UNITED STATES SUPREME COURT
PREVIEW
REVIEW
OVERVIEW

CRIMINAL CASES GRANTED REVIEW AND DECIDED DURING THE OCTOBER 2022-24 TERMS THRU MARCH 20, 2024

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

PAUL M. RASHKIND, ESQ.
SUPREME COURT & APPELLATE LAW

I. FIRST AMENDMENT

A. Limits on Criminal Speech. ***Counterman v. Colorado*, *No. 22-138*** (June 27, 2023) (OA ***transcript*** & ***audio***). From 2014 to 2016, Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." "Staying in cyber life is going to kill you." "You're not being good for human relations. Die." The messages put C. W. in fear and upended her daily existence. She believed that Counterman "was threatening her life"; "was very fearful that he was following" her; and was "afraid [she] would get hurt." As a result, she had "a lot of trouble sleeping" and suffered from severe anxiety. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. Eventually, C. W. decided that she had to contact the authorities. Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly ... make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional dis- tress." Colo. Rev. Stat. §18–3–602(1)(c) (2022). The only

evidence the State proposed to introduce at trial were his Facebook messages. Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten." The court decided, after considering the totality of the circumstances, that Counterman's statements "r[o]se to the level of a true threat." Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court sent the case to the jury, which found Counterman guilty as charged. The Colorado Court of Appeals affirmed. Counterman had urged the court to hold that the First Amendment required the State to show that he was aware of the threatening nature of his statements. Relying on its precedent, the court turned the request down: It declined to say that a speaker's subjective intent to threaten is necessary under the First Amendment to procure a conviction for threatening communications. Using the established objective standard, the court then approved the trial court's ruling that Counterman's messages were "true threats" and so were not protected by the First Amendment. The Colorado Supreme Court denied review. **The Supreme Court reversed (7-2) in a decision written by Justice Kagan.** "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." Justice Sotomayor concurred in part, and concurred in the judgment (joined in large part by Gorsuch). Thomas dissented, as did Barrett (joined by Thomas).

B. **Overbreadth.** ***United States v. Hansen***, ***No. 22-179*** (June 23, 2023) (OA ***transcript*** & ***audio***). Hansen promised hundreds of noncitizens a path to U.S. citizenship through "adult adoption." But that was a scam. Though there is no path to citizenship through "adult adoption," Hansen earned nearly $2 million from his scheme. The United States charged Hansen with violating 8 U.S.C. §1324(a)(1)(A)(iv), which forbids

"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 [activity] is or will be in violation of law." Hansen was convicted and moved to dismiss the clause (iv) charges on First Amendment overbreadth grounds. The District Court rejected Hansen's argument, but the Ninth Circuit concluded that clause (iv) was unconstitutionally overbroad. **The Supreme Court reversed (7-2) in a decision authored by Justice Barrett.** "Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not 'prohibi[t] a substantial amount of protected speech'—let alone enough to justify throwing out the law's 'plainly legitimate sweep.' *United States v. Williams*, 553 U.S. 285, 292 (2008)." The majority opinion concludes: "Even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In other words, Hansen asks us to throw out too much of the good based on a speculative shot at the bad. This is not the stuff of overbreadth—as-applied challenges can take it from here." Justice Thomas filed a concurring opinion, taking issue with the Court's overall application of the overbreadth doctrine. Justice Jackson dissented, joined by Sotomayor: "The Court reads [the statute's] broad language as a narrow prohibition on the intentional solicitation or facilitation of a specific act of unlawful immigration—and it thereby avoids having to invalidate this statute under our well-established First Amendment overbreadth doctrine. But the majority departs from ordinary principles of statutory interpretation to reach that result. Specifically, it rewrites the provision's text to include elements that Congress once adopted but later removed as part of its incremental expansion of this particular criminal law over the last century. It is neither our job nor our prerogative to retrofit federal statutes in a manner patently inconsistent with Congress's choices."

II. SECOND AMENDMENT

A. ***United States v. Rahimi***, ***No. 22-915*** (cert. granted June 30, 2023); decision below at 61 F.4th 443 (5th Cir. 2023) (OA ***transcript*** & ***audio***). Rahimi was charged with a violation of 18 U.S.C. §922(g)(8), which criminalizes the possession of firearms by persons subject to domestic-violence restraining orders. He moved to dismiss the indictment, arguing that 922(g)(8) violates the Second Amendment on its face. The district court denied the motion under then-existing Fifth Circuit precedent. Rahimi pleaded guilty and was sentenced to 73 months

imprisonment (followed by three years supervised release). He then appealed the Second Amendment ruling. The Fifth Circuit at first affirmed, reasoning that its prior precedent foreclosed Rahimi's Second Amendment challenge. But after the Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111 (2022), the Fifth Circuit withdrew its opinion, received supplemental briefing on *Bruen*, and then reversed the ruling. A month later, the court withdrew that opinion and issued an amended opinion that again reversed. The Fifth Circuit held that 922(g)(8) violates the Second Amendment on its face. The court began by reasoning that Rahimi fell "within the Second Amendment's scope." It acknowledged that the Supreme Court has described the right to keep and bear arms as a right belonging to "'ordinary, law-abiding citizens,'" but it interpreted that phrase to exclude only "'felons,'" "'the mentally ill,'" and other "groups that have historically been stripped of their Second Amendment rights." The Fifth Circuit concluded that, although Rahimi was "hardly a model citizen," he was not a "convicted felon" or otherwise excluded from the Second Amendment's scope. The court of appeals stated that, because Rahimi presumptively fell within the Second Amendment's scope, the government bore the burden of identifying historical analogues to Section 922(g)(8)—that is, longstanding regulations "that imposed 'a comparable burden on the right of armed self-defense' that were also 'comparably justified.'" (quoting *Bruen*, 142 S. Ct. at 2132-2133). The court then rejected each of the analogues the government offered. For example, the government cited a 17th-century English statute disarming individuals judged to be dangerous, but the court concluded that the statute was "not a forerunner of our Nation's historical tradition of firearm regulation." The government cited colonial and early state laws disarming categories of individuals legislatures "considered to be dangerous," but the Fifth Circuit distinguished those laws on the ground that they operated on a categorical basis, while Section 922(g)(8) rests on individualized findings. The government also cited colonial and state laws under which a person who was found to pose a threat to someone else could bear arms only if he posted a surety. But the Fifth Circuit emphasized that surety laws imposed only a "partial restriction" on the right to keep and bear arms, while Section 922(g)(8) "works an absolute deprivation of the right. Judge Ho issued a concurring opinion, finding 922(g)(8) "difficult to justify" because it disarms individuals "based on civil protective orders" rather than "criminal proceedings." He expressed concern that such orders are susceptible to "abuse." **Question presented:** Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

III. FOURTH AMENDMENT

A. Malicious Prosecution. ***Chiaverini v. Napoleon***, ***No. 23-50*** (cert. granted Dec. 13, 2023); decision below at 2023 WL 152477 (6th Cir. 2023). To make out a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983, a plaintiff must show that legal process was instituted without probable cause. *Thompson v. Clark*, 142 S. Ct. 1332, 1338 (2022). The circuits are split over the rule governing cases with multiple counts of prosecution. Under the "charge-specific rule," a malicious prosecution claim can proceed as to a baseless criminal charge, even if other charges brought alongside the baseless charge are supported by probable cause. Under the "any-crime rule," probable cause for even one charge defeats a plaintiff's malicious prosecution claims as to every other charge, including those lacking probable cause. Question presented: Whether Fourth Amendment malicious prosecution claims are governed by the "charge-specific rule," as the Second, Third, and Eleventh circuits hold, or by the "any-crime rule," as the Sixth Circuit holds.

