The Calm Before the Storm?

Selected Criminal-Law Cases in the Supreme Court's 2016-2017 Term

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Last year's review was titled *One Term, Two Courts*, and it noted some of the differences in the Court's decision making before and after Justice Antonin Scalia's passing.[1] Justice Scalia's replacement, Justice Neil Gorsuch, was sworn in on April 10, 2017, too late to have an impact on the criminal side of the 2016-2017 Term's ledger. He participated in only three of the twenty-two cases we discuss here,[2] and none of his votes was decisive. This was one Term, one Court.

Two characteristics mark the Term. One is a light criminal-law docket (with some significant rulings, but no blockbusters). The other is a relatively high degree of consensus— a high percentage of unanimous opinions—as well as fewer merits cases determined by a single vote than in the five previous Terms with a full Court.[3] The October 2017 term may well be different.

We will begin with two Fourth Amendment cases that may illustrate the way in which an eight-member Court strove for consensus.

FOURTH AMENDMENT

The Supreme Court decided two civil-rights cases before Justice Gorsuch joined the bench, issuing narrow holdings, perhaps avoiding a deadlock. In *Manuel v. City of Joliet*,[4] the justices addressed the threshold question whether the Fourth Amendment governs unlawful pretrial-detention claims even if the detention occurs after the start of legal process. In *County of Los Angeles v. Mendez*,[5] the Court unanimously rejected the Ninth Circuit's "provocation rule" in excessive-force claims, holding that a different Fourth Amendment violation cannot transform a reasonable use of force into an unreasonable seizure.

UNLAWFUL PRETRIAL DETENTION

In *Manuel*, police officers searched Elijah Manuel during a traffic stop and found a bottle of pills. According to Manuel, police officers falsely claimed that there was evidence of ecstasy, and a judge found probable cause to detain him based on the officers' claims. He brought a lawsuit under 42 U.S.C. § 1983, alleging that he was arrested unlawfully and detained without probable cause. The Seventh Circuit found that a detention following a legal process could not give rise to a Fourth Amendment claim, holding that any claim would have to be under the Due Process Clause. In a 6-2 decision, the U.S. Supreme Court reversed.[6]

Writing for the majority, Justice Kagan explained that the Supreme Court's precedents reflect that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case."[7] If the legal process itself goes wrong—for example, when a probable-cause determination is predicated solely on a police officer's false statements—the pretrial detention should be challenged under the Fourth Amendment. Although the Court addressed this "threshold inquiry" of which constitutional right is at issue, the Court did not define "the contours and prerequisites of a § 1983 claim."[8] Notably, the Court left open the question of whether the Fourth Amendment cause of action continues to accrue throughout the period of detention, which would be critical in determining whether Manuel's claim is time-barred.[9]

Justice Alito, joined by Justice Thomas, dissented.[10] Although they agreed with the Court that the Fourth Amendment continues to apply after the start of legal process, they would still have dismissed the unlawful-detention claim. They also accused the majority of not addressing the critical questions in Manuel's case: whether a malicious-prosecution claim could be brought under the Fourth Amendment and whether Fourth Amendment detention claims continue to accrue during pretrial detention.[11]

EXCESSIVE FORCE

Mendez involved a police shooting of two innocent individuals. Two deputy sheriffs entered a shack occupied by Angel Mendez and Jennifer Garcia without a warrant and without knocking or announcing their presence. Mendez, who had been napping, rose from the bed and picked up a BB gun nearby to place it on the floor. The deputies saw Mendez holding a gun and immediately opened fire. Mendez and Garcia were shot multiple times. Mendez and Garcia brought a 42

