UNITED STATES SUPREME COURT
PREVIEW
REVIEW
OVERVIEW

CRIMINAL CASES GRANTED REVIEW AND DECIDED DURING THE OCTOBER 2019-20 TERMS THRU SEPTEMBER 17, 2020

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

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I. SUPREME COURT PRACTICE

A. ***Standing Order on Extensions of Time*** (Mar. 19, 2020). Responding to COVID-19 concerns, the Court entered a standing order relating to petition-for-certiorari stage proceedings for petitions due after March 18, extending the time for filing a petition by 150 days under Sup. Ct. Rules 13.1 & 13.3. It also authorizes the Clerk to enter "reasonable" extensions of time under Rule 30.4 that will "ordinarily be granted." In addition, the time for distribution of the petition under Rules 15.5 and 15.6, can be delayed for a reasonable time based on COVID-19 difficulties in filing a reply brief, if a motion to extend time is filed at least two days before the scheduled distribution date. All such motions for extension of time must recite the opposing party's position on the motion. Note: The Order only applies to petition-stage proceedings and does not apply to cases once certiorari has been granted.

B. ***Memorandum Concerning Deadlines for Cert Stage Pleadings and Scheduling Cases for Conference*** (Feb. 2020). The Clerk has issued a four-page memorandum providing guidance to attorneys on the procedures for cert-stage briefs, waivers, and replies. It also addresses the practices and procedures for distribution of cert-stage filings for the Justices' consideration.

C. ***Order Modifying Requirements to Serve Printed Documents*** (Apr. 15, 2020). Due to COVID-19 health concerns, the Court entered an order modifying the requirements of various rules for filing documents. The order reduces the number of physical copies required for petition-stage filings to a single typewritten letter-sized paper copy (in addition to the

electronic filing), although the Court may later request that initially-filed typewritten documents be replaced in booklet format. The order also allows only electronic filings for four petition-stage filings: motions for extension of time, waivers of the right to respond, blanket amicus consents, and motions to delay distribution–although other types of petition-stage documents must still be filed with the Court in paper form. And, the order encourages and permits parties to agree to electronic-only service of documents to one another.

II. SEARCH & SEIZURE

A. Reasonable Suspicion to Stop Motorist. ***Kansas v. Glover*****,** 140 S. Ct. ___, *No. 18-556* (Apr. 6, 2020) (OA *transcript* & *audio*). While on routine patrol, a Kansas police officer ran a registration check on a pickup truck with a Kansas license plate. The Kansas Department of Revenue's electronic database indicated the truck was registered to Charles Glover, Jr. and that Glover's Kansas driver's license had been revoked. The officer stopped the truck to investigate whether the driver had a valid license because he "assumed the registered owner of the truck was also the driver." The stop was based only on the information that Glover's license had been revoked; the deputy did not observe any traffic infractions and did not identify the driver. Glover was in fact the driver, and was charged as a habitual violator for driving while his license was revoked. Though Glover admitted he "did not have a valid driver's license," he moved to suppress all evidence from the stop, claiming the stop violated the Fourth Amendment, as interpreted in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Delaware v. Prouse*, 440 U.S. 648 (1979), because the deputy lacked reasonable suspicion to pull him over. The trial court granted the motion to suppress based only on the judge's anecdotal personal experience that it is not reasonable for an officer to infer that the registered owner of a vehicle is the driver of the vehicle. The first state court of appeal reversed, but the state supreme court granted review and reinstated the order of suppression – although it expressly rejected reliance on just "common sense," it held that an officer lacks reasonable suspicion to stop a vehicle when the stop is based on the officer's suspicion that the registered owner of a vehicle is driving the vehicle unless the officer has "more evidence" that the owner actually is the driver. The Supreme Court reversed (8-1) in an opinion authored by Justice Thomas. "This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. We hold that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable." Justice

Kagan concurred (joined by Ginsburg), because of an additional fact not relied upon by the majority: "Crucially for me, [the police officer] knew yet one more thing about the vehicle's registered owner, and it related to his proclivity for breaking driving laws. . . . Kansas almost never revokes a license except for serious or repeated driving offenses. . . . [A] person with a revoked license has already shown a willingness to flout driving restrictions. That fact, as the Court states, provides a 'reason[] to infer' that such a person will drive without a license—at least often enough to warrant an investigatory stop. . . . And there is nothing else here to call that inference into question. That is because the parties' unusually austere stipulation confined the case to the facts stated above—i.e., that [the officer] stopped Glover's truck because he knew that Kansas had revoked Glover's license." Only Justice Sotomayor dissented from the Court's ruling.

B. **Excessive Force**. ***Torres v. Madrid***, 140 S. Ct. ___, *No. 19-292* (cert. granted Dec. 18, 2019); decision below at 769 F. App'x 654 (10th Cir. 2019). Police officers shot Torres, but she drove away and temporarily eluded capture. In her civil suit for excessive force suit, the district court granted summary judgment for the officers on the ground that no Fourth Amendment "seizure" occurred. The Tenth Circuit affirmed, reasoning that an officer's application of physical force is not a seizure if the person upon whom the force is applied is able to evade apprehension. The Supreme Court granted cert. Question presented: Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment, as the Eighth; Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a "seizure," as the Tenth Circuit and the D.C. Court of Appeals hold?

