is later used (or misused). “This provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them.” Van Buren, the Court held, had authority to access the information, regardless of his motive for doing so; his conduct did not violate the “exceeds authorized access” provision of the law. Justice Thomas dissented (joined by Chief Justice Roberts and Justice Alito): “Both the common law and statutory law have long punished those who exceed the scope of consent when using property that belongs to others. A valet, for example, may take possession of a person’s

car to park it, but he cannot take it for a joyride. The Computer Fraud and Abuse Act extends that principle to computers and information.”

VII. SENTENCING

- A. **First Step Act Eligibility.** *Terry v. United States, No. 20-5904* (June 14, 2021) (OA [transcript](#) & [audio](#)). Terry pleaded guilty in 2008 to possession with intent to distribute an unspecified amount of crack. The district court determined that his offense involved about 4 grams of crack so that the crack mandatory-minimums did not apply to him. But, he was determined to be a career offender, and sentenced to a bottom-of-the-guidelines sentence of 188 months. Two years later, Congress passed the Fair Sentencing Act of 2010, which increased the crack quantity thresholds from 5 grams to 28 for the 5- year mandatory minimum and from 50 grams to 280 for the 10-year mandatory minimum. §2(a), 124 Stat. 2372. But Congress did not make this change retroactive until 2018, when it enacted the First Step Act. After that, Terry sought resentencing on the ground that he was convicted of a crack offense modified by the Fair Sentencing Act. The district court denied his motion, and the Eleventh Circuit affirmed. The Supreme Court affirmed in a unanimous decision, authored by Justice Thomas: “In 1986, Congress established mandatory-minimum penalties for cocaine offenses. If the quantity of cocaine involved in an offense exceeded a minimum threshold, then courts were required to impose a heightened sentence. Congress set the quantity thresholds far lower for crack offenses than for powder offenses. But it has since narrowed the gap by increasing the thresholds for crack offenses more than fivefold. The First Step Act of 2018, Pub. L. 115–391, 132 Stat. 5194, makes those changes retroactive and gives certain crack offenders an opportunity to receive a reduced sentence. The question here is whether crack offenders who did not trigger a mandatory minimum qualify. They do not.” The Court reasoned as follows: The First Step Act makes an offender eligible for a sentence reduction only if the offender previously received “a sentence for a covered offense.” §404(b), 132 Stat. 5222. The Act defines “covered offense” as “a violation of a federal criminal statute, the statutory penalties for which were modified by” certain provisions in the Fair Sentencing Act. §404(a). The Fair Sentencing Act modified the statutory penalties for offenses that triggered mandatory minimum penalties because a person charged with the same conduct today no longer would face the same statutory penalties that they would have faced before 2010. For example, a person charged with knowing or intentional possession with intent to distribute at least 50 grams of crack was subject to a 10-year mandatory minimum before 2010. Now, he would be subject only to a 5-year mandatory minimum. But, the Fair Sentencing Act did not modify the statutory penalties for

Terry’s offense. Before 2010, a person charged with his offense—knowing or intentional possession with intent to distribute an unspecified amount of a schedule I or II drug—was subject to statutory penalties of imprisonment of 0-to-20 years and up to a \$1 million fine, or both, and a period of supervised release. After 2010, a person charged with this conduct is subject to the exact same statutory penalties. For this reason, Terry is not eligible for a sentence reduction. Justice Sotomayor concurred in part and concurred in the judgment, to highlight that the Court’s opinion sanitized the racial origins and impact of the 100-1 ratio set forth in the original statute, and that the *Terry* decision does not permit the later remedial Acts to rectify those inequities.

- B. First Step Act – Considerations in Granting Relief.** *Concepcion v. United States, No. 20-1650* (June 27, 2022) (OA [transcript](#) and [audio](#)). The First Step Act permits district courts to impose a reduced sentence on defendants previously convicted of certain covered offenses “as if” the revised penalties for crack cocaine contained in section 2 of the Fair Sentencing Act of 2010, Pub. L. 111-220, were “in effect at the time the covered offense was committed.” What authority does the sentencing court have to consider changes in the law or facts (such as rehabilitation) at resentencing proceedings under the First Step Act? It depended where one was resentenced. In the Third, Fourth, Tenth, and D.C. Circuits, district courts were required to consider intervening legal or factual developments—and not just the changes to the crack-cocaine statutory penalties—when conducting First Step Act resentencings. Thus, in those circuits, Concepcion (who is currently serving a 19-year sentence) would either have had his Sentencing Guidelines ranges recalculated to reflect the fact that he is no longer a career offender, or would have had his sentence reconsidered based on post-sentencing rehabilitation—or would have been entitled to both considerations. By contrast, within the First Circuit, where Mr. Concepcion was sentenced, the district court may consider intervening legal and factual developments only after initially deciding that a sentence reduction is appropriate in light of the First Step Act changes. In the Second, Sixth, Seventh and Eighth Circuits, district courts were allowed – but not required – to consider changes in the law or updated Guidelines and facts. Those circuits held that district courts are not required to consider any changes other than the revised statutory maximum and minimum sentences for crack cocaine imposed by the Fair Sentencing Act. Three other circuits went even further. In the Fifth, Ninth, and Eleventh Circuits, district courts were prohibited from considering any intervening case law or updated Guidelines and were not required to consider updated facts. Defendants in those circuits suffered under the weight of legally inaccurate Guidelines calculations and

outdated section 3553(a) factors that did not account for post-sentencing conduct. **The Supreme Court resolved these conflicting views in a 5-4 decision, authored by Justice Sotomayor, holding that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence.** “There is a longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her ‘as an individual.’ *Koon v. United States*, 518 U. S. 81, 113 (1996). In line with this history, federal courts today generally ‘exercise a wide discretion in the sources and types of evidence used’ to craft appropriate sentences. *Williams v. New York*, 337 U.S. 241, 246 (1949). When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction. *Pepper v. United States*, 562 U.S. 476, 492 (2011). Similarly, when a defendant’s sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant’s conduct and changes in the Federal Sentencing Guidelines since the original sentencing. *Ibid.*” In reaching this conclusion, the majority held that changes in law and facts are very much a part of the permissible resentencing considerations. “Put simply, the First Step Act does not require a district court to accept a movant’s argument that evidence of rehabilitation or other changes in law counsel in favor of a sentence reduction, or the Government’s view that evidence of violent behavior in prison counsels against providing relief. Nor does the First Step Act require a district court to make a point-by-point rebuttal of the parties’ arguments. All that is required is for a district court to demonstrate that it has considered the arguments before it. . . . The First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them.” Justice Kavanaugh dissented (joined by CJ Roberts, Alito and Barrett).