IV. FIFTH AMENDMENT.

A. Double Jeopardy Implication of Venue Error. ***Smith v. United States***, ***No. 21-1576*** (June 15, 2023) (OA ***transcript*** & ***audio***). Smith used a web application to uncover ideal fishing locations sold by a company from its database of such locations. He then made internet postings offering to disclose this fishing locations to the public. Smith was indicted in the Northern District of Florida for, among other charges, theft of trade secrets. Before trial, he moved to dismiss the indictment for lack of venue, citing the Constitution's Venue Clause, Art. III, §2, cl. 3, and its Vicinage Clause, Amdt. 6. He argued that trial in the Northern District of Florida was improper because he had accessed the subject data from Mobile (in the Southern District of Alabama) and the servers storing the data coordinates were located in Orlando (in the Middle District of Florida). The district court concluded that the jury needed to resolve factual disputes related to venue, and it therefore denied the motion to dismiss without prejudice. After the jury returned a verdict of guilty, Smith moved for a judgment of acquittal based on improper venue. The district court denied the motion, reasoning that the victim felt the effects of the crime at its headquarters in the Northern District of Florida. The Eleventh Circuit reversed as to venue, holding that venue was improper on the trade secrets charge, but it disagreed with Smith that this error barred reprosecution. It concluded that the "remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," and that the "Double Jeopardy [C]lause is not

implicated by a retrial in a proper venue." **The Supreme Court affirmed in a unanimous decision authored by Justice Alito:** "When a conviction is reversed because of a trial error, this Court has long allowed retrial in nearly all circumstances. We consider in this case whether the Constitution requires a different outcome when a conviction is reversed because the prosecution occurred in the wrong venue and before a jury drawn from the wrong location. We hold that it does not." The opinion concludes: "The reversal of a conviction based on a violation of the Venue or Vicinage Clauses, even when styled as a 'judgment of acquittal' under Rule 29, plainly does not resolve 'the bottom-line question of "criminal culpability."' *Evans* [*v. Michigan*], 568 [U.S. 313], at 324, n. 6 [(2013)]; *see also* [*United States v.*] *Martin Linen* [*Supply Co.*], 430 U.S. [564], at 571 [(1977)] ('[W]hat constitutes an "acquittal" is not to be controlled by the form of the judge's action'). Instead, such a reversal is quintessentially a decision that 'the Government's case against [the defendant] must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.' [*United States v.*] *Scott*, 437 U.S. [82], at 96 [(1978)]. In this case, then, the Eleventh Circuit's decision that venue in the Northern District of Florida was improper did not adjudicate Smith's culpability. It thus does not trigger the Double Jeopardy Clause."

B. **Double Jeopardy Following "Repugnant" Verdicts.** ***McElrath v. Georgia***, ***No. 22-721*** (Feb. 21, 2024) (OA ***transcript*** & ***audio***). Damian McElrath was tried, under Georgia law, for the crimes of malice murder, aggravated assault, and felony murder for attacking and killing Diane McElrath. The jury rendered a split verdict. It found Damian not guilty of malice murder by reason of insanity and guilty but mentally ill of felony murder and aggravated assault. He appealed, claiming that the verdicts were "repugnant" under Georgia law and that the conviction must be reversed or vacated. Georgia law distinguishes between merely inconsistent verdicts and repugnant verdicts. According to the Georgia Supreme Court, "inconsistent verdicts" involve "seemingly incompatible" conclusions. The "classic example," it said, is where the jury acquits a defendant on a predicate offense but then convicts on the compound offense. The Georgia Supreme Court has held that inconsistent verdicts should stand. By contrast, under Georgia law, repugnant verdicts occur when the jury must "make affirmative findings shown on the record that cannot logically or legally exist at the same time." In that circumstance, the verdicts are "a logical and legal impossibility" and both verdicts must be vacated and remanded for a new trial. In McElrath's case, the Georgia Supreme Court held that the guilty but mentally ill and not guilty by reason of insanity verdicts are repugnant because "it is not legally possible for an individual to

simultaneously be insane and not insane during a single criminal episode against a single victim." Thus, the Georgia Supreme Court vacated both the conviction and the acquittal and remanded for a new trial on both charges. On remand, McElrath filed a plea in bar arguing that the Double Jeopardy Clause prohibited the State from subjecting him to a second trial on the malice murder charge because he had been acquitted on that charge at his first trial. The trial court denied his motion, and McElrath appealed. The Georgia Supreme Court affirmed. **The Supreme Court granted cert and reversed in a unanimous decision authored by Justice Jackson:** "Under Georgia law, a jury's verdict in a criminal case can be set aside if it is 'repugnant'—meaning that it involves "affirmative findings by the jury that are not legally and logically possible of existing simultaneously.' 308 Ga. 104, 111, 839 S. E. 2d 573, 579 (2020). In this case, a jury found that petitioner Damian McElrath was 'not guilty by reason of insanity' with respect to a malice-murder count, but was 'guilty but mentally ill' regarding two other counts—felony murder and aggravated assault—all of which pertained to the same underlying homicide. Invoking the repugnancy doctrine, Georgia courts nullified both the 'not guilty' and 'guilty' verdicts, and authorized McElrath's retrial. McElrath now maintains that the Fifth Amendment's Double Jeopardy Clause prevents the State from retrying him for the crime that had resulted in the 'not guilty by reason of insanity' finding. Under the circumstances presented here, we agree. The jury's verdict constituted an acquittal for double jeopardy purposes, and an acquittal is an acquittal notwithstanding its apparent inconsistency with other verdicts that the jury may have rendered." The unanimous decision concluded: "Once there has been an acquittal, our cases prohibit any speculation about the reasons for a jury's verdict—even when there are specific jury findings that provide a factual basis for such speculation—'because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations.' *Smith v. United States*, 599 U.S. 236, 252-253 (2023). We simply cannot know why the jury in McElrath's case acted as it did, and the Double Jeopardy Clause forbids us to guess. 'To conclude otherwise would impermissibly authorize judges to usurp the jury right.' *Id.*, at 252." The Court's opinion makes clear that it does not address "the Double Jeopardy Clause's application to a trial judge's rejection of inconsistent or incomprehensible jury findings under state law. What is at issue here is Georgia's claim that, when a not-guilty verdict on one count is inconsistent with a guilty verdict on another count, double jeopardy poses no barrier to retrial on the former." Justice Alito concurred in a separate opinion, to clarify his understanding of the Court's holding, which is essentially a completely different ground not shared by the other justices. "Because the Constitution does not permit

appellate review of an acquittal, the State Supreme Court's decision must be reversed. As I understand it, our holding extends no further."