Footnotes

1. Charles D. Weisselberg and Juliana DeVries, *One Term, Two Courts: Selected Criminal-Law Cases in the Supreme Court's 2015-2016 Term*, 52 COURT REV. 142, 150 (2016).
2. The three cases were McWilliams v. Dunn, 137 S. Ct. 1790 (2017), Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), and Virginia v. LeBlanc, 137 S. Ct. 1726 (2017) (per curiam).
3. This Term, 41 decisions (59%) were unanimous and only seven merits cases (10%) were decided by a single vote. By contrast, the five terms before October 2015 had an average rate of unanimity of 49% and an average of 22% of the merits cases decided by one vote. *See* SCOTUSblog, *Final Stat Pack for October Term 2016*, at 5, http://www.scotusblog.com/wp-content/uploads/2017/06/SB_votesplit_20170628.pdf.
4. 137 S. Ct. 911 (2017).
5. 137 S. Ct. 1539 (2017).
6. *Manuel*, 137 S. Ct. at 915-17, 922.
7. *Manuel*, 137 S. Ct. at 918.
8. *Id.* at 920.
9. *Id.* at 916, 920.
10. *Id.* at 923 (Alito, J., dissenting).
11. Although Justice Thomas joined Justice Alito's opinion in full, he wrote separately to argue that the issue of the accrual date should have been left open for another case. *Id.* at 922 (Thomas, J., dissenting).

U.S.C. § 1983 action alleging several Fourth Amendment violations, including use of excessive force. The lower courts found that the deputies acted reasonably in shooting to protect themselves. Still, they determined that the officers used excessive force under the Ninth Circuit's provocation rule, which holds that an officer's otherwise appropriate use of force is unreasonable "if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation" (such as entering without a warrant).[12] The Supreme Court reversed.

In a unanimous ruling, Justice Alito wrote that the provocation rule "is incompatible with our excessive force jurisprudence."[13] Courts should determine whether the force used is reasonable by examining "whether the totality of the circumstances justifies a particular sort of search or seizure."[14] This inquiry is dispositive; if the officer carries out a seizure that is reasonable based on the circumstances, there is no valid excessive-force claim.[15] The provocation rule, however, would allow an excessive-force claim if there was a different Fourth Amendment violation, such as entering without a warrant. The Court decried the practice of "us[ing] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist."[16] Although the Court sharply criticized the provocation rule, it stopped short of dismissing the case. Instead, the justices sent the case back for further analysis of the officers' liability under an alternative theory.

FIFTH AND FOURTEENTH AMENDMENTS

This was a significant part of the Term's criminal-law docket, with notable rulings on double jeopardy, expert assistance, compensation for wrongful convictions and disclosure of exculpatory evidence.

DOUBLE JEOPARDY CLAUSE

Over the years, the Supreme Court has wrestled with the preclusive effect that may be given to inconsistent jury determinations. In *Bravo-Fernandez v. United States*,[17] the defendants were convicted of federal-program bribery charges but acquitted of conspiracy and other related offenses, which were inconsistent verdicts. On appeal, their bribery convictions were reversed due to an instructional error. Should the jury acquittal prevent the government from retrying the defendants on the bribery charges? A unanimous Court said no.

The Court's opinion, written by Justice Ginsburg, is a primer on issue preclusion in criminal law. When a jury returns a verdict of not guilty on some charges but fails to reach a verdict on a different count that depends on the same critical issue, *Yeager v. United States* provides that the hung count may not be retried because "there is no way to decipher what a hung count represents."[18] By contrast, when there are rationally irreconcilable verdicts of both acquittal and conviction, the acquittal has no preclusive effect under the rule established in *United States v. Powell*.[19] The *Bravo-Fernandez* case is more like *Powell* than *Yeager*, the Court held, because the defendants could not show that the jury necessarily resolved in their favor the question of whether they violated the bribery statute. We cannot know which of the inconsistent verdicts the jury really meant. And that the bribery convictions were later vacated for instructional error does not change the analysis since issue preclusion depends upon the jury's assessment of the evidence in light of the allegations as presented at trial.[20] The Court thus declined an invitation to deviate from the general rule that the Double Jeopardy Clause does not prevent reprosecution when a conviction is reversed for grounds other than insufficiency of the evidence.[21] Justice Thomas concurred to suggest that, in an appropriate case, the Court should reconsider *Yeager* and a prior case, *Ashe v. Swenson*.[22]

The Court granted certiorari to decide . . . whether *Ake* [*v. Oklahoma*] requires the appointment of an *independent* defense expert [but] instead decided a narrower question.

DUE PROCESS CLAUSE — ASSISTANCE OF EXPERTS

Ake v. Oklahoma[23] is the foundational case on an indigent defendant's right to expert assistance. *Ake* establishes that when an accused's mental condition is relevant to criminal culpability and punishment, the State must provide a mental-health professional capable of "conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense."[24] The Court granted certiorari in *McWilliams v. Dunn*[25] to decide whether *Ake* requires the appointment of an *independent* defense expert. It instead decided a narrower question.