- C. **Mandatory Life Without Parole for Juveniles.** *Jones v. Mississippi, No. 18-1259* (Apr. 22, 2021). (OA [transcript](#) & [audio](#)). Under *Miller v. Alabama*, 567 U.S. 460 (2012), an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment. In this case, a Mississippi trial judge acknowledged his sentencing discretion under *Miller* and then sentenced Brett Jones to life without parole for a murder that Jones committed when he was under 18. The Mississippi Court of Appeals affirmed, concluding that the discretionary sentencing procedure satisfied *Miller*. Jones argued, however, that a sentencer’s discretion to impose a sentence less than life without parole does not alone satisfy *Miller*; a sentencer who imposes a life-without-parole

sentence must also make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible. Jones contends that the trial judge did not make such a finding in his case. In a 6-3 decision authored by Justice Kavanaugh, the Court affirmed Jones's life sentence, holding that an LWOP sentence for a juvenile is permissible as long as "the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." The majority held that Jones's argument that the sentencer must make a finding of permanent incorrigibility is inconsistent with the Court's precedents. In *Miller*, the Court mandated "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a life- without-parole sentence. And in *Montgomery v. Louisiana*, which held that *Miller* applies retroactively on collateral review, the Court flatly stated that "Miller did not impose a formal factfinding requirement" and added that "a finding of fact regarding a child's incorrigibility . . . is not required." 577 U.S. 190, 211 (2016). The Court's majority opinion here states: "In light of that explicit language in the Court's prior decisions, we must reject Jones's argument. We affirm the judgment of the Mississippi Court of Appeals." Justice Thomas concurred in the result, reiterating his contention that *Montgomery* was incorrectly decided and that the Court should have clearly overruled it: "The Court correctly holds that the Eighth Amendment does not require a finding that a minor be permanently incorrigible as a prerequisite to a sentence of life without parole. But in reaching that result, the majority adopts a strained reading of *Montgomery v. Louisiana*, 577 U.S. 190 (2016), instead of outright admitting that it is irreconcilable with *Miller v. Alabama*, 567 U.S. 460 (2012)—and the Constitution. The better approach is to be patently clear that *Montgomery* was a 'demonstrably erroneous' decision worthy of outright rejection. *Gamble v. United States*, 587 U.S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 2). Justice Sotomayor dissented (joined by Breyer and Kagan): "Today, the Court guts *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Contrary to explicit holdings in both decisions, the majority claims that the Eighth Amendment permits juvenile offenders convicted of homicide to be sentenced to life without parole (LWOP) as long as 'the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment.' In the Court's view, a sentencer never need determine, even implicitly, whether a juvenile convicted of homicide is one of 'those rare children whose crimes reflect irreparable corruption.' *Montgomery*, 577 U.S., at 209. Even if the juvenile's crime reflects 'unfortunate yet transient immaturity,' *Miller*, 567 U.S., at 479, he can be sentenced to die in prison.

This conclusion would come as a shock to the Courts in *Miller* and *Montgomery*. *Miller*'s essential holding is that 'a lifetime in prison is a disproportionate sentence for all but the rarest children, those whose crimes reflect 'irreparable corruption.' *Montgomery*, 577 U.S., at 195 (quoting *Miller*, 567 U.S., at 479–480).

VIII. DEATH PENALTY

- A. **Post-Conviction DNA Testing.** *Reed v. Goertz*, No. 21-442 (cert. granted Apr. 25, 2022); decision below at 995 F.3d 425 (5th Cir. 2022) (OA transcript & audio). In *Skinner v. Switzer*, 562 U.S. 521, 524-25 (2011), the Court held that state prisoners may pursue post-conviction claims for DNA testing of crime-scene evidence in a civil rights action under 42 U.S.C. § 1983. The Court made clear that a prisoner bringing such a § 1983 claim may seek "to show that the governing state law denies him procedural due process" after he has unsuccessfully sought DNA testing under available state procedures. *Id.* at 525, 530. The question presented is whether the statute of limitations for a § 1983 claim seeking DNA testing of crime-scene evidence begins to run at the end of state-court litigation denying DNA testing, including any appeals (as the Eleventh Circuit has held), or whether it begins to run at the moment the state trial court denies DNA testing, despite any subsequent appeal (as the Fifth Circuit, joining the Seventh Circuit, held below).
- B. **Permissible Bases to Reverse Death Penalty.** *United States v. Tsarnaev*, No. 20-443 (Mar. 4, 2022) (OA transcript & audio). Dzhokhar Tsarnaev, the surviving brother accused of the Boston Marathon bombing, was convicted of murder and sentenced to death. The Second Circuit reversed the death penalty and the government petitioned for cert, which was granted. The questions presented were: Whether the court of appeals erred in concluding that respondent's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about Tsarnaev's case; (2) Whether the district court committed reversible error at the penalty phase of his trial by excluding evidence that his older brother was allegedly involved in different crimes (the "Waltham murders") two years before the offenses for which respondent was convicted. **The Supreme Court reversed the Second Circuit (6-3), in an opinion authored by Justice Thomas, holding that the court of appeals erroneously overturned the death penalty.** First, the Court held that the district court did not abuse its discretion by declining to ask about the content and extent of each juror's media consumption regarding the bombings. Jury selection falls "particularly within the