V. SIXTH AMENDMENT

A. Confrontation Clause: Substitute Expert Testimony. ***Smith v. Arizona***, ***Case. No. 22-899*** (cert. granted Sept. 29, 2023); decision below at 2022 WL 2734269 (Az. Ct. App. 2022) (OA ***transcript*** & ***audio***). . To prove the drug-related charges against Jason Smith, the state had the alleged drug evidence tested by crime lab analyst Elizabeth Rast. But by the time of trial, Rast was no longer employed by the crime lab—for reasons the State has never explained. The State called a substitute expert, Gregory Longoni, who reviewed only Rast's report and notes, who had not conducted or observed any of the tests at issue, nor conducted any quality assurance of those tests. Alhough Longoni acknowledged it would have taken him less than three hours to retest the evidence, the State did not have him do so prior to trial. Nonetheless, over Smith's objections, the trial court permitted Longoni to use Rast's notes and report, and recount from these documents the particular tests Rast performed on the evidence in Smith's case and the results she reached, reasoning that Longoni could testify to his "independent opinion" based on Rast's work without violating the Confrontation Clause. The Arizona Court of Appeals affirmed and held that Longoni's testimony did not violate the Confrontation Clause, even though Smith had no opportunity to cross-examine Rast. Applying Arizona Rule of Evidence 703, the court reasoned that "Longoni presented his independent expert opinions permissibly based on his review of Rast's work" and that an expert may "testif[y] 'to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion.'" The court also invoked the Supreme Court's plurality opinion in the *Williams v. Illinois*, 567 U.S. 50 (2012), to conclude that "[h]ad Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so." (citing Williams, 567 U.S. at 58–59). A little background on the Supreme Court's jurisprudence helps to appreciate the issue here. The Court held in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), that when the prosecution in a criminal trial introduces a forensic analyst's certifications, the analyst becomes a witness whom the defendant has a Sixth Amendment right to confront—a right that is not satisfied by cross-examining a substitute expert. Shortly after *Bullcoming*, the Court granted review in *Williams v. Illinois*, 567 U.S. 50 (2012), to address a factual scenario left open by *Bullcoming*: where "an expert witness [i]s asked for his independent opinion about underlying

testimonial reports that were not them-selves admitted into evidence." (Sotomayor, J., concurring)). But the result in *Williams*—a fractured 4-1-4 decision— "yielded no majority and ... ha[s] sown confusion in courts across the country." *Stuart v. Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch & Sotomayor, JJ., dissenting) (collecting cases). Now, more than a decade after *Williams*, state high courts and federal courts of appeals are firmly divided. This petition asks this Court to resolve two aspects of this divide, each a direct result of *Williams*. First, courts are divided over the viability of the rationale posited by the *Williams* plurality—though rejected by five Justices—that under Evidence Rule 703 (in its federal and various state forms), a nontestifying analyst's "[o]ut-of-court statements that are related by [a testifying] expert solely for the purpose of explaining the assumptions on which [the expert's] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams*, 567 U.S. at 57–58; *but see id.* at 104–110 (Thomas, J., concurring) (rejecting the not-for-the-truth rationale); *id. at 125–129* (Kagan, J., dissenting) (same). Second, courts are divided over the *Williams* plurality's rationale that the admission of substitute expert testimony would "not prejudice any defendant who really wishes to probe the reliability of the ... testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial," 567 U.S. at 58–59—a position that a majority of this Court rejected in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). *See id. at* 324 (holding that a defendant's "ability to subpoena the analysts ... is no substitute for the right of confrontation").
Question presented: Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst, on the grounds that (a) the testifying expert offers some independent opinion and the analyst's statements are offered not for their truth but to explain the expert's opinion, and (b) the defendant did not independently seek to subpoena the analyst.

B. ***Bruton*'s Slow Death.** ***Samia v. United States***, ***No. 22-196*** (June 23, 2023) (OA ***transcript*** & ***audio***). Samia traveled to the Philippines to work for crime lord Paul LeRoux. While there, LeRoux tasked Samia, Hunter, and Stillwell with killing a local real-estate broker who LeRoux believed had stolen money from him. Lee was found dead shortly thereafter, shot twice in the face at close range. Later that year, LeRoux was arrested by the DEA and became a cooperating witness. Hunter, Samia, and Stillwell were arrested thereafter. During a search of Samia's home, law enforcement found a camera containing surveillance photographs of Lee's home as well as a key to the van in which Lee had been murdered. And, during Stillwell's arrest, law enforcement found a

cell phone containing thumbnail images of Lee's dead body. Later, during a post-arrest interview with DEA agents, Stillwell waived his *Miranda* rights and gave a confession. admitting that he had been in the van when Lee was killed, but he claimed that he was only the driver and that Samia had shot Lee. The Government charged all three men in a multicount indictment, including murder-for-hire counts, as well as conspiracy-to-murder and kidnap. The government moved in limine to admit Stillwell's confession. But, because Stillwell would not testify and the full confession inculpated Samia, the Government proposed that an agent testify as to the content of Stillwell's confession in a way that eliminated Samia's name while avoiding any obvious indications of redaction. The district court granted the Government's motion but required further alterations to ensure consistency with its understanding of the Court's Confrontation Clause precedents, including *Bruton*. During its case in chief, in accordance with the court's ruling on its motion in limine, the government presented testimony about Stillwell's confession through a DEA agent, who recounted the key portion of Stillwell's confession implicating Samia as follows:

> Q. Did [Stillwell] say where [the victim] was when she was killed?
>
> A. Yes. He described a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving."

Other portions of the DEA agent's testimony also used the "other person" descriptor to refer to someone with whom Stillwell had traveled and lived and who carried a particular firearm. The jury was instructed that his testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. Samia was convicted and sentenced to Life plus 10 years. **Question presented:** Whether admitting a codefendant's redacted out-of-court confession that immediately inculpates a defendant based on the surrounding context violates the defendant's rights under the Confrontation Clause of the Sixth Amendment. **The Supreme Court affirmed the conviction in a (6-3) decision authored by Justice Thomas, which dramatically undermines the protection of the Court's *Bruton* precedents**. "Prosecutors have long tried criminal defendants jointly in cases where the defendants are alleged to have engaged in a common criminal scheme. However, when prosecutors seek to introduce a nontestifying defendant's confession implicating his codefendants, a constitutional concern may arise. The Confrontation Clause of the Sixth Amendment states that, '[i]n all criminal prosecutions, the accused shall enjoy the

right . . . to be confronted with the witnesses against him.' And, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court 'held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant.' *Richardson v. Marsh*, 481 U.S. 200, 201–202 (1987). Here, we must determine whether the Confrontation Clause bars the admission of a nontestifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the nonconfessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant. Considering longstanding historical practice, the general presumption that jurors follow their instructions, and the relevant precedents of this Court, we conclude that it does not." . . . "Viewed together, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly. *Richardson* explicitly declined to extend *Bruton*'s 'narrow exception' to the presumption that jurors follow their instructions beyond those confessions that occupy the former category. 481 U.S., at 207. *Gray* qualified but confirmed this legal standard, reiterating that the *Bruton* rule applies only to 'directly accusatory' incriminating statements, as distinct from those that do 'not refer directly to the defendant' and 'bec[o]me incriminating only when linked with evidence introduced later at trial.' 523 U.S., at 194, 196 (internal quotation marks omitted). Accordingly, neither *Bruton*, *Richardson*, nor *Gray* provides license to flyspeck trial transcripts in search of evidence that could give rise to a collateral inference that the defendant had been named in an altered confession." Here, the District Court's admission of Stillwell's confession, accompanied by a limiting instruction, did not run afoul of this Court's precedents. Stillwell's confession was redacted to avoid naming Samia, satisfying *Bruton*'s rule. And, it was not obviously redacted in a manner resembling the confession in *Gray*; the neutral references to some 'other person' were not akin to an obvious blank or the word 'deleted.' In fact, the redacted confession is strikingly similar to a hypothetical modified confession we looked upon favorably in *Gray,* where we posited that, instead of saying "'[m]e, deleted, deleted, and a few other guys,'" the witness could easily have said "'[m]e and a few other guys.'" 523 U.S., at 196. Accordingly, it 'fall[s] outside the narrow exception [*Bruton*] created.' *Richardson*, 481 U.S., at 208. Notably, the Court left open the question whether a trial court is constitutionally authorized to rewrite a confession to get it to fit within Confrontation Clause contours: "This Court has never opined as to whether rewriting a confession may serve as a proper method of redaction. *See Richardson v. Marsh*, 481 U.S. 200, 203, n. 1 (1987). Because the parties do not argue

