UNITED STATES SUPREME COURT
PREVIEW
REVIEW
OVERVIEW

CRIMINAL CASES GRANTED REVIEW AND DECIDED DURING THE OCTOBER 2020-21 TERMS THRU MAY 12, 2021

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

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I. SECOND AMENDMENT

A. ***New York State Rifle and Pistol Assn., et al. v. Corlett***, 141 S. Ct. ___, *No. 20-843* (cert. granted Apr. 26, 2021); decision below at 818 F. App'x 99 (2d Cir. 2020). New York prohibits its ordinary law-abiding citizens from carrying a handgun outside the home without a license, and it denies licenses to every citizen who fails to convince the state that he or she has "proper cause" to carry a firearm. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation," 554 U.S. 570, 592 (2008), and in *McDonald v. City of Chicago*, the Court held that this right "is fully applicable to the States," 561 U.S. 742, 750 (2010). For more than a decade since then, numerous courts of appeals have squarely divided on the question whether the Second Amendment allows the government to deprive ordinary law-abiding citizens of the right to possess and carry a handgun outside the home. Here, the Second Circuit affirmed the constitutionality of a New York regime that prohibits law-abiding individuals from carrying a handgun unless they first demonstrate some form of "proper cause" that distinguishes them from the body of "the people" protected by the Second Amendment. Question presented (as re-worded by the Supreme Court's order granting cert): Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

II. FOURTH AMENDMENT -- SEARCH & SEIZURE

A. Seizure by Excessive Force. ***Torres v. Madrid***, 140 S. Ct. ___, *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,*** 141 S. Ct. ___, *No. 20-18* (cert. granted Oct. 19, 2020); decision below at 2019 WL 5654385 (Ca. Ct. App., 1st Dist. 2019) (OA *transcript* & *audio*). Absent "consent" or "exigent circumstances," a police officer's "entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981). Here, Arthur Lange was driving home one evening, listening to loud music and at one point honked his horn a few times. A California highway patrol officer began following Lange, intending to conduct a traffic stop. The officer later testified that he believed the music and honking violated the California Vehicle Code. Those noise infractions carried base fines of $25 or $35. The officer initially followed at some distance and did not activate his siren or overhead lights, but his dashcam captured the ensuing events. He neared Lange's vehicle only after Lange turned onto his residential street. Approaching his house, Lange slowed and activated his garage door opener. As Lange continued toward his driveway, the officer turned on his overhead lights, but not his siren. At that point, Lange was about as far from his driveway "as first base is from second." "[A]pproximately four seconds" later, he turned into his driveway and then parked in his attached garage. The officer parked in the driveway behind him, and, as the garage door began to descend, the officer left his squad car, stuck his foot under the door to stop it from closing, and entered the garage. Inside the garage, the officer asked Lange: "Did you not see me behind you?" When Mr. Lange answered that he had not, the officer asked him about the honking and music, then requested Lange's license and registration. After more questioning, the Officer stated that he could smell alcohol on Mr. Lange's breath and ordered him out of the garage for a DUI investigation. Lange was eventually charged with driving under the influence and "the infraction of operating a vehicle's sound system at excessive levels." His motion to suppress was denied by the trial court and affirmed on appeal following his conditional plea of guilty, which helding that misdemeanor pursuit categorically justifies warrantless entry of the home. Five state supreme courts have such a categorical exception to the warrant requirement, holding that misdemeanor pursuit categorically justifies warrantless home entry: California, Massachusetts, Ohio, Illinois, and North Dakota. Two federal circuits (the Tenth and Sixth), as well as three state supreme courts (Florida, New Jersey and Arkansas) apply a case-by-case approach, allowing warrantless entry only when some exigency beyond mere pursuit of a suspected misdemeanant leaves police no time to seek a warrant. **Question presented:** Does pursuit of a person who a police officer has probable cause to believe has committed a

misdemeanor categorically qualify as an exigent circumstance sufficient to allow the officer to enter a home without a warrant?