III. SIXTH AMENDMENT

A. **Unanimous Verdicts.** ***Ramos v. Louisiana,*** 140 S. Ct. ___, *No. 18-5924* (Apr. 20, 2020) (OA *transcript* & *audio*). Evangelisto Ramos was tried by a twelve-member jury on a charge of second-degree murder. The State's case against Ramos was based on purely circumstantial evidence. The prosecution did not present any eyewitnesses to the crime. Some of the evidence was susceptible of innocent explanation. After deliberating, ten jurors found that that the state had proven its case against Ramos. However, two jurors concluded that the state had failed to prove him guilty beyond a reasonable doubt. Notwithstanding the different jurors' findings, under Louisiana's law permitting non-unanimous jury verdicts, a guilty verdict was entered. Ramos was sentenced to spend the remainder of his life in prison without the

possibility of parole. He challenged the non-unanimous verdict law in state court. On appeal, the Court of Appeal noted that "some of the evidence may be susceptible of innocent explanation," yet it rejected his challenge, concluding that "non-unanimous twelve-person jury verdicts are constitutional." Ramos petitioned the Supreme Court for cert, arguing that under the Sixth Amendment, a unanimous jury is required and this right should be incorporated to the states under the Fourteenth Amendment. The Supreme Court reversed (6-3) in a fractured 6-3 opinion authored by Justice Gorsuch, supported in various parts by two, three or four justices; with a concurrence on a separate ground by a sixth justice; over dissents by three justices. **Background:** Two states, Louisiana and Oregon, adhere to their post-Civil War era non-unanimous verdict laws. The underlying issue had been addressed in a badly fractured decision in 1972—*Apodaca v. Oregon*—in which a plurality of four justices held that the Sixth Amendment's unanimous jury requirement does not apply to the states, questioning whether unanimity serves an important "function" in "contemporary society," and concluding that unanimity's costs out-weighed its benefits. Four dissenting justices recognized that the Sixth Amendment requires unanimity, and that the guarantee is fully applicable against the states under the Fourteenth Amendment. Justice Powell issued the deciding opinion in a separate concurrence (with which no other justice agreed) in which he adopted "dual-track" incorporation approach. He agreed that the Sixth Amendment requires unanimity but believed that the Fourteenth Amendment does not render this guarantee fully applicable against the States—even though the dual-track incorporation approach had been rejected by the Court nearly a decade earlier. Justice Powell's concurrence became the deciding opinion, but it has been legally lampooned during the decades since. Indeed, in this case, Louisiana asked the Supreme Court to simply forget about the *Apodaca* decision and decide the question anew. **Court's decision in Ramos:** Justice Gorsuch's lead opinion concludes that the Sixth Amendment right to a jury trial (as incorporated against the states by the Fourteenth Amendment) requires a unanimous verdict to support a conviction of a serious crime. The text and structure of the Sixth Amendment defy Louisiana's and Oregon's non-unanimous verdict schemes. Justice Gorsuch was joined in the judgment by Ginsburg, Breyer, Sotomayor and Kavanaugh. His actual reasoning received only plurality support. Only three justices (Gorsuch, Ginsburg and Breyer) concluded that *Apodaca* lacked precedential force; their view is that one justice's concurrence which lacks support from any other justice (such as Justice Powell's concurrence) should not have binding precedential effect. Another consideration whether to overturn precedent, a reliance interest, brought together those three justices and Justice Sotomayor,

who concluded that Louisiana's and Oregon's reliance on *Apodaca* was not a strong enough interest to overcome correcting the *Apodaca* decision—after all, *Teague v. Lane* will limit retroactive application of a corrective decision. Justice Thomas took his own approach in a unique concurring opinion, which contends that the Sixth Amendment unanimous-jury requirement incorporates under the Fourteenth Amendment's Privileges or Immunities clause, but not under the Due Process clause. Justice Kavanaugh agreed with the Gorsuch opinion, but he wrote a concurrence advancing his view of how easy it should be to circumvent stare decisis (*Rowe v. Wad*e beware). Justice Alito dissented (joined by C.J. Roberts, and in part Kagan). The Alito dissent is both indignant and ironic for one who may take the opposite view when considering *Rowe v. Wade*: "The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority's approach is not just a way to dispose of this one case, the decision marks an important turn." Justice Kagan did not join the portion of Alito's dissent that concluded with a threat about *Rowe v. Wade*: "By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases."

1. **Retroactivity of Ramos v. Louisiana**. ***Edwards v. Vannoy, Warden***, 140 S. Ct. ___, *No. 19-5807* (cert. granted May 4, 2020). Whether the Court's decision in *Ramos v. Louisiana*, 590 U.S. ___ (2020), applies retroactively to cases on federal collateral review.