that the District Court's imposition of further redactions was inappropriate in this case, we do not consider the issue here either." Justice Barrett filed a concurring opinion, and concurred in the judgment, rejecting the historical discussion Thomas set forth about the Confrontation Clause: "At best, the evidence recounted in Part II–A shows that, during a narrow historical period, some courts assumed and others expressly held that a limiting instruction sufficiently protected a codefendant from a declaration inadmissible on hearsay grounds. In suggesting anything more, the Court overclaims. That is unfortunate. While history is often important and sometimes dispositive, we should be discriminating in its use. Otherwise, we risk undermining the force of historical arguments when they matter most." Justice Kagan dissented (joined by Sotomayor and Jackson), concluding that this ruling developed from the majority's preconceived notion that "*Bruton* should go" and will render *Bruton* a shell of its former self. Justice Jackson also filed her own dissenting opinion, questioning the significant undermining impact this case will have on other Sixth Amendment rights.

VI. EIGHTH AMENDMENT

A. Time Limits on Criminal Forfeitures. ***McIntosh v. United States***, ***No. 22-7386*** (cert. granted Sept. 29, 2023); decision below at 58 F.4th 606 (2d Cir. 2023) (OA ***transcript*** & ***audio***). Question presented: Whether a district court may enter a criminal forfeiture order outside the time limitations set forth in Rule 32.2, Fed.R.Crim.P.? The Second Circuit Court of Appeals rejected petitioner's argument that the district court's forfeiture order was invalid where the government failed to submit a preliminary order of forfeiture until more than 2-1/2 years after sentencing, and the government also failed to comply with the district court's direction that it provide a formal order of forfeiture within one week of sentencing. The circuits on split on this question. *Compare United States v. Maddux*, 37 F.4th 1170 (6th Cir. 2022) (rejecting the decision below and concluding that Rule 32.2 was a mandatory claim processing rule preventing forfeiture in that case); and *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2011)(Rule 32.2's mandates are jurisdictional, and a court lacks the "power to enter" forfeiture once Rule 32.2's deadlines have passed); and *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011) (concluding that Rule 32.2's deadlines are simply "time-related directive[s]")

B. Fines and Forfeitures. ***Tyler v. Hennepin County, MN***, ***No 22-166*** (May 25, 2023) (OA ***transcript*** & ***audio***). Hennepin County confiscated 93-year-old Geraldine Tyler's former home as payment for

approximately $15,000 in property taxes, penalties, interest, and costs. The County sold the home for $40,000, and, consistent with a Minnesota forfeiture statute, kept all proceeds, including the $25,000 that exceeded Tyler's debt as a windfall for the public. In all states, municipalities may take real property and sell it to collect payment for property tax debts. Most states allow the government to keep only as much as it is owed; any surplus proceeds after collecting the debt belong to the former owner. But in Minnesota and a dozen other states, local governments take absolute title, extinguishing the owner's equity in exchange only for cancelling a smaller tax debt, code enforcement fine, or debt to government agencies. Tyler filed suit, alleging that the County had unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The district court dismissed the suit for failure to state a claim, and the Eighth Circuit affirmed. The Supreme Court reversed, in a unanimous opinion by Chief Justice Roberts: "The Takings Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong [v. United States]*, 364 U.S. [40] at 49 [(1960)]. A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more. Because we find that Tyler has plausibly alleged a taking under the Fifth Amendment, and she agrees that relief under 'the Takings Clause would fully remedy [her] harm,' we need not decide whether she has also alleged an excessive fine under the Eighth Amendment." Justice Gorsuch concurred, joined by Jackson.

VII. CRIMES

A. Federal Jurisdiction Over Foreign Sovereigns. ***Turkiye Halk Bankasi A.S. v. United States***, ***No. 21-1450*** (Apr. 19, 2023) (OA ***transcript*** & ***audio***). The United States indicted Halkbank, a bank owned by the Republic of Turkey, for conspiring to evade U.S. economic sanctions against Iran. The United States brought the prosecution in the U. S. District Court for the Southern District of New York. Halkbank contended that the indictment should be dismissed because the general federal criminal jurisdiction statute, 18 U.S.C. §3231, does not extend to prosecutions of instrumentalities of foreign states such as Halkbank. Halkbank alternatively argued that the Foreign Sovereign Immunities Act of 1976 provides instrumentalities of foreign states with absolute immunity from criminal prosecution in U.S. courts. In a mixed 9-0 decision authored by Justice Kavanaugh (with Justices Gorsuch and

Alito concurring in part and dissenting in part), the Court ruled against Halkbank on both points. Instead, the Court held "that the District Court has jurisdiction under 18 U.S.C. §3231 over the prosecution of Halkbank. We further hold that the Foreign Sovereign Immunities Act does not provide immunity from criminal prosecution." With respect to the holding of the Court of Appeals that the District Court has jurisdiction under 18 U. S. C. §3231, the Court affirmed. With respect to the holding of the Court of Appeals that the FSIA does not provide immunity to Halkbank, the Court we affirmed on different grounds—namely, that the FSIA does not apply to criminal proceedings. With respect to a separate common-law immunity claim made by Halkbank (which was not fully developed in the courts below, the Court vacated the judgment of the Court of Appeals and remanded for the Court of Appeals to consider the parties' common-law arguments in a manner consistent with this opinion. The separate opinion of Gorsuch (joined by Alito) takes issue with whether the Court should have affirmed on different grounds, or used the same FSIA grounds used below: "[T]he Court holds that the FSIA's rules apply only in civil cases. To decide whether a foreign sovereign is susceptible to criminal prosecution, the Court says, federal judges must consult the common law. Respectfully, I disagree. The same statute we routinely use to analyze sovereign immunity in civil cases applies equally in criminal ones." The separate opinion concludes: "Today's decision overcomplicates the law for no good reason. In the FSIA, Congress supplied us with simple rules for resolving this case and others like it. Respectfully, I would follow those straightforward directions to the same straightforward conclusion the Second Circuit reached: This case against Halkbank may proceed."

B. ACCA

1. Jury Trial Right for Proving Occasions of Priors. ***Erlinger v. United States***, ***No. 23-370*** (cert. granted Nov. 20, 2023) decision below at 77 F.4th 617 (7th Cir. 2023). Question presented: Whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). **Note:** The Seventh Circuit, below, ruled that it was foreclosed by circuit precedent from ruling that a jury trial is required under these circumstances. In the Supreme Court, the Solicitor General has declined to argue in favor of the Seventh Circuit's holding: "In light of this Court's recent articulation of the standard for determining whether offenses occurred on different occasions in

Wooden v. United States, 595 U.S. 360 (2022), the government agrees with th[e] contention . . . that the Sixth Amendment requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions under the ACCA." Although the government has opposed previous petitions raising this issue, the government now takes the position that "recent developments make clear that this Court's intervention is necessary to ensure that the circuits correctly recognize defendants' constitutional rights in this context." Due to the Solicitor General's concession on the substantive issue, the Court appointed private counsel, Nick Harper, to brief and argue in support of the judgment below. Harper formerly clerked for Justices Anthony Kennedy and Amy Coney Barrett.