1. **Knock and Talk**. ***Bovat v. Vermont***, 141 S. Ct ___, *No. 19-1301* (**cert denied** Oct. 19, 2020). Even though the Court denied review in this case, conferenced in the days after the passing of Justice Ginsburg, Justice Gorsuch (joined by Sotomayor and Kagan) wrote a statement highlighting potential abuse of the "knock and talk" law enforcement technique, and cautioning that it is not an unlimited license to a warrantless search of the home and its curtilage: "The 'knock and talk' is an increasingly popular law enforcement tool, and it's easy to see why. All an officer has to do is approach a home's front door, knock, and win the homeowner's consent to a search. Because everything is done with permission, there's usually no need to bother with a warrant, or worry whether exigent circumstances might forgive one's absence. After all, the Fourth Amendment protects against unreasonable searches, and consensual searches are rarely that."

   "But with the rise of the knock and talk have come more and more cases testing the boundaries of the consent on which they depend. Sometimes, officers appear with overbearing force or otherwise seek to suggest that a homeowner has no choice but to cooperate. Other times, officers fail to head directly to the front door to speak with the homeowner, choosing to wander the property first to search for whatever they can find."

   Here, Vermont game wardens suspected Clyde Bovat of unlawfully hunting a deer at night (Vermont calls it a "deer jacking"), so they decided to pay him a visit to—in their words—"investigate further." But the wardens admit that "pretty soon after arriving" they focused on a window in Mr. Bovat's detached garage. Heading there and peering inside, the wardens spotted what they thought could be deer hair on the tailgate of a parked truck. The detached garage was across the driveway from the home, as this photo illustrates.

The game warden's detour to the detached garage was not brief. According to Mr. Bovat's wife, the wardens lingered on the property for perhaps fifteen minutes and never even made it to the front door of the home. Instead, after watching from inside, she finally decided to go out to speak with the wardens—and it was only then they finally sought consent for a search. Mrs. Bovat refused the request, but by that point, of course, the whole exercise of seeking consent was pointless—the wardens had all they needed, forget about any knock or talk. They left the property only to return promptly with a search warrant premised on what they had seen through the garage window.

"For reasons that remain unclear, the Vermont Supreme Court analyzed the propriety of the wardens' conduct without mentioning [*Florida v.*] *Jardines*, [569 U.S. 1 (2013), in which the U.S. Supreme Court recognized that a home's "curtilage," the area immediately surrounding it, is protected by the Fourth Amendment much like the home itself.] Instead, the court held that the officers' initial visit and search of the property was perfectly appropriate in light of the "plain view" doctrine—the commonsense principle that the Fourth Amendment doesn't normally require an officer to ignore what he sees lying before him. But that doctrine applies only when an officer finds himself in a place he is lawfully permitted to occupy. No one, after all, thinks an officer can unlawfully break into a home, witness illegal activity, and then claim the benefit of the plain view doctrine."

So, then why did the Court not grant cert to review this case? Likely because Justice Ginsburg was not there to add the necessary fourth vote. But Justice Gorsuch explained it more obliquely: "Despite the Vermont Supreme Court's error, I acknowledge that understandable reasons exist for my

colleagues' decision to let this case go. For one, it is unclear whether *Jardines*'s message about the protections due a home's curtilage has so badly eluded other state or federal courts. For another, there might be reason to hope that, while Vermont missed *Jardines* in one deer-jacking case, its oversight will prove a stray mistake. But however all that may be, the error here remains worth highlighting to ensure it does not recur. Under *Jardines*, there exist no 'semiprivate areas' within the curtilage where governmental agents may roam from edge to edge. Nor does *Jardines* afford officers a fifteen-minute grace period to run around collecting as much evidence as possible before the clock runs out or the homeowner intervenes. The Constitution's historic protections for the sanctity of the home and its surroundings demand more respect from us all than was displayed here."