IV. FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

A. Limits on Abrogation of Insanity Defense. ***Kahler v. Kansas***, 140 S. Ct. ___, *No. 18-6135* (Mar. 23, 2020) (OA *transcript* & *audio*). In Kansas, along with four other states (Alaska, Idaho, Montana, and Utah), it is not a defense to criminal liability that mental illness prevented the defendant from knowing his actions were wrong. So long as he knowingly killed a human being—even if he did it because he believed the devil told him to, or because a delusion convinced him that his victim was trying to kill him, or because he lacked the ability to control his actions—he is guilty. Kahler argued that this rule defies a fundamental, centuries-old precept of our legal system: "People cannot be punished for crimes for which they are not morally culpable. Thus, he argued, Kansas's rule violates the Eighth Amendment's prohibition

of cruel and unusual punishments and the Fourteenth Amendment's due process guarantee." The Supreme Court affirmed the Kansas procedure (6-3), in an opinion by Justice Kagan, holding the Kansas approach to the insanity defense does not offend the Constitution. "In Kansas, a defendant can invoke mental illness to show that he lacked the requisite *mens rea* (intent) for a crime. He can also raise mental illness after conviction to justify either a reduced term of imprisonment or commitment to a mental health facility. But Kansas, unlike many States, will not wholly exonerate a defendant on the ground that his illness prevented him from recognizing his criminal act as morally wrong. The issue here is whether the Constitution's Due Process Clause forces Kansas to do so—otherwise said, whether that Clause compels the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime. We hold that the Clause imposes no such requirement." The majority reviewed the history of the insanity defense and concluded that it does not support the view that due process requires a specific insanity defense test or that the Kansas rule "offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." The majority found no consensus for a particular insanity test at common law, nor after *M'Naghten*'s *Case,* and it observed that the current scope of the rule is beset by conflicts among medical experts. For these reasons, the majority held that states should be constitutionally permitted to define and revise insanity defense tests "as new medical knowledge emerges and as legal and moral norms evolve." The majority found it significant that the Kansas procedure permits a defendant to offer any mental health evidence at sentencing and that this evidence can persuade a judge to commit a defendant to a mental health facility instead of imposing a term of imprisonment. Justice Breyer dissented (joined by Ginsburg and Sotomayor), and cautioned that other jurisdictions are now free to adopt rules eliminating the "core" of the insanity defense, which has traditionally tied a defendant's legal guilt to his capacity to be morally blameworthy for his actions. Repeating a hypothetical he raised at argument, he said the anomaly of the Kansas-type rule allows a defendant who kills a person believing that the person was a dog can claim insanity, while a defendant who kills a person believing a dog ordered him to do the killing, cannot.

V. CRIMES

A. Federal Preemption of State Prosecutions. *Kansas v. Garcia,* 140 S. Ct. ___, *No. 17-834* (Mar. 3, 2020) (OA *transcript* & *audio*).

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which made it illegal to employ unauthorized aliens, established an

employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a. Regulations implementing IRCA created a "Form I-9" that employers are required to have all prospective employees complete—citizens and aliens alike. IRCA contains an "express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens," *Arizona v. United States*, 567 U.S. 387, 406 (2012), but IRCA "is silent about whether additional penalties may be imposed against the employees themselves." IRCA also provides that "[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5). Here, three respondents used other peoples' social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease. Kansas prosecuted them for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions. The Supreme Court reversed (5-4), in an opinion by Justice Alito, holding that the state statutes are neither expressly nor impliedly preempted by the federal law. (1) IRCA contains a provision that expressly preempts state law, but it is plainly inapplicable here. That provision applies only to the imposition of criminal or civil liability on employers and those who receive a fee for recruiting or referring prospective employees. 8 U.S.C. § 1324a(h)(2). It does not mention state or local laws that impose criminal or civil sanctions on employees or applicants for employment. (2) Respondent's arguments in favor of implied preemption, including "field preemption" are also rejected in a lengthy discussion. Justice Thomas filed a concurring opinion (joined by Gorsuch) reiterating his view that the Court should abandon the "purposes and objectives test" in determining federal preemption because the doctrine impermissibly rests on judicial guesswork about "broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law." The opinion also questions the doctrine of field preemption, but concedes, for now, that the test was properly applied here. Justice Breyer concurred and dissented in part (Ginsburg, Sotomayor & Kagan joined). "I agree with the majority that nothing in the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat. 3359, expressly preempts Kansas' criminal laws as they were applied in the prosecutions at issue here. But I do not agree with the majority's conclusion about implied preemption." The dissent relies both on the Court's precedents and the government's previous and current positions in arguments before the Court. "[I]n my view, IRCA's text, together with its structure, context, and purpose, make it 'clear and

manifest' that Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization. *Arizona v. United States*, 567 U.S. 387, 400 (2012) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)); *see* Brief for United States as Amicus Curiae in *Puente Arizona v. Arpaio*, No. 15–15211 etc. (CA9), p. 15 (contending that the Act preempts state criminal laws 'to the extent they regulate fraud committed to demonstrate authorization to work in the United States under federal immigration law'); Tr. of Oral Arg. 22–23 (standing by the Government's position in *Puente Arizona*). That is to say, the Act reserves to the Federal Government—and thus takes from the States—the power to prosecute people for misrepresenting material information in an effort to convince their employer that they are authorized to work in this country." The dissent concludes: "By permitting these prosecutions, the majority opens a colossal loophole. Starting a new job almost always involves filling out tax-withholding forms alongside an I–9. So unless they want to give themselves away, people hoping to hide their federal work-authorization status from their employer will put the same false information on their tax-withholding forms as they do on their I–9. To let the States prosecute such people for the former is, in practical effect, to let the States police the latter. And policing the latter is what the Act expressly forbids. For these reasons, I would hold that federal law impliedly preempted Kansas' criminal laws as they were applied in these cases. Because the majority takes a different view, with respect, I dissent."