2. Applicable Statutory Version of Amended Predicate Offense. ***Brown v. United States***, ***No. 22-6389*** consolidated with ***Jackson v. United States***, ***No. 22-6640*** (cert. granted May 15, 2023); decisions below at 47 F.4th 147 (3rd Cir. 2022), 55 F.4th 846 (11th Cir. 2022) (OA ***transcript*** & ***audio***). The Armed Career Criminal Act provides that felons who possess a firearm are normally subject to a maximum 10-year sentence. But if the felon already has at least three "serious drug offense" convictions, then the minimum sentence is fifteen years. The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment often years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Courts decide whether a prior state conviction counts as a serious drug offense using the categorical approach. That requires determining whether the elements of a state drug offense are the same as, or narrower than those of its federal counterpart. If so, the state conviction qualifies as an ACCA predicate. But federal drug law often changes – as in ***Brown***, where Congress decriminalized hemp, narrowing the federal definition of marijuana; and in ***Jackson***, narrowing the definition of cocaine derivatives both under the state and federal laws. In ***Brown***, choosing the earlier statutory version results in a categorical match between the state and federal offenses, meaning that the predicate for enhancement has been satisfied. But, under the amended statutory version, the offenses do not match-and the state offense is not an ACCA predicate. Should a sentencing court apply the original law or the amended law. More broadly,

in ***Jackson***, the question is whether to consult the prior federal/state drug schedules (both of which were amended to reflect the same predicate schedules), or the amended versions. In either case, the version of law that the court chooses to consult dictates the difference between serving a 10-year maximum or a 15-year minimum. **Question presented in *Brown*:** Which version of federal law should a sentencing court consult under ACCA's categorical approach? **Question presented in *Jackson*:** Whether the "serious drug offense" definition in the Armed Career Criminal Act incorporates the federal drug schedules that were in effect at the time of the federal firearm offense, or the federal drug schedules that were in effect at the time of the prior state drug offense.

C. Federal Wire Fraud and Bribery

1. **Federal Bribery.** ***Snyder v. United States***, ***No. 23-108*** (cert. granted Dec. 13, 2023); decision below at 71 F.4th 555 (7th Cir. 2023). Title 18 U.S.C. § 666(a)(1)(B) makes it a federal crime for a state or local official to "corruptly solicit[,] demand[,] ... or accept[] ... anything of value from any person, intending to be influenced or rewarded in connection with any" government business "involving any thing of value of $5,000 or more." The circuits are divided 5-2 on whether the thing given must be given for a quid pro quo. In the First and Fifth Circuits, gratuities are not criminal. To secure a section 666 conviction, the government must instead prove that the official and the payor agreed to exchange something of value for official action. In other words, the government must prove a quid pro quo bribe like paying a legislator to vote for a bill. In direct conflict, the Seventh Circuit below, joined by the Second, Sixth, Eighth, and Eleventh Circuits, do not require a quid pro quo and permit convictions for gratuities. While section 666 requires that the official act "corruptly," those circuits and the government read that word to require only that officials knew they were getting something of value that was intended to reward them. For example, as the petititioner postulates in his petition, in five circuits a politician can be prosecuted if a constituent donates to the official's campaign who took a previous action the constituent likes. Similarly, in five circuits it would be criminal for a real-estate agent to offer a deal on a condo to a city housing official whose policies helped the agent weather a prior recession. Question presented: Whether section 666 criminalizes gratuities, *i.e.,* payments in recognition of actions the official has already taken

or committed to take, without any quid pro quo agreement to take those actions.

2. **Lobbyist Liability.** ***Percoco v. United States***, ***No. 21-1158*** (May 11, 2023) (OA ***transcript*** & ***audio***). Joseph Percoco was a longtime political associate of New York's governor. He spent time in and out of government service. The events of this case took place during a period of time that included an eight-month interval between two stints as a top aide to the Governor of New York. During that interval, Empire State Development (ESD), a state agency, informed developer Steven Aiello that his real-estate company, COR Development, needed to enter into a "Labor Peace Agreement" with local unions if he wished to receive state funding for a lucrative project. Interested in avoiding the costs of such an agreement, Aiello reached out to Percoco through an intermediary so that Percoco could "help us with this issue while he is off the 2nd floor," i.e., the floor that housed the Governor's office. Percoco agreed and received two payments totaling $35,000 from Aiello's company. Mere days before returning to his old job, Percoco called a senior official at ESD and urged him to drop the labor-peace requirement. ESD promptly reversed course the next day and informed Aiello that the agreement was not necessary. When these facts became known to prosecutors, Percoco was charged with, and convicted of, conspiring to commit federal honest-services wire fraud. His conviction was based on jury instructions that required the jury to determine whether he had a "special relationship" with the government and had "dominated and controlled" government business. The Second Circuit affirmed his conviction. The Supreme Court granted cert to consider whether a private citizen with influence over government decision-making can be convicted for wire fraud on the theory that he or she deprived the public of its "intangible right of honest services." 18 U.S.C. §§1343, 1346. In the Supreme Court, the government declined to defend the legal accuracy of the jury instructions, but claimed that any error was harmless, and that valid alternative theories allowed the conviction to be sustained. The Court held, in an opinion by Justice Alito, that the jury instruction given was not the proper test for determining whether a private person may be convicted of honest-services fraud. As to the belated position taken by the government in the Supreme Court, the Court held: "[T]he jury instructions are substantially different from either of the Government's new theories, and the Second Circuit—which treated even the language the Government now disclaims in

[prior Second Circuit precedent] as good law—did not affirm on either of these theories. We decline to do so here." The conviction was reversed and the case remanded for further proceedings. Justice Jackson joined all of Alito's opinion, except Part II-C-2, which addressed the application of harmless error and alternative bases to sustain the jury instructions. Justice Gorsuch concurred (joined by Thomas) but he wanted a more comprehensive decision about the vagueness and due-process validity of prosecution based on the "honest services fraud" theory of prosecution.

3. **"Right-to-Control" Theory of Fraud Overruled**. ***Ciminelli v. United States***, ***No. 21-1170*** (May 11, 2023). (OA ***transcript*** & ***audio***). Louis Ciminelli owned a construction company that paid lobbyists annually to obtain state-funded jobs in New York. The lobbyists concocted a scheme to tailor the bid process to favor Ciminelli's company. The scheme guaranteed that his construction company would be selected as the preferred developer of a project in the Buffalo Billion ($) initiative. When the scheme was uncovered, Ciminelli was charged and convicted of wire fraud under the "right-to-control" theory of fraud. Under the right-to-control theory, a defendant is guilty of wire fraud if he schemes to deprive the victim of "potentially valuable economic information" "necessary to make discretionary economic decisions." *United States v. Percoco*, 13 F.4th 158, 170 (CA2 2021). His prosecution presented the question whether the Second Circuit's longstanding "right to control" theory of fraud describes a valid basis for liability under the federal wire fraud statute, which criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §1343. The Supreme Court had previously held, however, that the federal fraud statutes criminalize only schemes to deprive people of traditional property interests. *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Because "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest, the *Ciminelli* Court held, unanimously, that the right-to-control theory is not a valid basis for liability under §1343. Accordingly, it reversed the conviction and the Second Circuit's precedent. Justice Alito, concurred, but contended, in part, that the government might be able to retry Ciminelli on a valid theory of fraud, such as that he obtained valuable contracts, a traditional form of property.