C. "Community Caretaking" Exception to Warrant Requirement. ***Caniglia v. Strom***, 141 S. Ct. ___, *No. 20-157* (cert. granted Nov. 20, 2020); decision below 953 F.3d 112 (1st Cir. 2020) (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 are deeply divided about whether the "community caretaking" exception can justify a warrantless intrusion into a home. There is at least a four-to-three split on that question among the federal Courts of Appeals. State courts are similarly divided. *See Ray v. Twp. of Warren*, 626 F.3d 170, 176– 77 (3d Cir. 2010) (acknowledging split); *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 554 (7th Cir. 2014) (same); *Corrigan v. Dist. of Columbia*, 841 F.3d 1022, 1034 (D.C. Cir. 2016) (same). Here, Mr. Caniglia's wife called police

because Mr. Caniglia seemed to be acting irrationally and doing so with firearms. After investigating, police 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." Question presented: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home?

D. Indian Reservation Searches. ***United States v. Cooley***, 141 S. Ct. ___, *No. 19-1414* (cert. granted Nov. 20, 2020); decision below at 919 F.3d 1135 (9th Cir. 2020) (OA *transcript* and *audio*). Question presented: Whether a police officer of an Indian tribe lacks authority to temporarily detain and search a non-Indian on a public right-of-way within a reservation based on a potential violation of state or federal law.

III. SIXTH AMENDMENT

A. Confrontation Clause; Forfeiture by "Opening the Door." ***Hemphill v. New York***, 141 S Ct. ___, *No. 20-637* (cert. granted Apr.19, 2021); decision below at 150 N.E.3d 356 (NY CA 2020). After unsuccessfully prosecuting another man for a murder, the State of New York tried and convicted Darrell Hemphill for the same crime. His attorney contended at trial that certain physical evidence indicated that the first suspect actually committed the crime. In response, the prosecution introduced into evidence an allocution statement of the first suspect, not made during Hemphill's trial, but rather during the first suspect's guilty plea to lesser charges (for which he received time-served). Hemphill objected that admitting the first suspect's allocution—a classic testimonial statement—without calling him to the stand would violate his Sixth Amendment right to be confronted with the witnesses against him. The trial court overruled the objection and admitted the allocution. New York's Court of Appeals affirmed.

Hemphill's petition raises the question whether he forfeited his Sixth Amendment right to be confronted with the witnesses against him when his attorney contended at trial physical evidence indicated that the first suspect actually committed the crime. It is true that a litigant's argument or introduction of evidence at trial is often deemed to "open the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence. And, all parties to this petition agree that a criminal defendant, like any other litigant, may open the door to the admission of evidence that is otherwise inadmissible under the ordinary rules of evidence when it "clarif[ies], rebut[s], or complete[s] an issue" that the defendant has raised. *United States v. Holmes,* 620 F.3d 836, 843 (8th Cir. 2010) (citation omitted). Where, however, responsive evidence would otherwise be barred by the Confrontation Clause, courts have openly split over whether, or under what circumstances, the opening- the-door concept renders the evidence admissible. *State v. Hull*, 788 N.W.2d 91, 101-02 (Minn. 2010) ("Cases from other jurisdictions have gone both ways on this question."); *Lane v. State*, 997 N.E.2d 83, 92-93 (Ct. App. Ind. 2013) (noting split) Question presented: Whether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.

B. Unanimous Verdicts; Retroactivity of *Ramos v. Louisiana*. ***Edwards v. Vannoy, Warden***, 140 S. Ct. ___, *No. 19-5807* (cert. granted May 4, 2020) (OA *transcript* & *audio*). Whether the Court's decision in *Ramos v. Louisiana*, 590 U.S. ___ (2020)—holding that the Sixth Amendment right to a jury trial requires a unanimous verdict to support a conviction of a serious crime in both state and federal courts—applies retroactively to cases on federal collateral review.

IV. CRIMES

A. 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.
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> 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.