province of the trial judge,” *Skilling v. United States*, 561 U.S. 358, 386 (2010), whose broad discretion in this area includes deciding what questions to ask prospective jurors, *see Mu’Min v. Virginia*, 500 U.S. 415, 427 (1991). Second, the Court held that the district court did not abuse its discretion in excluding from the sentencing proceedings evidence of the Waltham murders. Although the Federal Death Penalty Act provides that, at the sentencing phase of a capital trial, “information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor,” (18 U.S.C. §3593(c)), the district court may exclude information “if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” Such evidentiary decisions are reviewed for abuse of discretion. Here, Dzhokhar sought to introduce evidence linking his deceased brother to the unsolved Waltham murders to support his mitigation defense that his brother was the ringleader of the bombing. That evidence, however, did not allow the jury to confirm or assess the brother’s alleged role in the Waltham murders., so the district court did not abuse its discretion when it reasonably excluded the evidence for its lack of probative value and potential to confuse the jury. Justice Breyer dissented as to the second issue (joined by Kagan and Sotomayor, except for a brief paragraph in which he recounts his concern about the problems inherent in a system that allows for imposition of the death penalty).

- C. **Challenging Method of Execution by §1983 Action.** *Nance v. Ward, No. 21-439* (June 23, 2022). Nance, a death row inmate, filed a § 1983 suit bringing an as-applied challenge to Georgia’s sole statutorily authorized method of execution, lethal injection. He alleged the use of a firing squad as an alternative method. The Eleventh Circuit held that Nance’s challenge could not be heard. The panel ruled that he must bring his challenge in habeas rather than via § 1983 because he had alleged an alternative method not currently authorized under Georgia law. It further held that Nance’s claim would be an impermissible successive petition notwithstanding that the claim would not have been ripe at the time of his first petition. **The Supreme Court granted cert and reversed (5-4) in an opinion written by Justice Kagan:** “In several recent decisions, this Court has set out rules for challenging a State’s proposed method of execution under the Eighth Amendment. To prevail on such a claim, a prisoner must identify a readily available alternative method of execution that would significantly reduce the risk of severe pain. In doing so, the prisoner is not confined to proposing a method authorized by the executing State’s law; he may instead ask for a method used in other States. *See Bucklew v. Precythe*, 587 U.S.____, ____ (2019) (slip op., at 19). This case concerns the procedural vehicle appropriate for a prisoner’s method-of-execution claim. We have held that such a claim

can go forward under 42 U.S.C. §1983, rather than in habeas, when the alternative method proposed is already authorized under state law. *See Nelson v. Campbell*, 541 U.S. 637, 644–647 (2004). Here, the prisoner has identified an alternative method that is not so authorized. The question presented is whether §1983 is still a proper vehicle. We hold that it is.” Justice Barrett dissented, joined by Thomas, Alito and Gorsuch.

IX. APPEALS

A. **Applying Plain Error Review to *Rehaif* Error.** *Greer v. United States, No. 19-8709* together with *United States v. Gary, No. 20-444* (June 14, 2021) (Greer OA [transcript & audio](#)) (Gary OA [transcript & audio](#)). The Court held in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that, in a prosecution under 18 U.S.C. §§ 922(g) and 924(a)(2), the government must prove not only that the defendant knew he possessed a firearm, but also that he knew he belonged to the relevant category of persons barred from possessing a firearm. That decision raised questions about how it is applied as an intervening decision on direct appeals by two categories of offenders who had not objected below, those who were convicted after trial (*Greer*) and those who pleaded guilty to the offense (*Gary*). At trial, Greer stipulated to the fact that he was a felon. And Gary admitted that he was a felon when he pled. The Eleventh Circuit ruled in *Greer* that the plain error standard applied and that Greer could not meet the third prong because the trial record evidence did not establish that the error affected the defendant’s substantial rights or impacted the fairness, integrity, or public reputation of the trial. In contrast, the Fourth Circuit held that Gary is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court’s error affected the outcome of the proceedings. The Court affirmed the Eleventh Circuit in *Greer* and reversed the Fourth Circuit in *Gary*. Justice Kavanaugh wrote an opinion joined in whole by all except Justice Sotomayor, who concurred in part, and dissented in part. In both cases, the Court held that normal plain-error review applies, with the defendant bearing the burden of showing that there is a reasonable probability that, but for the *Rehaif* error, the outcome of the proceeding would have been different. The majority opinion states the fundamental problem for appellants, post-*Rehaif*: “As many courts have recognized and as common sense suggests, individuals who are convicted felons ordinarily know that they are convicted felons. That simple point turns out to be important in the two cases before us.” The Court’s analysis tracks the requirements of plain error review and since it drew support from the full Court (as presently constituted), and applies recent precedents on the subject, it is