B. **Oklahoma Tribal Jurisdiction.** ***McGirt v. Oklahoma,*** 140 S. Ct. ___, *No. 18-9526* (July 9. 2020) (OA *transcript* & *audio*). Patrick Dwayne Murphy was convicted of murder and sentenced in Oklahoma state court, even though he is a member of the Creek Indian Nation. The Tenth Circuit held in *Murphy v. Royal, Warden,* 875 F.3d 896 (10th Cir. 2017) (see below) that Oklahoma lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. It held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore "Indian country" subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. In its cert petition, Oklahoma argued that this holding placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions. To put this issue into perspective, the former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Other litigants have invoked the *Murphy* decision to reincarnate the historical boundaries of all "Five Civilized Tribes"—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. According to the state,

the decision thus threatened to effectively redraw the map of Oklahoma. The state also contended that prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*; and that civil litigants are using the decision to expand tribal jurisdiction over non-members. The question presented in *Murphy* was: Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a). The Court granted cert to decide the issue in *Carpenter, Warden v. Murphy* (below), but was unable to do so during the 2018 Term, likely because the justices were evenly divided and Justice Gorsuch is recused from that case. It was set for reargument this Term, but mid-Term, the Court granted cert in Jimcy McGirt's case, a *pro se* petition raising the same issue raised in *Murphy*. McGirt had been convicted in Oklahoma state court and imprisoned for three serious sexual offenses. Unlike Murphy, who won in the federal court of appeals, McGirt's claims that Oklahoma lacked jurisdiction over his crime were rejected in the state court below. Justice Gorsuch was not recused from the *McGirt* case. And his participation made all the difference in deciding the legal issue. He authored the Court's (5-4) opinion reversing the Oklahoma Court of Criminal Appeals' decision, holding instead that land in Northeastern Oklahoma reserved for the Creek Nation since the 19th century remains "Indian country" for purposes of the Major Crimes Act, placing certain serious crimes under federal jurisdiction if they were committed by "[a]ny Indian" within "the Indian country." 18 U.S.C. §1153(a). Justice Gorsuch's introduction of the issue and summary of the decision are notable:

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U.S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat. 368.

> Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

The reasoning of the majority opinion spans 42 pages, but its conclusion summarizes why it rejects the states' various contrary arguments:

> The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

Chief Justice Roberts dissented (joined by Alito, Kavanaugh and, but for a footnote, by Thomas). Justice Thomas also dissented separately.

1. ***Sharp (formerly Carpenter/Royal), Warden v. Murphy,*** 140 S. Ct. ___, *No. 17-1107* (July 9, 2020) (2018 Term OA *transcript* & *audio*) (case set for reargument during the October 2019 Term). Summarily affirmed in a 6-2 per curiam decision "for the reasons stated in *McGirt v. Oklahoma.*" Justices Alito and Thomas dissented and Justice Gorsuch did not participate in the *Murphy* decision.

C. ACCA, Guns, Drugs and Vagueness

1. **Recklessness as a "Violent Felony."** ***Borden v. United States*****,** 140 S. Ct. ___, *No. 19-5410* (cert. granted Mar. 2, 2020); decision below at 769 F. App'x. 266 (6th Cir. 2019). 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). The Circuits are split on whether the use of force clause in the ACCA encompasses crimes committed recklessly (see discussion of *Walker*, below). The Sixth Circuit falls into the group that extends the holding in *Voisine v. United States*, 136 S. Ct. 2272 (2016) (addressing the phrase "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A)) to the use of force clause in the ACCA). *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017). Even within the Sixth Circuit, however, there is disagreement on this point, as a separate panel has argued that the ACCA's use of force clause cannot be so broad as to include recklessness. *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017) (explaining it was bound by *Verwiebe*, despite its disagreement). Borden's petition was being held during the pendency of *Walker*, below, but his petition was granted a week after *Walker* was dismissed due to the defendant's death. Question presented: Whether the "use of force clause" in § 924(e)(2)(B)(i) encompasses crimes with a *mens rea* of recklessness. The Court did not grant cert on a second issue addressing whether due process is violated if a newer, more punitive interpretation of law is applied at sentencing than was in force at the time the crime was committed.

a) ***Walker v. United States*****,** 140 S. Ct. ___, *No. 19-373* (cert. granted Nov. 15, 2019) **(cert. dismissed due to death of petitioner, Feb. 27, 2020)**; decision below at 769 F. App'x. 195 (6th Cir. 2019). After discovering 13 bullets in a rooming house that he managed and removing them for safekeeping, Walker was convicted of possessing ammunition as a felon, in violation of 18 U.S.C. §922(g). He was sentenced to a mandatory 15 years imprisonment under the ACCA. Following the Supreme Court's decision in *Johnson*, holding ACCA's residual clause unconstitutionally vague, he filed a § 2255 petition, alleging in part that one of his predicate ACCA convictions–Texas robbery resulting in bodily injury–should not qualify as a violent felony under ACCA's force clause because it could be committed with a *mens rea* of

recklessness. The district court agreed and resentenced Walker to 88 months. The Sixth Circuit reversed, applying its circuit precedent that an offense that can be committed with a *mens rea* of recklessness qualifies as a "violent felony" under ACCA's force clause. This holding is part of a growing conflict among the circuits. The First, Fourth and Ninth Circuits hold that such offenses do not qualify as violent felonies, while the Fifth, Sixth, Eighth, Tenth and DC circuits hold that they can qualify under the force clause. The Third and Eleventh Circuits are presently in the process of deciding the question. The Solicitor General agreed that cert should be granted. Question presented: Whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)? As noted above, cert was dismissed after the counsel for the parties advised the Court that Walker died.