B. ACCA, Guns, Drugs and Vagueness

1. Sequential Offenses as Separate ACCA Predicates. ***Wooden v. United States***, 141 S. Ct. ___, *No. 20-5279* (cert. granted Feb. 22, 2021); decision below at 945 F.3d 498 (6th Cir. 2020). 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 faces 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. The circuits are split on this issue; the 3rd, 5th, 6th 7th, 8th, 10th, 11th and D.C. circuits hold that crimes are automatically committed on different "occasions" whenever the crimes were committed "successively rather than simultaneously." In other circuits, by contrast, showing that offenses are temporally sequential is not sufficient. These courts "understand 'occasions' in its broader sense, as the conjuncture of circumstances that provides an opportunity to commit a crime." The Supreme Court granted cert in this case, in what began as a *pro se* petition. Counsel has since been appointed for further briefing and argument. **Question presented:** Does ACCA's text, structure, history and purpose dictate that "occasions" are different circumstances or opportunities, not simply different times.

2. 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) (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). 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.

C. 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). (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. 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.

V. SENTENCING

A. Covered Offenses Under First Step Act. ***Terry v. United States***, 141 S. Ct. ___, *No. 20-5904* (cert. granted Jan. 8, 2021); decision below at 2020 WL 5640801 (11th Cir. 2020) (OA *transcript* & *audio*). Section 404 of the First Step Act of 2018 made the Fair Sentencing Act of 2010 retroactive. Section 404 authorized federal district courts to impose a reduced sentence for anyone with a "covered offense." Pub. L. No. 115-391, 132 Stat. 5194, § 404(b). Congress defined a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." § 404(a). Section 2 of the Fair Sentencing Act of 2010 modified 21 U.S.C. § 841 by raising the crack-cocaine quantities that determine three tiers of penalties in 21 U.S.C. § 841(b)(1). For the top-tier range of 10-years-to-life in § 841(b)(1)(A), Section 2 raised the threshold from 50 to 280 grams of crack. And, for the mid-tier range of 5-to-40- years in § 841(b)(1)(B), Section 2 raised the threshold from 5 to 28 grams of crack. The bottom-tier range of 0-to-20-years in § 841(b)(1)(C) applies to offenses not subject to the top- or mid-tier ranges in §§ 841(b)(1)(A) or (b)(1)(B). Section 2 of the Fair Sentencing Act did not modify the text of § 841(b)(1)(C). But by raising the quantity threshold in § 841(b)(1)(B)(iii) from 5 grams to 28 grams of crack, it had the effect of increasing § 841(b)(1)(C)'s upper boundary from 5 grams to 28 grams of crack. Question presented: Whether pre-August 3, 2010 crack offenders sentenced under 21 U.S.C. § 841(b)(1)(C) have a "covered offense" under Section 404 of the First Step Act.1?

VI. FEDERAL DEATH PENALTY

A. ***United States v. Tsarnaev***, 141 S. Ct ___, *No. 20-443* (cert. granted Mar. 22, 2021); decision below at 968 F.3d 24 (2d Cir. 2020). 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. Questions presented: (1) 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 respondent's case; (2) Whether the district court committed reversible

error at the penalty phase of respondent's trial by excluding evidence that respondent's older brother was allegedly involved in different crimes two years before the offenses for which respondent was convicted.

VII. APPEALS

A. Applying Plain Error Review to *Rehaif* Error.

1. **Considering Matters Outside Record.** ***Greer v. United States***, 141 S. Ct. ___, *No. 19-8709* (cert. granted Jan. 8, 2021); decision below at 798 F. App'x 483 (11th Cir. 2020) (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. Federal courts of appeals have applied plain error review to cases on remand following the Rehaif decision, and, in some cases, have resorted to matters outside the trial record to decide the plain error issue. Question presented: When applying plain-error review based upon an intervening United States Supreme Court decision, may a circuit court of appeals review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?