worth quoting in detail: “Under Rule 51(b) of the Federal Rules of Criminal Procedure, a defendant can preserve a claim of error ‘by informing the court’ of the claimed error when the relevant ‘court ruling or order is made or sought.’ If the defendant has ‘an opportunity to object’ and fails to do so, he forfeits the claim of error. If the defendant later raises the forfeited claim on appeal, Rule 52(b)’s plain-error standard applies. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Here, both defendants forfeited their *mens rea* claims by failing to properly preserve them under Rule 51(b). We therefore conduct plain-error review under Rule 52(b). Rule 52(b) provides: ‘A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.’ ‘Rule 52(b) is permissive, not mandatory.’ *United States v. Olano*, 507 U.S. 725, 735 (1993). To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements. *See Rosales-Mireles v. United States*, 585 U.S. ___, ___ (2018)). First, there must be an error. Second, the error must be plain. Third, the error must affect ‘substantial rights,’ which generally means that there must be ‘a reasonable probability that, but for the error, the outcome of the proceeding would have been different.’ (internal quotation marks omitted). If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on ‘the fairness, integrity or public reputation of judicial proceedings.’ *Ibid.* (internal quotation marks omitted); *see also Olano*, 507 U.S., at 735–737. The defendant has ‘the burden of establishing entitlement to relief for plain error.’ *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). That means that the defendant has the burden of establishing each of the four requirements for plain-error relief. Satisfying all four prongs of the plain-error test ‘is difficult.’ *Puckett*, 556 U.S., at 135.” Applying the plain error standard left Greer and Gary in a tough position. Although the first and second prongs of plain-error review are met (*Rehaif* error occurred and it was plain), the third prong was problematic: whether the *Rehaif* errors affected the defendants’ “substantial rights.” Greer had the burden of showing that, if the district court had correctly instructed the jury on the *mens rea* element of a felon-in-possession offense, there is a “reasonable probability” that he would have been acquitted. *Dominguez Benitez*, 542 U.S., at 83. And Gary had the burden of showing that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a “reasonable probability” that he would not have pled guilty. Against that burden, the Court used a common-sense standard of proof, assuming lay juries share the common sense of justices and judges: “In a felon-in-possession case where the defendant was in fact a felon when he possessed firearms, the defendant faces an uphill climb in trying to satisfy the substantial-rights prong of the plain-error test based on an argument that he did not know he was a felon. The reason is simple: ‘If

a person is a felon, he ordinarily knows he is a felon. Felony status is simply not the kind of thing that one forgets.’ [(quoting a court of appeals judge below)]. That simple truth is not lost upon juries. Thus, absent a reason to conclude otherwise, a jury will usually find that a defendant knew he was a felon based on the fact that he was a felon. A defendant considering whether to plead guilty would recognize as much and would likely factor that reality into the decision to plead guilty. In short, if a defendant was in fact a felon, it will be difficult for him to carry the burden on plain-error review of showing a ‘reasonable probability’ that, but for the *Rehaif* error, the outcome of the district court proceedings would have been different.” Concluding, the Court faulted both defendants for not making representations on appeal (without record evidence) to rebut the presumption created in this decision: “Importantly, on appeal, neither *Greer* nor *Gary* has argued or made a representation that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms. Therefore, *Greer* cannot show that, but for the *Rehaif* error in the jury instructions, there is a reasonable probability that a jury would have acquitted him. And *Gary* likewise cannot show that, but for the *Rehaif* error during the plea colloquy, there is a reasonable probability that he would have gone to trial rather than plead guilty.” The Court did allow that such argument and representations may be adequate in other cases; “there may be cases in which a defendant who is a felon can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms. See Fed. Rule App. Proc. 10(e). Indeed, at oral argument, the Government conceded that there are circumstances in which a defendant might make such a showing. But if a defendant does not make such an argument or representation on appeal, the appellate court will have no reason to believe that the defendant would have presented such evidence to a jury, and thus no basis to conclude that there is a ‘reasonable probability’ that the outcome would have been different absent the *Rehaif* error.” *Gary*’s structural error argument was rejected, as well. The Court held in both cases that the fact that everyone involved in the cases was ignorant of an essential element of the offense was not a structural error. Justice Sotomayor concurred in *Greer*, subject to two understandings, (1) the Court’s analysis in *Greer* case does not extend to the distinct context of harmless-error review, which applies when defendants contemporaneously object at trial; (2) the knowledge-of-status element is an element just like any other. The Government must prove it beyond a reasonable doubt, and defendants seeking relief based on *Rehaif* errors bear only the usual burden on plain-error review. Justice Sotomayor concurred, yet dissented as to *Gary*, agreeing that the Fourth Circuit erred in holding that the district court’s failure to inform *Gary* of

the knowledge- of-status element automatically entitled him to relief on plain-error review. But, unlike the majority opinion, she would not have decided in the first instance whether Gary can make a case-specific showing that the error affected his substantial rights. Instead, she would have vacated the judgment below and remanded for the Fourth Circuit to address that question. Her dissent lists many reasons why a defendant might not know a prior conviction was a felony for federal law purposes.

X. IMMIGRATION

- A. **Proving Defenses to Illegal Re-entry.** *United States v. Palomar-Santiago*, No. 20-437 (May 24, 2021) (OA [transcript](#) & [audio](#)). In 1998, Refugio Palomar-Santiago was removed from the United States based on a conviction for felony driving under the influence (DUI). Palomar-Santiago waived his right to appeal and was removed to Mexico the next day. He later returned to the United States and was indicted on one count of unlawful reentry in violation of 8 U.S.C. §1326(a). Between Palomar-Santiago’s removal and indictment, the Supreme Court held in *Leocal v. Ashcroft* that offenses like his DUI conviction do not in fact render noncitizens removable. Palomar-Santiago sought to defend against his unlawful-reentry charge by challenging the validity of his 1998 removal order. Palomar-Santiago moved to dismiss the indictment on the ground that his prior removal order was invalid in light of *Leocal*. The district court granted the motion, and the Ninth Circuit affirmed. By statute, however, defendants “may not” bring such collateral attacks “unless” they “demonstrat[e]” that (1) they “exhausted any administrative remedies that may have been available to seek relief against the [removal] order,” (2) the removal proceedings “improperly deprived [them] of the opportunity for judicial review,” and (3) “entry of the order was fundamentally unfair.” §1326(d). The Ninth Circuit held that Palomar-Santiago was excused from making the first two showings because his prior removal order was premised on a conviction that was later found not to be a removable offense. The government petitioned for cert. The Supreme Court reversed in a unanimous decision authored by Justice Sotomayor, holding that the statute does not permit such an exception.
- B. **Relief from Removal for Ambiguous Convictions.** *Pereida v. Wilkinson*, No. 19-438 (Mar. 4, 2021) (OA [transcript](#) & [audio](#)). Pereida entered the U.S. unlawfully, and the government secured a lawful order directing his removal. Before the immigration judge, he refused to produce any evidence about his crime of conviction even after the government introduced evidence suggesting that he was convicted under a statute setting forth some crimes involving fraud. The only