2. **Determining "Serious Drug Offense."** ***Shular v. United States,*** 140 S. Ct. ___, *No. 18-6662* (Feb. 26, 2020) (OA *transcript* & *audio*). Shular qualified as an armed career criminal based on prior Florida convictions for controlled substance offenses, none of which required a finding that Shular had "knowledge of the illicit nature of the substance," i.e., that he was dealing with a "controlled substance." He argued that the categorical approach should apply to "serious drug offenses" under ACCA (as it does to violent crimes) and because the Florida crimes lack the *mens rea* element required for the generic offense, none of his Florida convictions should qualify as a "serious drug offense" under the categorical approach. The Eleventh Circuit affirmed Shular's conviction, holding that the definition of a "serious drug offense" under ACCA does not include a *mens rea* element regarding the illicit nature of the controlled substance; the ACCA requires only that a prior offense "'involve[]' . . . certain activities related to controlled substances." On cert, Shular argued that "[t]he generic offenses named in § 924(e)(2)(A)(ii) include a *mens rea* element of knowledge that the controlled substance is illicit." He emphasized that his prior convictions were for state offenses that do not make knowledge of the substance's illegality an element of the offense; the state offenses, he therefore maintain[ed], do not match the generic offenses in §924(e)(2)(A)(ii). In a unanimous decision written by Justice Ginsburg, the Supreme Court affirmed, holding that "§924(e)(2)(A)(ii)'s 'serious drug offense' definition [does not] call for a comparison to a generic

offense. ... The 'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." In rejecting Shular's argument, the Court determined that the categorial approach has been used by the Court in two ways: (1) comparing the predicate to a generic offense (as in *Taylor v. United States,* 495 U.S. 575 (1990)), or (2) by simply determining if the predicate meets "some other criterion" such as it did in *Stokeling v. United States,* 586 U.S. ___ (2019) (determining whether an offense "has as an element the use, attempted use, or threatened use of physical force against the person of another"). Here, the Court applies the second methodology. The unanimous decision also found that the rule of lenity is inapplicable because the justices divined no ambiguity in the statutory language. Shular attempted to argue, in the alternative, that if §924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it requires knowledge of the substance's illicit nature, yet he specifically disclaimed that issue in his cert petition, so the Court would not address that argument. See *slip* at n.3. Justice Kavanaugh concurred, adding that the rule of lenity only applies as a last step of statutory analysis: "To sum up: Under this Court's longstanding precedents, the rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means."

D. Defrauding the Government. ***Kelly v. United States***, 140 S. Ct. ___, *No. 18-1059* (May 7, 2020) (OA *transcript* & *audio*). Bridget Kelly was convicted for her involvement in the "Bridgegate" scheme, which imposed crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee's mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. Specifically, she was convicted of conspiring to obtain by fraud, knowingly converting, or intentionally misapplying property of an organization receiving federal benefits, in violation of 18 U.S.C. §§ 371 and 666(a)(1)(A); a substantive count of § 666(a)(1)(A); and conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; and two substantive counts of wire fraud. She contested whether her public statements about the purported reasons for the action qualify as violations of these federal crimes. After the Third Circuit sustained her convictions, Kelly argued that cert should be granted to reaffirm the body of case law limiting prosecutions for government officials who allegedly deprive the citizenry of good government. "For over three

decades, this Court has repeatedly warned against using vague federal criminal laws to impose 'standards of . . . good government' on 'local and state officials.' *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The Supreme Court granted cert and unanimously reversed the mail fraud and program fraud convictions in an opinion authored by Justice Kagan. "The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct. Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property. The Government contends it was, because the officials sought both to 'commandeer' the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. . . . We disagree. The realignment of the toll lanes was an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme. We therefore reverse the convictions." The Court's decision reversed not only Kelly's conviction, but also that of her co-defendant William Baroni (who never even petitioned for cert). Baroni actually appeared in the case as a respondent under the rule that all parties who are not petitioner are respondents, and filed a brief supporting petitioner Kelly. The Court concluded as to both convicted defendants: "For no reason other than political payback, Baroni and Kelly used deception to reduce Fort Lee's access lanes to the George Washington Bridge—and thereby jeopardized the safety of the town's residents. But not every corrupt act by state or local officials is a federal crime. Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion."

E. **Computer Fraud and Abuse Act.** ***Van Buren v. United States***, 140 S. Ct. ___, *No. 19-783* (cert. granted Apr. 20, 2020); decision below at 940 F.3d 1192 (11th Cir. 2019). 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. As a result of patrolling the town over the years, 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 one count of felony computer fraud, in violation of 18 U.S.C. § 1030 and one count of honest-services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346. 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. 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." Question presented: Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.