2. **Step 3--Affecting Outcome of Proceedings.** ***United States v. Gary*****,** 141 S. Ct. ___, *No. 20-444* (cert. granted Jan. 8, 2021); decision below at 954 F.3d 194 (4th Cir. 2020) (OA *transcript* & *audio*). Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. §§922(g)(1) and 924(a), 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.

VIII. IMMIGRATION

A. Proving Defenses to Removal. ***United States v. Palomar-Santiago***, 141 S. Ct. ___, *No. 20-437* (cert. granted Jan 8, 2021); decision below at 813 F. App'x. 282 (9th Cir. 2020). Under 8 U.S.C. §1326(d), a defendant charged with unlawful reentry into the United States following removal may assert the invalidity of the original removal order as an affirmative defense only if he "demonstrates that"

he "exhausted any administrative remedies that may have been available to seek relief against the order," 8 U.S.C. §1326 (d)(1), the removal proceedings "deprived [him] of the opportunity for judicial review," 8 U.S.C. §1326(d)(2), and "the entry of the order was fundamentally unfair," 8 U.S.C. 1326 (d)(3). Question presented: Whether a defendant automatically satisfies all three of those prerequisites solely by showing that he was removed for a crime that would not be considered a removable offense under current circuit law, even if he cannot independently demonstrate administrative exhaustion or deprivation of the opportunity for judicial review.

B. Relief from Removal for Ambiguous Convictions. ***Pereida v. Wilkinson***, 141 S. Ct. ___, *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 Notices.** ***Niz-Chavez v. Garland***, 141 S. Ct. ___, *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)(l)(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)(l), 1229(a)(l). 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.

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. Standard for Granting Federal Habeas Relief. ***Brown, Acting Warden v Davenport***, 141 S. Ct ___ *No. 20-826* (cert. granted Apr. 5, 2021); decision below at 975 F.3d 537 (6th Cir. 2020). 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 state petitioned for cert, raising the following issue: In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Court held that the test for determining whether a constitutional error was harmless on habeas review is whether the defendant suffered "actual prejudice." Congress later enacted 28 U.S.C. § 2254(d)(1), which prohibits habeas relief on a claim that was adjudicated on the merits by a state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Although the Court has held that the *Brecht* test "subsumes" § 2254(d)(1)'s requirements, the Court declared in *Davis v. Ayala*, 576 U.S. 257, 267 (2015), that those requirements are still a "precondition" for relief and that a state-court harmlessness determination under *Chapman v. California*, 386 U.S. 18 (1967), still retains "significance" under the *Brecht* test. Question presented: May a federal habeas court grant relief based solely on its conclusion that the *Brecht* test is satisfied, as the

Sixth Circuit held, or must the court also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held?

1. **Insufficient Basis to Grant Habeas Relief. *Mays, Warden v. Hines***, 141 S. Ct. ___, *No. 20-507* (Mar. 29, 2021) (*per curiam*). "A Tennessee jury found Anthony Hines guilty of murdering Katherine Jenkins at a motel. Witnesses saw Hines fleeing in the victim's car and wearing a bloody shirt, and his family members heard him admit to stabbing someone at the motel. But almost 35 years later, the Sixth Circuit held that Hines was entitled to a new trial and sentence because his attorney should have tried harder to blame another man. In reaching its conclusion, the Sixth Circuit disregarded the overwhelming evidence of guilt that supported the contrary conclusion of a Tennessee court. This approach plainly violated Congress' prohibition on disturbing state-court judgments on federal habeas review absent an error that lies 'beyond any possibility for fairminded disagreement.' *Shinn v. Kayer*, 592 U.S. ___, ___ (2020) (per curiam) (slip op., at 1); 28 U.S.C. §2254(d). We now reverse." Justice Sotomayor noted her dissent, but did not file a dissenting opinion.

D. Mandatory Life Without Parole for Juveniles. *Jones v. Mississippi,* 141 S. Ct. ___, *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 in- corrigible 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)."

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