D. **Witness Tampering Liability for Jan 6.** ***Fischer v. United States, No. 23-5572*** (cert. granted Dec. 13, 2023); decision below at 64 F.4th 329 (D.C. Cir. 2023). Question as presented by Solicitor General: Whether the court of appeals correctly determined that the indictments in these three cases permissibly included a charge of corruptly obstructing, influencing, or impeding an official proceeding, in violation of 18 U.S.C. 1512(c)(2), based on each petitioner's violent conduct in seeking to prevent the constitutionally and statutorily required congressional examination and ratification of presidential election results? Stated differently (as petitioner frames the question): Did the D.C. Circuit err in construing 18 U.S.C. § 1512(c) ("Witness, Victim, or Informant Tampering") – which prohibits obstruction of congressional inquiries and investigations – to include acts unrelated to investigations and evidence?

E. **Federal Aggravated Identity Theft**. ***Dubin v. United States***, ***No. 22-10*** (June 8, 2023). (OA ***transcript*** & ***audio***). The federal aggravated identity theft statute provides: "Whoever, during and in relation to any felony violation enumerated [elsewhere in the statute], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person, shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. §1028A(a)(1). Conviction under the statute requires a mandatory two-year prison sentence, stacked on top of the sentence for the underlying offense. Here, David Dubin was convicted of healthcare fraud, an enumerated offense. The government also prosecuted him for aggravated identity theft in connection with the healthcare fraud. The government's theory was that Dubin overbilled Medicaid for the services provided and, as to its additional charge of aggravated identity theft, Dubin violated 1028A because he put Patient L's identifying information on the fraudulent Medicaid claim form. The district court reluctantly accepted this argument, expressing hope that it would be reversed. But the Fifth Circuit affirmed. Adopting the panel majority's opinion as the law of the circuit, the en banc Fifth Circuit held 9-1-8 that a defendant is guilty of aggravated identity theft anytime he recites someone else's name as part of a predicate crime—even when he has authority to use that person's name and the predicate crime does not involve a misrepresentation about that person's identity. **The Supreme Court reversed (9-0)** in an opinion by Justice Sotomayor (with Gorsuch only concurring in the judgment), which significantly narrowed the scope of the aggravated identity fraud statute. "There is no dispute that . . . Dubin overbilled Medicaid for psychological testing. The question is whether, in defrauding Medicaid, he also committed '[a]ggravated identity theft,' 18 U.S.C. §1028A(a)(1), triggering a mandatory 2-year

prison sentence. The Fifth Circuit found that he did, based on a reading of the statute that covers defendants who fraudulently inflate the price of a service or good they actually provided. On that sweeping reading, as long as a billing or payment method employs another person's name or other identifying information, that is enough. A lawyer who rounds up her hours from 2.9 to 3 and bills her client electronically has committed aggravated identity theft. The same is true of a waiter who serves flank steak but charges for filet mignon using an electronic payment method. The text and context of the statute do not support such a boundless interpretation. Instead, §1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal, rather than merely an ancillary feature of a billing method. Here, the crux of petitioner's overbilling was inflating the value of services actually provided, while the patient's means of identification was an ancillary part of the Medicaid billing process." **Justice Gorsuch's concurrence** contends that 1028A(1)(a) is hopelessly vague and the statute should be struck down as such, not salvaged by judicial re-interpretation: "Whoever among you is not an 'aggravated identity thief,' let him cast the first stone. The United States came to this Court with a view of 18 U.S.C. §1028A(a)(1) that would affix that unfortunate label on almost every adult American. Every bill splitter who has overcharged a friend using a mobile-payment service like Venmo. Every contractor who has rounded up his billed time by even a few minutes. Every college hopeful who has overstated his involvement in the high school glee club. All of those individuals, the United States says, engage in conduct that can invite a mandatory 2-year stint in federal prison. The Court today rightly rejects that unserious position. But in so holding, I worry the Court has stumbled upon a more fundamental problem with §1028A(a)(1). That provision is not much better than a Rorschach test. Depending on how you squint your eyes, you can stretch (or shrink) its meaning to convict (or exonerate) just about anyone. Doubtless, creative prosecutors and receptive judges can do the same. Truly, the statute fails to provide even rudimentary notice of what it does and does not criminalize. We have a term for laws like that. We call them vague. And '[i]n our constitutional order, a vague law is no law at all.' *United States v. Davis*, 588 U.S. ___, ___ (2019) (slip op., at 1)."

VIII. TRIALS

A. Expert Testimony of Knowledge. ***Diaz v. United States***, ***No. 23-14*** (cert. granted Nov. 13, 2023); decision below at 2023 WL 314309 (9th Cir. 2023) (OA ***transcript*** & ***audio***). An essential element of proving importation of illegal drugs in violation of the Controlled Substances Act

is that the defendant knew she was transporting drugs. This element is "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Ruan v. United States*, 142 S. Ct. 2370, 2377 (2022) (quoting *Elonis v. United States*, 575 U.S. 723, 736 (2015)). This petition concerns how this element may be proven. Diaz was apprehended at the Southern border, where investigators found methamphetamine hidden in the door panels of the car she was driving. For many years, the federal government has recognized that drug-trafficking organizations in Mexico sometimes use "blind mules"—people who do not know drugs are in the cars they are driving—to transport drugs across the border. She maintained at trial that that must have happened here. To rebut her defense, the government called a Homeland Security agent to testify in an expert capacity that "in most circumstances, the driver knows they are hired" to transport drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing drivers. Petitioner argued that this testimony violated Federal Rule of Evidence 704(b), which prohibits an expert witness in a criminal case from "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged." Fed. R. Evid. 704(b). The district court and Ninth Circuit disagreed, holding that testimony implicates that rule only when it provides "an 'explicit opinion' on the defendant's state of mind." Question presented: In a prosecution for drug trafficking – where an element of the offense is that the defendant knew she was carrying illegal drugs – does Rule 704(b) permit a governmental expert witness to testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters?

IX. SENTENCING

A. Consecutive vs. Concurrent under 924(c)(1)(D)(ii). ***Lora v. United States***, ***No. 22-49*** (June 16, 2023) (OA ***transcript*** & ***audio***). District courts have discretion to impose either consecutive or concurrent sentences unless a statute mandates otherwise. 18 U.S.C. § 3584(a). Section 924(c)(l)(D)(ii) of Title 18 includes such a mandate, but only for sentences imposed under "this subsection." Efrain Lora was charged in connection with a drug-trafficking murder. He was convicted and sentenced under a different subsection, section 924(j), which does not explicitly include the mandatory consecutive-sentence mandate in 924(c). Lora therefore argued that the district court had discretion to impose concurrent sentences because Section 924(j) creates a separate offense not subject to Section 924(c)(l)(D)(ii). The Second Circuit ruled that the district court was required to impose consecutive sentences

because Section 924(j) counts as "under" Section 924(c). **The Supreme Court reversed in a unanimous decision authored by Justice Jackson.** "When a federal court imposes multiple prison sentences, it can typically choose whether to run the sentences concurrently or consecutively. *See* 18 U.S.C. §3584. An exception exists in subsection (c) of §924, which provides that 'no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment.' §924(c)(1)(D)(ii). In this case, we consider whether §924(c)'s bar on concurrent sentences extends to a sentence imposed under a different subsection: §924(j). We hold that it does not. A sentence for a §924(j) conviction therefore can run either concurrently with or consecutively to another sentence."