James McWilliams was convicted of capital murder. At the jury portion of the penalty phase, the prosecution called two psychiatrists who had previously evaluated him for competency to stand trial. The defense subpoenaed mental-health records from the facility where he was held, though the records did not arrive before the jury recommended a sentence of death. Prison records and a report from a neuropsychologist employed by the State arrived two days before the sentencing hearing. Although the defense had asked for a continuance and for expert assistance to evaluate the materials, the requests

12. *Mendez*, 137 S. Ct. at 1545 (internal citations omitted).
13. *Id.* at 1546.
14. *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)).
15. *Id.* at 1547.
16. *Id.* at 1546.
17. 137 S. Ct. 352 (2016).
18. *Id.* at 357 (quoting Yeager v. United States, 557 U.S. 110, 121-22 (2009)).
19. 469 U.S. 57, 68 (1984).
20. 137 S. Ct. at 363-64.
21. *Id.*
22. *Id.* at 366, 367 (Thomas, J., concurring) (addressing *Yeager*, *supra*, and Ashe v. Swenson, 397 U.S. 436 (1970)).
23. 470 U.S. 68 (1985).
24. *Id.* at 83.
25. 137 S. Ct. 1790 (2017).

[T]he justices ruled that [Colorado's "Exoneration Act"] failed to afford a constitutionally adequate remedy.

were denied and the defendant was sentenced to death. His case reached the Supreme Court on federal habeas corpus.

In a 5-4 decision authored by Justice Kennedy, the Court found that the state appellate court's decision was contrary to, or involved an unreasonable application, of law clearly established by *Ake*.[26] Neither the State neuropsychologist "nor any other expert helped the defense evaluate [the] report or McWilliams' extensive medical records and translate these data into a legal strategy."[27] No one helped the defense prepare arguments or testimony, nor did the short time frame allow for more expert assistance.[28] The majority noted that, "[a]s a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team" and that "appears to be the approach the overwhelming majority of jurisdictions have adopted."[29] However, the majority did not need to reach the broader question whether an *independent* expert is constitutionally required, since it was clear that that McWilliams was denied the help of *any* expert.[30] The Court remanded for the Court of Appeals to address whether the error required habeas relief to be granted.[31]

Justice Alito dissented, joined by the Chief Justice and Justices Thomas and Gorsuch.[32] Criticizing the majority for avoiding the broader question, these four justices would hold that *Ake* left open whether due process requires the appointment of a defense-team expert as opposed to simply a neutral expert, so McWilliams could not show that the state courts had failed to follow clearly established law.[33]

DUE PROCESS CLAUSE — REFUND OF FEES, COSTS, AND RESTITUTION

The petitioners in *Nelson v. Colorado*[34] were two defendants whose criminal convictions had been overturned. Shannon Nelson was acquitted in a retrial that followed an appellate reversal; Luis Alonzo Madden was not retried after his convictions were overturned. Nelson and Madden both sought return of costs, fees, and restitution that they had paid.[35] Colorado's "Exoneration Act" provides for refund only if a person affirmatively brings a civil claim and proves actual innocence of the offense by clear and convincing evidence.[36] The Colorado Supreme Court found that the Act affords the only process to obtain a refund, and that it comports with the Due Process Clause. Seven members of the Supreme Court disagreed.

In an opinion by Justice Ginsburg, the justices ruled that the Act failed to afford a constitutionally adequate remedy. The majority measured the State's procedures under the three-part test set forth in *Mathews v. Eldridge*,[37] reasoning that *Mathews* provides the appropriate framework since the challenge was to the continuing deprivation of property after a conviction was reversed or vacated, and no further criminal process is implicated. Applying *Mathews*, the former defendants' "interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests" in retaining the funds.[38] They "should not be saddled with any proof burden" since they are presumed innocent.[39] The State "may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated."[40]