remaining question was whether Pereida could prove his eligibility for discretionary relief from removal under these circumstances. In a 5-3 decision written by Justice Gorsuch (Barrett did not participate), the Court held that Pereida cannot avoid removal. “Under the Immigration and Nationality Act (INA), individuals seeking relief from a lawful removal order shoulder a heavy burden. Among other things, those in Mr. Pereida’s shoes must prove that they have not been convicted of a ‘crime involving moral turpitude.’ Here, Mr. Pereida admits he has a recent conviction, but declines to identify the crime. As a result, Mr. Pereida contends, no one can be sure whether his crime involved ‘moral turpitude’ and, thanks to this ambiguity, he remains eligible for relief. Like the Eighth Circuit, we must reject Mr. Pereida’s argument. The INA expressly requires individuals seeking relief from lawful removal orders to prove all aspects of their eligibility. That includes proving they do not stand convicted of a disqualifying criminal offense.” An alien has not carried that burden when the record shows he has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction. First, the INA squarely places the burden of proof on the alien to prove eligibility for relief from removal. §1229a(c)(4)(A). Second, the categorical approach does not help in these circumstances. “[W]here, as here, the alien bears the burden of proof and was convicted under a divisible statute containing some crimes that qualify as crimes of moral turpitude, the alien must prove that his actual, historical offense of conviction isn’t among them.” Third, Pereida’s contention that this interpretation invites “grave practical difficulties” in record-keeping is not persuasive. Justice Breyer dissented, joined by Sotomayor and Kagan: “This case, in my view, has little or nothing to do with burdens of proof. It concerns the application of what we have called the ‘categorical approach’ to determine the nature of a crime that a noncitizen (or defendant) was previously convicted of committing. That approach sometimes allows a judge to look at, and to look only at, certain specified documents. Unless those documents show that the crime of conviction necessarily falls within a certain category (here a ‘crime involving moral turpitude’), the judge must find that the conviction was not for such a crime. The relevant documents in this case do not show that the previous conviction at issue necessarily was for a crime involving moral turpitude. Hence, applying the categorical approach, it was not. That should be the end of the case.”

- C. **Stop-Time Notice.** *Niz-Chavez v. Garland, No. 19-863* (Apr. 29, 2021) (OA [transcript](#) & [audio](#)). The Attorney General can cancel removal of certain immigrants under 8 U.S.C. §1229b (a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of

continuous presence in the United States, and a permanent resident must have seven years of continuous residence. § 1229b(a)(2), (b)(1)(A). Under the “stop-time rule,” the government can end those periods of continuous residence by serving “a notice to appear under section 1229(a),” which, in turn, defines “a ‘notice to appear’” as “written notice ... specifying” specific information related to the initiation of a removal proceeding. §§ 1229b (d)(1), 1229(a)(1). In *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018), the Supreme Court held that only notice “in accordance with” section 1229(a)’s definition triggers the stop-time rule. Here, the government sent Mr. Niz-Chavez one document containing the charges against him. Then, two months later, it sent a second document with the time and place of his hearing. In light of *Pereira*, the government now concedes the first document isn’t enough to trigger the stop-time rule. Still, the government submits, the second document does the trick. On its view, a “notice to appear” is complete and the stop-time rule kicks in whenever it finishes delivering all the statutorily prescribed information, even if it is done on an installment basis. The Sixth Circuit agreed. The Supreme Court reversed (6-3) in an opinion written by Justice Gorsuch. The stop-time provision of the statute refers to “a” notice, not multiple documents. “Our only job today is to give the law’s terms their ordinary meaning and, in that small way, ensure the federal government does not exceed its statutory license. Interpreting the phrase ‘a notice to appear’ to require a single notice— rather than 2 or 20 documents—does just that. . . . [T]he law’s terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.” Justice Kavanaugh dissented in an opinion joined by Chief Justice Roberts and Justice Alito.

- D. Limited Federal Court Jurisdiction to Review Nondiscretionary BIA Decisions.** *Patel v. Garland*, No. 20-979 (May 16, 2022) Pankajkumar S. Patel checked a box on a Georgia driver's license application erroneously identifying himself as a U.S. citizen, even though he was eligible for a license regardless of his citizenship. When Patel later sought to adjust his status to lawful permanent resident, a divided panel of the Board of Immigration Appeals (BIA) denied him relief, holding that he is inadmissible because he “falsely represented” himself as a U.S. citizen for a benefit under state law. 8 U.S.C. § 1182(a) (6)(C)(ii). Rejecting the government's own position and that of nearly every other circuit, the *en banc* Eleventh Circuit, by a 9-5 vote, held that it lacked jurisdiction to review threshold eligibility findings for five major categories of discretionary relief from removal, such as whether Patel is inadmissible

for mistakenly representing himself as a U.S. citizen. The Eleventh Circuit separately held, contrary to a precedential BIA decision, that Section 1182(a)(6)(C)(ii) renders noncitizens inadmissible even if their misrepresentation of citizenship is immaterial to the government benefit sought. The Supreme Court granted Patel’s petition for cert and appointed amicus counsel to argue in support of the Eleventh Circuit’s decision. **The Supreme Court rejected the arguments of Patel and the Solicitor General**, siding instead with the court-appointed amicus. **In a 5-4 decision authored by Justice Barrett, the Court affirmed**, holding that federal courts lack jurisdiction to review facts found as part of any judgment relating to the granting of discretionary-relief in immigration proceedings enumerated under 8 U.S.C. §1252(a)(2)(B)(i). Justice Gorsuch dissented, joined by Breyer, Sotomayor and Kagan.