B. **Safety Valve**. ***Pulsifer v. United States***, ***No. 22-340*** (Mar. 15, 2024) (OA ***transcript*** & ***audio***). The "safety valve" provision of the federal sentencing statute requires a district court to ignore any statutory mandatory minimum and instead follow the Sentencing Guidelines if a defendant was convicted of certain nonviolent drug crimes and can meet five sets of criteria. *See* 18 U.S.C. § 3553(f)(1)-(5). Congress amended the first set of criteria, in § 3553(f)(1), in the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221, broad criminal justice and sentencing reform legislation designed to provide a second chance for nonviolent offenders. A defendant satisfies § 3553(f)(1), as amended, if he "does not have-(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (emphasis added). Question presented: Whether the "and" in 18 U.S.C. § 3553(f)(1) means "and," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, and (C) a 2-point offense (as the Ninth Circuit held), or whether the "and" means "or," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3- point offense, or (C) a 2-point violent offense (as the Seventh and Eighth Circuits held). The Supreme Court held (6-3) that "and" means "or." In a majority opinion written by Justice Kagan, the Court decided that a defendant facing a mandatory minimum sentence is eligible for safety-valve relief under §3553(f)(1) only if he satisfies each of the provision's three conditions—or said more specifically, only if he does not have more than four criminal-history points, does not have a prior three-point offense, and does not have a prior two-point violent offense. The majority rejected the straightforward definition of words and simple construction offered by

the defendant – that the word "and" joins these features of criminal history, so that a defendant is ineligible for safety valve only if he has all the items listed in A, B and C in combination. Instead, the majority accepted the government's reading that "and" connects three criminal history conditions, all of which must be satisfied thusly: A sentencing court must find the defendant does not have A, does not have B, and does not have C. The reasoning for the majority's decision is steeped in rules of statutory construction that, candidly, is just a bunch of talk; rules invoked to support a result that defies logic and grammar and Congressional intent, just to fulfill a government premise that Congress never really intended to limit punishment under a law it found to be unduly harsh. Justice Gorsuch dissented, forcefully, joined by Sotomayor and Jackson, making a pointed attack on the majority opinion: "Adopting the government's preferred interpretation guarantees that thousands more people in the federal criminal justice system will be denied a chance—just a chance—at an individualized sentence. For them, the First Step Act offers no hope. Nor, it seems, is there any rule of statutory interpretation the government won't set aside to reach that result. Ordinary meaning is its first victim. Contextual clues follow. Our traditional practice of construing penal laws strictly falls by the wayside too. Replacing all that are policy concerns we have no business considering." After a detailed and lengthy refutation of the majority's reasoning, the dissent concludes: "Today, the Court does not hedge its doubts in favor of liberty. Instead, it endorses the government's implicit distribution theory and elevates it over the law's ordinary and most natural meaning. It is a regrettable choice that requires us to abandon one principle of statutory interpretation after another. We must read words into the law; we must delete others. We must ignore Congress's use of a construction that tends to avoid, not invite, questions about implicit distribution. We must dismiss Congress's variations in usage as sloppy mistakes. Never mind that Congress distributed phrases expressly when it wanted them to repeat in the safety valve. Never mind that Congress used 'or' when it sought an efficient way to hinge eligibility for relief based on a single characteristic. We must then read even more words yet into the law to manufacture a superfluity problem that does not exist. We must elevate unexpressed congressional purposes over statutory text. Finally, rather than resolve any reasonable doubt about statutory meaning in favor of the individual, we must prefer a more punitive theory the government only recently engineered. Today, the Court indulges each of these moves. All to what end? To deny some individuals a chance—just a chance—at relief from mandatory minimums and a sentence that fits them and their circumstances. It is a chance Congress promised in the First Step Act, and it is a promise this Court should have honored." In the end,

both the majority and dissenting opinions must seem like a lot of double-talk to any criminal defendant seeking relief that Congress made them eligible to receive, but which is no longer available under the holding of this case.

X. DEATH PENALTY

A. Post-Conviction DNA Testing. ***Reed v. Goertz***, ***No. 21-442*** (Apr. 18, 2023) (OA ***transcript*** & ***audio***). In many States, a convicted prisoner who still disputes his guilt may ask state courts to order post-conviction DNA testing of evidence. If the prisoner's request fails in the state courts and he then files a federal 42 U. S. C. §1983 procedural due process suit challenging the constitutionality of the state process, when does the statute of limitations for that §1983 suit begin to run? The Eleventh Circuit has held that the statute of limitations begins to run at the end of the state-court litigation denying DNA testing, including the state-court appeal. See *Van Poyck v. McCollum*, 646 F. 3d 865, 867 (2011). In this case, by contrast, the Fifth Circuit held that the statute of limitations begins to run when the state trial court denied DNA testing, notwithstanding a subsequent state-court appeal. See 995 F. 3d 425, 431 (2021). In a 6-3 decision authored by Justice Kavanaugh, the Court held that the statute of limitations begins to run at the end of the state-court litigation. "In sum," the Court held, "when a prisoner pursues state post-conviction DNA testing through the state-provided litigation process, the statute of limitations for a §1983 procedural due process claim begins to run when the state litigation ends. In Reed's case, the statute of limitations began to run when the Texas Court of Criminal Appeals denied Reed's motion for rehearing. Reed's §1983 claim was timely." Justice Thomas dissented, with an opinion, and Justices Alito and Gorsuch dissented in a separate opinion.

XI. IMMIGRATION

A. Aggravated Felony Predicate Offenses. ***Pugin v. Garland***, ***No. 22-23*** (together with ***Garland v. Cordero-Garcia***, ***No. 22-331)*** (consolidated) (June 22, 2023) (OA ***transcript*** & ***audio***). Under the Immigration and Nationality Act (INA), a noncitizen who is convicted of an "aggravated felony" is subject to mandatory removal and faces enhanced criminal liability in certain circumstances. One aggravated felony is "an offense relating to obstruction of justice." 8 U.S.C. § 1101(a)(43)(S). The Court granted certiorari on these two cases, one filed as to a ruling adverse to the petitioner and another in a ruling adverse to the government. The Court reworded and limited the question presented as follows: **To qualify as "an offense relating to**

obstruction of justice," 8 U.S.C. § 1101(a)(43)(S), must a predicate offense require a nexus with a pending or ongoing investigation or judicial proceeding? In other words, does an offense relate to obstruction of justice under §1101(a)(43)(S) even if the offense does not require that an investigation or proceeding be pending. That question arises because some obstruction offenses can occur when an investigation or proceeding is not pending, such as threatening a witness to prevent the witness from reporting a crime to the police. In a unanimous decision authored by Justice Kavanaugh, the Court held that an offense may relate] to obstruction of justice under §1101(a)(43)(S) even if the offense does not require that an investigation or proceeding be pending.

B. ***In Absentia* Removal Orders**. ***Campos Chavez v. Garland***, ***No. 22-674*** consolidated with ***Garland v. Singh***, ***No. 22-884*** (cert. granted June 30, 2023); decisions below at 54 F.4th 314 (5th Cir. 2022) and 51 F.4th 371 (9th Cir. 2022). Campos-Chavez and Singh each received notice of a removal hearing that he failed to attend. Yet the courts of appeals held that removal orders entered in absentia at these missed hearings may be rescinded for lack of notice. Under 8 U.S.C. §1229a(b)(5), a noncitizen may be ordered removed in absentia when he "does not attend a [removal] proceeding" "after written notice required under paragraph (1) or (2) of [8 U.S.C. §1229(a)] has been provided" to him or his counsel of record. 8 U.S.C. §1229a(b)(5)(A). An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time" if the noncitizen subject to the order demonstrates that he "did not receive" such notice. 8 U.S.C. §1229a(b)(5)(C)(ii). **Question presented:** Whether the failure to receive, in a single document, all of the information specified in paragraph (1) of 8 U.S.C. §1229(a) precludes an additional document from providing adequate notice under paragraph (2), and renders any in absentia removal order subject, indefinitely, to rescission. **NOTE:** In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the Supreme Court decided against the government on the two-document issue, but this was only as to the requirements of paragraph (1) of Section 1229(a); it did not did not squarely address when an NOH satisfies the requirements of paragraph (2).