VI. DEATH PENALTY

A. Applicable Law at Capital Resentencing. ***McKinney v. Arizona***, 140 S. Ct. ___, *No. 18-1109* (Feb. 25, 2020) (OA *transcript* & *audio*). McKinney was convicted of two murders and sentenced to death in 1993 by a judge in Arizona. Nearly 20 years later, the Ninth Circuit granted McKinney a conditional writ of habeas corpus, finding that Arizona courts over a 15-year period had refused as a matter of law to consider non-statutory mitigating evidence in death penalty cases, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Eddings*, held that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence. McKinney's case then returned to the Arizona Supreme Court. In that court, McKinney argued that he was entitled to resentencing by a jury. By contrast, the state asked that the Arizona Supreme Court itself conduct a reweighing of the aggravating and mitigating circumstances, as permitted by *Clemons v. Mississippi*, 494 U.S. 738 (1990). The Arizona Supreme Court agreed with the state. The court itself reviewed the evidence in the record and reweighed the relevant aggravating and mitigating circumstances, including McKinney's PTSD. The court upheld both death sentences. McKinney's cert petition challenged application of the old law from 1990, and argued he was entitled to resentencing by a jury. In a 5-4 decision, the Supreme Court affirmed in an opinion authored by Justice Kavanaugh. "This Court's precedents [the 1990's decision in *Clemons,* notwithstanding intervening decisions in *Ring v. Arizona,* 536 U.S. 584 (2002), and *Hurst v. Florida,* 577 U.S. ___ (2016)] establish that state appellate courts may conduct a *Clemons* reweighing of aggravating and mitigating circumstances, and may do so in collateral proceedings as appropriate and provided under state law." Justice Ginsburg dissented (joined by Breyer, Sotomayor & Kagan), contending that *Ring* and *Hurst* should apply because the remand proceeding before the Arizona Supreme Court should be characterized as a direct appeal, not a collateral review proceeding, and this characterization makes all the difference. "Thus, the pivotal question: Is McKinney's case currently on direct review, in which case *Ring* applies, or on collateral review, in which case *Ring* does not apply? I would rank the Arizona Supreme Court's proceeding now before this Court for review as direct in character. I would therefore hold McKinney's death sentences unconstitutional under *Ring*, and reverse the judgment of the Arizona Supreme Court."

VII. APPEALS

A. Party Presentation Rule. ***United States v. Sineneng-Smith,*** 140 S. Ct. ___, *No. 19-67* (May 7, 2020) (OA *transcript* & *audio*). Respondent was convicted of two counts of encouraging or inducing illegal immigration for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv)

and (B)(i), and two counts of mail fraud, in violation of 18 U.S.C. 1341. The 1324(a) offenses criminalize encouraging or inducing immigration violations for profit. Here, the respondent was charged and convicted of "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law," 8 U.S.C. 1324(a)(1)(A)(iv), "for the purpose of commercial advantage or private financial gain." She argued unsuccessfully, in the district court. that the above-cited provisions, did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment. as applied. On appeal, Sineneng-Smith repeated the arguments she had presented to the district court. The Ninth Circuit panel, though, took a different tack. Instead of adjudicating the case presented by the parties, the appeals court named three *amici* and invited them to brief and argue issues framed by the panel, including a question Sineneng-Smith herself never raised earlier: "[W]hether the statute of conviction is overbroad . . . under the First Amendment." The Ninth Circuit ultimately concluded, in accord with the invited *amici*'s arguments, that §1324(a)(1)(A)(iv) is unconstitutionally overbroad. The government petitioned for cert because the judgment of the Court of Appeals invalidated a federal statute and the Court predictably granted cert, which it does in response to virtually every such government cert petition. The sole question presented was: "Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional." The Supreme Court reversed, unanimously, in an opinion authored by Justice Ginsburg, which is highly critical of the Court of Appeals for commandeering the issue and decision, which had not been advanced by the appellant. The rule of party advocacy, the Court noted, is central to litigation: "'[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc)). They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.'" Consistent with that principle, the Court held that "the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion. We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel." Ironically, the practice of appointing *amici* to argue points expressly waived by parties is common, both in the Supreme Court and the Courts of Appeals (although in reality this is nearly always to allow affirmance, not

reversal of the judgment below). Justice Ginsburg addressed this inconsistency in the Court's opinion and an attached addendum: "The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate. *See, e.g., Day v. McDonough*, 547 U. S. 198, 202 (2006) (federal court had 'authority, on its own initiative,' to correct a party's 'evident miscalculation of the elapsed time under a statute [of limitations]' absent 'intelligent waiver'). But this case scarcely fits that bill." – A footnote also protests against the apparent inconsistency in the Court's holding here and the reality of what it has done recently in no fewer than 20 cases, including significant criminal cases, such as *Johnson v. United States* (raising new issue not raised in cert petition), *Beckles v. United States* (appointing amicus to argue position conceded by government), *Welch v. United States* (same), *Montgomery v. Alabama* (same), and two other cases this Term, *Holguin-Hernandez v. United States* (same) and *Sharp v. Carpenter* (seeking to find new ways to reverse decision favorable to a criminal defendant): "In an addendum to this opinion, we list cases in which this Court has called for supplemental briefing or appointed amicus curiae in recent years. None of them bear any resemblance to the redirection ordered by the Ninth Circuit panel in this case." The decision in this case is ironic because the party-presentation issue seized by the Supreme Court's holding was not the issue presented in the government's cert petition, which was limited to the merits of the decision, not the process in the court of appeals—As noted above (but it bears repeating) the issue presented states, simply: "Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional." Justice Thomas concurred, but also challenged the overbreadth doctrine, which he argues is "untethered from the text and history of the First Amendment."