- E. **Right to Bond Hearing Under 1231(a)(6).** *Johnson v. Arteaga-Martinez*, No. 19-896 (June 13, 2022). **In an 8-1 decision written by Justice Sotomayor, the Court held that non-citizens ordered removed are not entitled to bond hearings after being detained for six months or more.** “Section 241(a) of the Immigration and Nationality Act (INA), codified at 8 U. S. C. §1231(a), authorizes the detention of noncitizens who have been ordered removed from the United States. *See* 110 Stat. 3009–598. In particular, §1231(a)(6) provides that after a 90-day ‘removal period,’ a noncitizen ‘may be detained’ or may be released under terms of supervision. This Court recently held that §1231(a) applies to individuals who are removed and who then reenter without authorization and apply for withholding of removal based on a fear that they will be persecuted or tortured if returned to their countries of origin. *See Johnson v. Guzman Chavez*, 594 U. S. ___, ___, (2021) (slip op., at 1). The issue in this case is whether the text of §1231(a)(6) requires the Government to offer detained noncitizens bond hearings after six months of detention in which the Government bears the burden of proving by clear and convincing evidence that a noncitizen poses a flight risk or a danger to the community. It does not.” Justice Thomas (joined by Gorsuch) concurred, but contended that federal courts lack jurisdiction to decide the question at all because §1252(b)(9) limits federal court jurisdiction to review “questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien . . . only” in two circumstances: when the court reviews a “final order” of removal, or (2) when §1252 otherwise grants jurisdiction. *See, e.g., Johnson v. Guzman Chavez*, 594 U. S. ___, ___, (2021). Justice Breyer dissented, in large part because the decision overlooks *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), in which the Court “read an implicit limitation into” 1231(a)(6). “Because a ‘statute permitting indefinite detention of an alien would raise a serious constitutional problem,’ we held that the “statute, read in light of the

Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." Unwilling to concede the point, Justice Breyer noted: "Since the Court remands this case for further proceedings, I would add that, in my view, *Zadvydas* applies (the Court does not hold to the contrary), and the parties are free to argue about the proper way to implement *Zadvydas*' standard in this context, and, if necessary, to consider the underlying constitutional question, a matter that this Court has not decided."

XI. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254, 2255 AND RULE 60(b).

- A. Second or Successive § 2255 Applications.** *Avery v. United States, No. 19-633* (cert. denied Mar. 23, 2020). Although the Court denied certiorari review, Justice Kavanaugh issued a statement suggesting it remains an open question whether the second-or-successive-petition limitation on § 2254 applications (state convictions) applies to § 2255 applications (federal convictions), particularly after the government has now conceded the limitation should not apply in the latter. "Federal prisoners can seek postconviction relief by filing an application under 28 U.S.C. § 2255. State prisoners can seek federal postconviction relief by filing an application under § 2254. The issue in this case concerns second-or-successive applications. As relevant here, the law provides that a 'claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed.' §2244(b)(1) (emphasis added). The text of that second-or-successive statute covers only applications filed by state prisoners under § 2254. Yet six Courts of Appeals have interpreted the statute to cover applications filed by state prisoners under § 2254 and by federal prisoners under § 2255, even though the text of the law refers only to § 2254. *See Gallagher v. United States*, 711 F. 3d 315 (CA2 2013); *United States v. Winkelman*, 746 F. 3d 134, 135–136 (CA3 2014); *In re Bourgeois*, 902 F. 3d 446, 447 (CA5 2018); *Taylor v. Gilkey*, 314 F. 3d 832, 836 (CA7 2002); *Winarske v. United States*, 913 F. 3d 765, 768–769 (CA8 2019); *In re Baptiste*, 828 F. 3d 1337, 1340 (CA 11 2016). After Avery's case was decided, the Sixth Circuit recently rejected the other Circuits' interpretation of the second-or-successive statute and held that the statute covers only applications filed by state prisoners under § 2254. *Williams v. United States*, 927 F. 3d 427 (2019). Importantly, the United States now agrees with the Sixth Circuit that 'Section 2244(b)(1) does not apply to Section 2255 motions' and that the contrary view is 'inconsistent with the text of Section 2244.' Brief in Opposition 10, 13. In other words, the Government now disagrees with the rulings of the six Courts of

Appeals that had previously decided the issue in the Government's favor. In a future case, I would grant certiorari to resolve the circuit split on this question of federal law." Lawyers in the Second, Third, Fifth, Seventh, Eighth and Eleventh Circuits should be prepared to grab the brass ring in future cases.

B. Post-Conviction Relief Under Rule 60(b)(1). *Kemp v. United States, No. 21-5726* (June 13, 2022). Federal Rule of Civil Procedure 60(b) authorizes relief from final judgment. Rule 60(b)(1) authorizes such relief based on "mistake, inadvertence, surprise, or excusable neglect." The question presented is whether the "mistake" prong of Rule 60(b)(1) authorizes relief based on a district court's legal error. Here, Kemp challenged the district court's dismissal of his post-conviction petition as untimely. He filed his motion under Rule 60(b)(6), the residuary clause of Rule 60(b) which has no set time limit. The government conceded, and the Eleventh Circuit held, that the district court committed legal error by dismissing Kemp's post-conviction petition as untimely. But, it denied him relief by recharacterizing his motion as falling under Rule 60(b)(1), which has a one-year time limit he did not meet. Although he sought relief from that judgment under Rule 60(b)(6), the courts below held that, because he alleged legal error, his motion was cognizable only under Rule 60(b)(1). And because he filed his motion more than one year after the judgment, it was untimely. **The Supreme Court affirmed, in an 8-1 decision written by Justice Thomas.** "We conclude, based on the text, structure, and history of Rule 60(b), that a judge's errors of law are indeed 'mistake[s]' under Rule 60(b)(1)." . . . "[N]othing in the text, structure, or history of Rule 60(b) persuades us to narrowly interpret the otherwise broad term 'mistake' to exclude judicial errors of law. Because Kemp's Rule 60(b) motion alleged such a legal error, we affirm the Eleventh Circuit's judgment that the motion was cognizable under Rule 60(b)(1), subject to a 1-year limitations period, and, therefore, untimely." Justice Sotomayor concurred. Justice Gorsuch dissented because he would have dismissed the cert petition as improvidently granted: "Questions like these are best resolved not through a doubtful interpretive project focused on a pronoun dropped in 1946, but through the rulemaking process. There, policy interests on both sides can be accounted for and weighed in light of the 'collective experience of bench and bar.'"