XII. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254, 2255

A. **Brady Violation & Adequate and Independent Ground for State Judgment.** ***Glossip v. Oklahoma***, ***No. 22-7466*** (cert. granted Jan. 22, 2024); decision below at 529 P.3d 218 (Okla. Ct Crim App. 2023). Justin Sneed was, in the State's words, its "indispensable witness," and

Richard Glossip's "fate turned on Sneed's credibility." Sneed is the person who "bludgeoned the victim to death, and his testimony linking Glossip to the murder was central to the conviction." He only claimed Mr. Glossip was involved after being fed Mr. Glossip's name six times and threatened with execution. And his accounting of basic facts about the crime has shifted dramatically with each telling. With Sneed's credibility already tenuous, the State undisputedly hid from the jury Sneed's having "seen a psychiatrist" who diagnosed Sneed with a psychiatric condition that rendered him volatile and "potentially violent," particularly when combined with methamphetamine use, a street drug Sneed was abusing at the time he murdered Barry Van Treese. In fact, the State allowed Sneed to affirmatively tell the jury he had not seen a psychiatrist. Before the Oklahoma Court of Criminal Appeals (OCCA), the State confessed error, admitting that the failure to disclose the truth about Sneed's psychiatric condition, leaving the jury with Sneed's uncorrected false testimony and then suppressing this information for a quarter-century, rendered "Glossip's trial unfair and unreliable." Before the U.S. Supreme Court, the State has admitted Mr. Glossip is entitled to a new trial on these grounds, as well as in light of "cumulative error" regarding "multiple issues raised in Glossip's Post-Conviction Relief Application." But the OCCA has refused to stop the execution of an innocent man who never had a fair trial. Questions presented by Glossip: (1)(a) Whether the State's suppression of the key prosecution witness's admission he was under the care of a psychiatrist and failure to correct that witness's false testimony about that care and related diagnosis violate the due process of law. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); (b) Whether the entirety of the suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims. See *Kyles v. Whitley*, 514 U.S.419 (1995) (2) Whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.). **NOTE:** In addition to the questions presented by the parties, the Court has directed the parties to brief and argue an additional question: Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment. (Justice Gorsuch took no part in the consideration or decision of this motion and this petition).

B. Requisite Deference to District Court Findings. ***Thornell v. Jones***, ***No. 22-982*** (cert. granted Dec. 13, 2023); decision below at 52 F.4th 1104 (9th Cir. 2023). Over thirty years ago, Jones beat Robert Weaver to death and also beat and strangled Weaver's 7-year-old

daughter, Tisha, to death, for which he was convicted and sentenced to death. The district court denied habeas relief following an evidentiary hearing on Jones's ineffective-assistance-of-sentencing-counsel claims. But a Ninth Circuit panel reversed the district court, giving no deference to the district court's detailed factual findings. Nine Ninth circuit judges dissented from the denial of en banc rehearing. Question Presented: "Did the Ninth Circuit violate the Supreme Court's precedents by employing a flawed methodology for assessing *Strickland* prejudice when it disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the State's rebuttal when it reversed the district court and granted habeas relief?"

C. **Habeas Corpus Saving Clause.** ***Jones v. Hendrix, Warden***, ***Case No. 21-857*** (June 22, 2023) (OA ***transcript*** & ***audio***). Under 28 U.S.C. § 2255, federal inmates can collaterally challenge their convictions on any ground cognizable on collateral review, with successive attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by the Supreme Court. *See* 28 U.S.C. §2255(h). Title 28 U.S.C. § 2255(e), however, is a saving clause, which allows inmates to collaterally challenge their convictions outside this process through a traditional habeas action under 28 U.S.C. § 2241 whenever it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [their] detention." **Question presented:** Does § 2255(e) permit a traditional habeas corpus action under 2241 for federal inmates who did not challenge their convictions because established circuit precedent stood firmly against them, but the Supreme Court later rules that the statute of conviction did not criminalize their activity, that the decision is retroactively applicable, makes clear that the circuit precedent was wrong, and that those convicted are legally innocent of the crime of conviction. **The Supreme Court's held (6-3) that the Saving Clause does not permit such a successive filing. In a majority opinion authored by Justice Thomas, the Court explained its holding:** "This case concerns the interplay between two statutes: 28 U.S.C. §2241, the general habeas corpus statute, and §2255, which provides an alternative postconviction remedy for federal prisoners. Since 1948, Congress has provided that a federal prisoner who collaterally attacks his sentence ordinarily must proceed by a motion in the sentencing court under §2255, rather than by a petition for a writ of habeas corpus under §2241. To that end, §2255(e) bars a federal prisoner from proceeding under §2241 'unless . . . the [§2255] remedy by motion is inadequate or ineffective to test the legality of his detention.' Separately, since the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), second or successive §2255 motions are barred unless they rely on either 'newly

discovered evidence,' §2255(h)(1), or 'a new rule of constitutional law,' §2255(h)(2). A federal prisoner may not, therefore, file a second or successive §2255 motion based solely on a more favorable interpretation of statutory law adopted after his conviction became final and his initial §2255 motion was resolved. The question presented is whether that limitation on second or successive motions makes §2255 'inadequate or ineffective' such that the prisoner may proceed with his statutory claim under §2241. We hold that it does not." Justices Kagan and Sotomayor dissented and joined Justice Jackson's lengthy dissenting opinion., which begins: "Today, the Court holds that an incarcerated individual who has already filed one postconviction petition cannot file another one to assert a previously unavailable claim of statutory innocence. The majority says that result follows from a 'straightforward' reading of 28 U.S.C. §2255. … But the majority reaches this preclusion decision by 'negative inference.' … And it is far from obvious that §2255(h)'s bar on filing second or successive post-conviction petitions (with certain notable exceptions) prevents a prisoner who has previously sought postconviction relief from bringing a newly available legal innocence claim in court. … [P]utting aside its questionable interpretation of §2255(h), the majority is also wrong to interpret §2255(e)—known as the saving clause—as if Congress designed that provision to filter potential habeas claims through the narrowest of apertures, saving essentially only those that a court literally would be unable to consider due to something akin to a natural calamity. … This stingy characterization does not reflect a primary aim of §2255(e), which was to 'save' any claim that was available prior to §2255(h)'s enactment where Congress has not expressed a clear intent to foreclose it. Jones's legal innocence claim fits that mold. I am also deeply troubled by the constitutional implications of the nothing-to-see-here approach that the majority takes with respect to the incarceration of potential legal innocents. ... Apparently, legally innocent or not, Jones must just carry on in prison regardless, since (as the majority reads §2255) no path exists for him to ask a federal judge to consider his innocence assertion. But forever slamming the courtroom doors to a possibly innocent person who has never had a meaningful opportunity to get a new and retroactively applicable claim for release re viewed on the merits raises serious constitutional concerns."

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