B. Preserving Sentencing Reasonableness Issue for Appeal. ***Holguin-Hernandez v. United States,*** 140 S. Ct. ___, *No. 18-7739* (Feb. 26, 2020) (OA *transcript* & *audio*). In a unanimous decision written by Justice Breyer, the Court determined that a defendant's district-court argument for a specific sentence preserved his claim on appeal that a longer sentence was unreasonably long. "A criminal defendant who wishes a court of appeals to consider a claim that a ruling of a trial court was in error must first make his objection known to the trial-court judge. The Federal Rules of Criminal Procedure provide two ways of doing so. They say that '[a] party may preserve a claim of error by informing the court . . . of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for

that objection.' Fed. Rule Crim. Proc. 51(b). Errors 'not brought to the court's attention' in one of these two ways are subject to review only insofar as they are 'plain.' Rule 52(b); *see United States v. Olano*, 507 U.S. 725, 732–736 (1993). In this case, a criminal defendant argued in the District Court that the sentencing factors set forth in 18 U.S.C. § 3553(a) did not support imposing any prison time for a supervised-release violation. At the very least, the defendant contended, any term of imprisonment should be less than 12 months long. The judge nevertheless imposed a sentence of 12 months. The question is whether the defendant's district-court argument for a specific sentence (namely, nothing or less than 12 months) preserved his claim on appeal that the 12-month sentence was unreasonably long. We think that it did." The government and *amici* asked the Court to decide, more generally, what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence, but the Court refused to do so because the Court of Appeals had not considered those arguments. Instead, the Court held "only that the defendant here properly preserved the claim that his 12-month sentence was unreasonably long by advocating for a shorter sentence and thereby arguing, in effect, that this shorter sentence would have proved 'sufficient,' while a sentence of 12 months or longer would be 'greater than necessary' to 'comply with' the statutory purposes of punishment. Justice Alito concurred (joined by Gorsuch), reiterating that "a defendant who requests a specific sentence during a sentencing hearing need not object to the sentence after its pronouncement in order to preserve a challenge to its substantive reasonableness (i.e., length) on appeal;" but the concurrence makes clear that the Court's decision does not decide (1) "what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence," and (2) "what is sufficient to preserve any 'particular' substantive-reasonableness argument . . . -- we do not suggest that a generalized argument in favor of less imprisonment will insulate all arguments regarding the length of a sentence from plain-error review."

C. Plain Error Review of Unpreserved Factual Errors. ***Davis v. United States***, 140 S. Ct. ___, *No. 19-5421* (Mar. 23, 2020) (per curiam). The Fifth Circuit, in its never-ending quest to avoid appellate review of sentencing issues, adhered to a rule that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." This standard of non-review meant that the Fifth Circuit could avoid addressing factual disputes on appeal, absent an explicit objection in the sentencing court. This rule insulated any such ruling, even from plain error review. Using that rule, the Fifth Circuit refused to decide whether Davis' sentence should have been run

concurrently to his state conviction because the state and federal offenses constituted part of the "same course of conduct," and were therefore relevant conduct to each other. Previously, Justice Sotomayor had criticized the Fifth Circuit's approach, suggesting it be reconsidered. *See Carlton v. United States*, 135 S. Ct. 2399 (2015). But the Fifth persisted. In a per curiam decision, the Supreme Court vacated the *Davis* decision and remanded it for reconsideration under the plain error rule. "Rule 52(b) states in full: 'A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.' The text of Rule 52(b) does not immunize factual errors from plain-error review. Our cases likewise do not purport to shield any category of errors from plain-error review. *See generally Rosales- Mireles v. United States*, 585 U.S. ___ (2018); *United States v. Olano*, 507 U.S. 725 (1993). Put simply, there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error."

VIII. IMMIGRATION

A. Relief from Removal. ***Pereida v. Barr***, 140 S. Ct. ___, *No. 19-438* (Dec. 18, 2019); decision below at 916 F.3d 1128 (8th Cir. 2019). A noncitizen may not apply for relief from deportation, including asylum and cancellation of removal, if he has been convicted of a disqualifying offense listed in the Immigration and Nationality Act. The categorical approach (including its "modified" variant) governs the analysis of potentially disqualifying convictions. Under that approach, a conviction for a state offense does not carry immigration consequences unless it "necessarily" establishes all elements of the potentially corresponding federal offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013. Accordingly, four courts of appeals hold that a state conviction does not bar relief from removal if the state-court record is merely ambiguous as to whether the conviction involved the elements of the corresponding federal offense. In their view, ambiguity means the conviction does not "necessarily" establish the elements of the federal offense. Four other courts of appeals-including the Eighth Circuit below-take the opposite view. They hold that a merely ambiguous conviction is nonetheless disqualifying because the immigration laws place an evidentiary burden of proof on noncitizens to establish eligibility for relief. Cert was granted. The question presented is: Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.