C. Writ in Aid of Habeas Proceeding. *Shoop v. Twyford, No. 21-511* (June 21 2022). Raymond Twyford, a state prisoner, filed a federal habeas corpus petition. he claimed that his trial counsel was ineffective for failing to present evidence of a head injury Twyford sustained as a teenager during a suicide attempt. That injury, Twyford argued, left him "unable to make rational and voluntary choices." In support of his claims,

he sought to be transported to an appropriate facility for a neurological exam. The transportation request was granted below under the All Writs Act. The state petitioned for cert challenging the transportation order. **The Court reversed, in a 5-4 decision, with a majority opinion written by C.J. Roberts.** “The All Writs Act authorizes federal courts to ‘issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.’ 28 U.S.C. §1651(a). In this case, the District Court ordered the State to transport a prisoner in its custody to a hospital for medical testing. The prisoner argued that the testing could reveal evidence helpful in his effort to obtain habeas corpus relief. The question is whether the District Court’s order is ‘necessary or appropriate in aid of the federal court’s resolution of the prisoner’s habeas case. We hold that it is not, and therefore reverse.” The majority opinion is based on the limits imposed by AEDPA, which, in part, restricts a federal habeas court from developing and considering new evidence except in very narrow circumstances. Unless the district court first determines that the potential evidence could be considered by it, the All Writs Act does not authorize a transport order for that evidence to be developed. “A court therefore must, consistent with AEDPA, determine at the outset whether the new evidence sought could be lawfully considered. This is true even when the All Writs Act is the asserted vehicle for gathering new evidence. We have made clear that a petitioner cannot use that Act to circumvent statutory requirements or otherwise binding procedural rules.” Justice Breyer dissented (joined by Sotomator and Kagan); Justice Gorsuch dissented separately.

- D. Adequate and Independent State Law Grounds Precluding Relief.** *Cruz v. Arizona*, No. 21-846 (cert. granted Mar. 28, 2022); decision below at 487 P.3d 991 (Az. 2021). In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Court held that in cases where a capital defendant’s future dangerousness is at issue, due process entitles the defendant to inform the jury that he will be ineligible for parole if not sentenced to death. For many years thereafter, the Arizona Supreme Court refused to apply *Simmons*. In *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam) the U.S. Supreme Court summarily reversed the Arizona Supreme Court’s misapplication of *Simmons* and confirmed that the *Simmons* rule applies in Arizona. Cruz’s conviction became final after *Simmons* but before *Lynch*. He was sentenced to death after the trial judge repeatedly denied him his right under *Simmons* to inform the jury that he was parole-ineligible. After *Lynch* applied *Simmons* to Arizona Cruz filed a successive petition for postconviction relief in state court, under Arizona Rule of Criminal Procedure 32.1(g), seeking the relief that *Simmons* and *Lynch* require. The Arizona Supreme Court denied relief on state law procedural grounds because it found that *Lynch* was not a

“significant change in the law,” one of the prerequisites for relief under Rule 32.1(g). Although the Arizona Supreme Court recognized that *Lynch* “was dictated by” *Simmons*, the court concluded that the rule of *Lynch* should not apply to cases pending on collateral review. Cruz petitioned for cert, presenting the following question: Whether the Arizona Supreme Court’s holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment? In granting certiorari, the Supreme Court limited the question presented: Whether the Arizona Supreme Court’s holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment?

- E. **Standard for Granting Federal Habeas Relief.** *Brown, Acting Warden v Davenport, No. 20-826* (April 21, 2022) (OA [transcript](#) & [audio](#)). Ervine Davenport was unconstitutionally shackled during his trial for murder, at which a jury found him guilty. All 12 jurors later testified that the shackling did not affect their verdict. Their decision, they said, was based on the evidence, which was highlighted by uncontroverted testimony that Davenport strangled a woman over a foot shorter and nearly 200 pounds lighter than he. On direct appeal, the Michigan courts evaluated the juror testimony and the evidence of guilt and found that the shackling error was harmless beyond a reasonable doubt. But, on federal habeas review, the Sixth Circuit found those determinations irrelevant. So long as it makes an independent finding on habeas review that Davenport was prejudiced, the court held below, the State must retry him. The court of appeals analyzed prejudice solely under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which required the defendant to show the error had a harmful and injurious effect or influence on the outcome of his trial. The Court declined to also evaluate the error under the AEDPA. The state petitioned for cert challenging the failure to apply AEDPA. **The Supreme Court reversed in a 6-3 decision written by Justice Gorsuch.** “After a state court determines that an error at trial did not prejudice a criminal defendant, may a federal court grant habeas relief based solely on its independent assessment of the error’s prejudicial effect under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Or must a federal court also evaluate the state court’s decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)? The Sixth Circuit ruled that an individual who satisfies *Brecht* alone is entitled to habeas relief. This was mistaken. When a state court has ruled on the merits of a state prisoner’s claim, a federal court cannot grant relief without first applying both the test this Court outlined in *Brecht* and the one Congress prescribed in AEDPA.” The difference is significant. “Handed down before Congress adopted AEDPA, *Brecht*