Justice Alito concurred, but would have analyzed the issue under the due-process framework of *Medina v. California*,[41] which applies to rules that are part of the criminal process.[42] He would have reached the same outcome under *Medina* for fines and monetary penalties, drawing in part on historical practices.[43] Noting that a restitution order is much like a civil judgment, however, Justice Alito would have held that refunds of restitution awards are not constitutionally required, especially awards that follow a final judgment later vacated on collateral review.[44] Justice Thomas dissented, arguing that there is no substantive right under the Due Process Clause to repayment of funds that were lawfully paid to the State, and Colorado was free to craft its own procedures, if any, for recoupment.[45]

The case may have a substantial impact. It clarifies which due process test—*Mathews* or *Medina*—applies after the criminal process is completed. And, of course, it instructs states not to impose more than "minimal procedures" for reimbursement of fees when a conviction is invalidated.

DUE PROCESS CLAUSE — VAGUENESS

Two terms ago, the Supreme Court decided *Johnson v. United States*[46] and held that a residual clause in the Armed Career Criminal Act of 1984 ("ACCA") was unconstitutionally vague. The same language in the ACCA's residual clause, defining a

26. *Id.* at 1801.
27. *Id.* at 1800.
28. *Id.* at 1800-01.
29. *Id.* at 1800.
30. *Id.*
31. *Id.* at 1801.
32. *Id.* at 1801 (Alito, J., dissenting).
33. *Id.* at 1804, 1806. The dissenting justices also argued that the majority decided the case on an issue for which review was denied. *Id.* at 1806-07.
34. 137 S. Ct. 1249 (2017).
35. *Id.* at 1253.
36. *Id.* at 1254. The individual must also have served at least part of a term of incarceration for a felony conviction, and the conviction must have been overturned for reasons other than insufficiency of the evidence, or legal error not related to actual innocence. *Id.*
37. 424 U.S. 319, 335 (1976).
38. 137 S. Ct. at 1257-58.
39. *Id.* at 1256.
40. *Id.* at 1258.
41. 505 U.S. 437 (1992).
42. 137 S. Ct. at 1258, 1258 (Alito, J., concurring).
43. *Id.* at 1260.
44. *Id.* at 1261-62.
45. *Id.* at 1263, 1265-66 (Thomas, J., dissenting).
46. 135 S. Ct. 2551 (2015).

"crime of violence" as involving conduct "that presents a serious potential risk of physical injury to another," is in the U.S. Sentencing Guidelines and is one of the criteria that allows a defendant to be sentenced as a career offender.[47] The District Court found that the defendant in *Beckles v. United States*[48] qualified as a career offender under the Guidelines, and he challenged the provision in light of the holding in *Johnson*. Although the statute was void for vagueness, a majority of the Court ruled that the relevant guideline was not susceptible to such a challenge.

Writing for five members of the Court, Justice Thomas relied upon the justices' earlier ruling in *United States v. Booker*, which made the Guidelines "effectively advisory."[49] Reasoning that "[b]ecause they merely guide the District Courts' discretion, the Guidelines are not amenable to a vagueness challenge."[50] A defendant can challenge a sentence or a Guidelines provision on other grounds, such as under the *Ex Post Facto* Clause, the Eighth Amendment in a capital prosecution, or the Due Process Clause if a court uses materially false evidence to sentence an uncounseled defendant.[51] But since the Guidelines do not fix the permissible range of sentences, and merely guide the exercise of discretion within the sentencing range, they are different from statutes.

Justice Ginsburg concurred in the result because the official commentary to the challenged guideline expressly designated Beckles' offense as a crime of violence.[52] Justice Sotomayor agreed with Justice Ginsburg, but wrote separately to address the majority's vagueness ruling. She noted that while the Guidelines were no longer binding, they play a central role in federal sentencing, providing the framework for the thousands of sentencing proceedings each year.[53] Justice Sotomayor contended that a district court's reliance on a vague guideline creates a serious risk of arbitrary enforcement, since the Guidelines functionally anchor the judge's discretion. She also queried how a guideline could be treated as formal law for *Ex Post Facto* Clause and Eighth Amendment but not for a vagueness challenge.[54]

DUE PROCESS CLAUSE — BRADY MATERIAL

The *Brady* case—*Turner v. United States*[55]—arose from a highly publicized murder prosecution in the District of Columbia. The seven petitioners were convicted on a theory that they participated in a group attack upon the victim, who was robbed, beaten, and sodomized. Decades later, they sought to vacate their convictions based upon evidence withheld by the prosecution, the most important of which was the identity of a man seen near the scene of the crime, and who was arrested for attacks in the neighborhood shortly after the murder took place. The petitioners sought to tie that together with other undisclosed evidence—noises heard by another witness—which might have supported a theory that the offense was committed by a single perpetrator, rather than a group.[56]

[T]he Court found that the suppressed evidence was "*Brady* information" since it was favorable to the accused, as either exculpatory or impeaching evidence.