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

A. Rule 59(e) Motions Not Second or Successive Petitions. ***Banister v. Davis, Dir.,*** 140 S. Ct. ___, *No. 18-6943* (June 1, 2020) (OA *transcript* & *audio*). A motion brought under Federal Rule of Civil Procedure 59(e) to alter or amend a habeas court's judgment does not qualify as a successive petition in violation of AEDPA. In a 7-2 decision authored by Justice Kagan, the Court held that a Rule 59(e) motion is instead part and parcel of the first habeas proceeding. As a result, it is not a prohibited successive petition. A rule 59(e) motion is unlike a Rule 60(b) motion, which under *Gonzalez v. Crosby*, 545 U.S. 524 (2005) counts as a second or successive habeas application if it "attacks the federal court's previous resolution of a claim on the merits." Justice Alito (joined by Thomas) dissented.

B. Second or Successive § 2255 Applications. ***Avery v. United States***, 140 S. Ct. ___, *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.

C. Retroactivity: Mandatory Life Without Parole for Juveniles. ***Jones v. Mississippi,*** 140 S. Ct. ___, *No. 18-1259* (cert. granted Mar. 9, 2020); decision below at __ So. 3d __, 2017 WL 6387457 (Miss. Ct. App. Dec. 14, 2017) **[cert. granted following dismissal of *Malvo,* below, when Virginia state law was amended to permit Malvo to be paroled]**. Three weeks after Brett Jones turned 15, in July 2004, he killed his paternal grandfather, Bertis Jones, during an altercation about Brett's girlfriend. Brett had come to stay with his grandparents in Mississippi approximately two months before to escape his mother and stepfather's troubled household in Florida. He was tried by a jury and convicted of murder. The circuit court sentenced Brett to life imprisonment without parole, the mandatory penalty for murder. Following the Court's opinion in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court of Mississippi granted Brett's motion for post-conviction relief, vacated his mandatory life-without-parole sentence, and remanded for a new sentencing hearing. According to the state supreme court's instructions, the circuit court on remand was required to consider a set of "juvenile characteristics and circumstances"—sometimes referred to as the *Miller* factors—in deciding whether Brett should be sentenced to life with eligibility for parole or resentenced to life without eligibility for parole. The circuit court held a resentencing hearing, taking evidence on aggravators and mitigators, and on April 17, 2015, (more than nine months before *Montgomery v. Louisiana* was decided) the circuit court resentenced Brett to life in prison without possibility of parole. The court did not find that Brett was permanently incorrigible, nor did it acknowledge that only permanently incorrigible juvenile homicide offenders may be sentenced to life without parole. In fact, it did not address Brett's capacity for rehabilitation at all. Instead, the court viewed its task merely as assessing aggravating and mitigating circumstances. The Court's subsequent decision in *Montgomery v. Louisiana* explained that its prior decision in *Miller v. Alabama* held that the Eighth Amendment bars life-without-parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." The Court charged sentencing authorities with "separat[ing] those juveniles who may be sentenced to life without parole from those who may not." The majority of lower

courts interpret these statements to mean that a sentencing authority must make a finding, whether written or oral, that a juvenile is one of the rare, permanently incorrigible juvenile offenders "who may be sentenced to life without parole." *Montgomery* rejected the view that the rule of *Miller* is purely procedural (and therefore non-retroactive). *Montgomery* also addressed the argument that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." The argument "[t]hat this finding is not required," the Court explained, would "speak[] only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee." That argument therefore did not affect the substantive (and thus retroactive) nature of *Miller*'s holding. A minority of courts conclude, nevertheless, that sentencing authorities may impose a life-without-parole sentence on a juvenile without first determining that he or she is permanently incorrigible. Despite the development and clarification of Supreme Court law relating to juvenile sentencing, Brett's sentence was affirmed in a split decision by the Mississippi Court of Appeals. Although the state supreme court initially granted review, and heard argument en banc, it dismissed Brett's petition (5-4), without explanation. Question presented: Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

1. ***Mathena v. Malvo*****,** 139 S. Ct. ___, *No. 18-217* (cert. granted Mar. 18, 2019) (cert. dismissed by agreement of parties based on change in Virginia law, Feb. 26, 2020) (OA *transcript* & *audio*). This case involves the notorious serial murderers committed by the D.C. snipers. One of the two snipers, Lee Malvo was originally sentenced in 2004 to life without parole, even though he was a juvenile when the crime occurred. The life sentence was not mandatory under the sentencing statute. Eight years later, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Four years after that, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when *Miller* was decided. The Fourth Circuit concluded that Virginia must resentence Malvo for crimes for which he was sentenced in 2004. The basis of that decision was the Fourth Circuit's conclusion that *Montgomery* expanded the prohibition against "mandatory life without parole

for those under the age of 18 at the time of their crimes" announced in *Miller v. Alabama* to include discretionary life sentences as well. Virginia's highest court has adopted a diametrically opposed interpretation of *Montgomery*. In its view, *Montgomery* did not extend *Miller* to include discretionary sentencing schemes but rather held only that the new rule of constitutional law announced in *Miller* applied retroactively to cases on collateral review. *See Jones v. Commonwealth*, 795 S.E.2d 705, 721, 723 (Va.), cert. denied, 138 S. Ct. 81 (2017). The Supreme Court of Virginia acknowledged that prohibiting discretionary life sentences for juvenile homicide offenders may be the next step in the Supreme Court's Eighth Amendment jurisprudence, but it concluded that both *Montgomery* and *Miller* "addressed mandatory life sentences without possibility of parole." The question presented was: Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision *(Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question? As noted above, the proceeding was dismissed by the Court after oral argument, on motion of both parties, based on a newly-enacted change in Virginia law permitting parole in such cases.