sought to adapt *Chapman*'s harmless-error rule, developed for cases on direct appellate review, for use in federal habeas proceedings. ... Citing the need to afford appropriate respect to final state-court decisions that have already endured direct appeal, including potential review in this Court, *Brecht* effectively inverted *Chapman*'s burden. ... Rather than require the prosecution to prove that a constitutional trial error is harmless, *Brecht* held that a state prisoner seeking to challenge his conviction in collateral federal proceedings must show that the error had a 'substantial and injurious effect or influence' on the outcome of his trial." AEDPA added a new set of burdens. "It instructed that a federal court 'shall not . . . gran[t]' relief with respect to a claim that has been adjudicated on the merits in state court 'unless' the state court's decision was (1) 'contrary to' or an 'unreasonable application of' clearly established federal law, as determined by the decisions of this Court, or (2) based on an 'unreasonable determination of the facts' presented in the state-court proceeding. § 2254(d)." The majority opinion reversed, concluding: "Even assuming Mr. Davenport met his burden under *Brecht*, he cannot do so under AEDPA. And a federal court cannot grant habeas relief unless a state prisoner like Mr. Davenport satisfies both this Court's equitable precedents and Congress's statute." Justice Kagan dissented, joined by Breyer and Sotomayor.

- F. **Permissible Evidentiary Hearing to Establish Cause and Prejudice.** *Shinn v. Ramirez*, No. 20-1009 (May 23, 2022) (OA [transcript](#) & [audio](#)). In a 6-3 decision authored by Justice Thomas, the Court eviscerated favorable law (written by Justice Kennedy in 2012) that allowed state prisoners to obtain review where ineffective assistance of post-conviction counsel led to the prisoner's failure to meet the strict procedural default rules of AEDPA. The issue is complicated and resolves a conflict between AEDPA and Justice Kennedy's majority opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), which opened a door for prisoners to establish that their post-conviction counsel's deficient representation could provide cause and prejudice allowing their defaulted claims to be heard. The introduction of Justice Thomas's opinion explains the conflict. "A federal habeas court generally may consider a state prisoner's federal claim only if he has first presented that claim to the state court in accordance with state procedures. When the prisoner has failed to do so, and the state court would dismiss the claim on that basis, the claim is 'procedurally defaulted.' To overcome procedural default, the prisoner must demonstrate 'cause' to excuse the procedural defect and 'actual prejudice' if the federal court were to decline to hear his claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court explained that ineffective assistance of

postconviction counsel is ‘cause’ to forgive procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the State required the prisoner to raise that claim for the first time during state postconviction proceedings. Often, a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the standard to expand the state-court record is a stringent one. If a prisoner has ‘failed to develop the factual basis of a claim in State court proceedings,’ a federal court ‘shall not hold an evidentiary hearing on the claim’ unless the prisoner satisfies one of two narrow exceptions, *see* 28 U.S.C. §2254(e)(2)(A), and demonstrates that the new evidence will establish his innocence ‘by clear and convincing evidence,’ §2254(e)(2)(B). In all but these extraordinary cases, AEDPA ‘bars evidentiary hearings in federal habeas proceedings initiated by state prisoners.’ *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013). The question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with §2254(e)(2)’s narrow limits because a prisoner’s state postconviction counsel negligently failed to develop the state-court record. We conclude that it does not.” The majority held that under 28 U.S.C. §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel. The decision effectively unwrites *Martinez*, in which Justice Kennedy had been joined by CJ Roberts, Ginsburg, Breyer, Alito, Sotomayor, and Kagan; only Justice Scalia dissented, joined by Thomas. Here, Justice Thomas flipped CJ Roberts and Justice Alito, and added to his view the three new justices, to leave *Martinez* as a way to establish cause and prejudice, but without any means to create a record to prove the cause and prejudice. Justice Sotomayor dissented, joined by Breyer and Kagan. The dissent is worth a read: “This decision is perverse. It is illogical: It makes no sense to excuse a habeas petitioner’s counsel’s failure to raise a claim altogether because of ineffective assistance in post-conviction proceedings, as *Martinez* and *Trevino [v Thaler]* did, but to fault the same petitioner for that postconviction counsel’s failure to develop evidence in support of the trial-ineffectiveness claim. In so doing, the Court guts *Martinez*’s and *Trevino*’s core reasoning. The Court also arrogates power from Congress: The Court’s analysis improperly reconfigures the balance Congress struck in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) between state interests and individual constitutional rights. By the Court’s telling, its holding (however implausible) is compelled by statute. Make no mistake. Neither AEDPA nor this Court’s precedents require this result.”

G. Traditional Habeas Corpus Savings Clause. *Jones v. Hendrix, Warden, Case No. 21-857* (cert. granted May 16, 2022); decision below at 8 F.4th 683 (8th Cir. 2021). Under 28 U.S.C. § 2255, federal inmates can collaterally challenge their convictions on any ground cognizable on collateral review, with successive attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by the Supreme Court. *See* 28 U.S.C. §2255(h). Title 28 U.S.C. § 2255(e), however, is a savings clause, which allows inmates to collaterally challenge their convictions outside this process through a traditional habeas action under 28 U.S.C. § 2241 whenever it “appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [their] detention.” Question presented: Does § 2255(e) permit a traditional habeas corpus action under 2241 for federal inmates who did not challenge their convictions because established circuit precedent stood firmly against them, but the Supreme Court later rules that the statute of conviction did not criminalize their activity, that the decision is retroactively applicable, makes clear that the circuit precedent was wrong, and that those convicted are legally innocent of the crime of conviction.

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