In a 6-2 ruling, authored by Justice Breyer, the Court found that the suppressed evidence was "*Brady* information" since it was favorable to the accused, as either exculpatory or impeaching evidence.[57] However, the majority agreed with the lower courts that the withheld evidence was not material, and thus the non-disclosure did not violate the Due Process Clause. The guilt of a single other perpetrator would be inconsistent with the petitioners' guilt only if there was no group attack. Since virtually every witness to the crime testified that it was a group attack, the withheld evidence was insufficient to undermine confidence in the outcome of the jury's verdict.[58] Justices Kagan and Ginsburg dissented.[59] They did not disagree on the law, but saw the potential impact of the withheld evidence differently, arguing that it could have changed the tenor of the entire trial.[60]

In addition to these merits cases with full opinions, the justices issued a memorandum disposition worth a brief mention. In *Rippo v. Baker*,[61] the justices emphasized that the Due Process Clause may require a judge to recuse himself even if he has no actual bias. "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[62]

SIXTH AMENDMENT

The Court handed down four significant Sixth Amendment cases last Term. In *Pena-Rodriguez v. Colorado*,[63] the Court examined the impact of juror racial bias on a defendant's right to an impartial jury, and the evidence that can establish bias. The justices also decided three noteworthy ineffective-assistance-of-counsel cases.

47. U.S. Sentencing Comm'n, Guidelines Manual §§ 4B1.1(a), 4B1.2(a)(2) (Nov. 2006).
48. 137 S. Ct. 886 (2017).
49. *Id.* at 894 (quoting United States v. Booker, 543 U.S. 220, 245 (2005).) Justice Kennedy joined the majority opinion but noted that the vagueness doctrine, which is concerned with giving fair warning to an offender and preventing arbitrary enforcement, cannot automatically be transferred to sentencing. *Id.* at 897, 897 (Kennedy, J., concurring). Justice Kagan did not participate in the decision.
50. *Id.*
51. *Id.* at 895-96 (citations omitted).
52. *Id.* at 897, 897-98 (Ginsburg, J., concurring).
53. *Id.* at 898, 899 (Sotomayor, J., concurring).
54. *Id.* at 901-03.
55. 137 S. Ct. 1885 (2017).
56. *Id.* at 1891-93.
57. *Id.* at 1893.
58. *Id.* at 1894-95.
59. *Id.* at 1896 (Kagan, J., dissenting).
60. *Id.* at 1897.
61. 137 S. Ct. 905 (2017) (per curiam).
62. *Id.* at 907 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975).)
63. 137 S. Ct. 855 (2017).

Writing for the majority, Justice Kennedy emphasized the unique nature of racial bias.

RIGHT TO AN IMPARTIAL JURY AND EVIDENCE OF BIAS

The Court has generally protected jury deliberations from intrusive inquiry by barring a criminal defendant from impeaching a verdict through juror testimony.[64] In *Pena-Rodriguez*, the Court recognized a constitutional exception to the "no-impeachment rule" when there is clear evidence of racial bias.

A Colorado jury convicted Miguel Angel Peña-Rodriguez of unlawful sexual contact and harassment.[65] After the verdict, two jurors disclosed that a juror made racially biased statements during deliberations, including his belief that Mr. Peña-Rodriguez was guilty because he is Mexican.[66] Peña-Rodriguez brought a motion for a new trial, but the trial court denied relief under Colorado Rule of Evidence 606(b). Like its federal counterpart, the Colorado evidentiary rule prohibited a juror from testifying about a statement made during deliberations in a proceeding inquiring into the validity of the verdict.[67] The state's appellate courts affirmed. In a 5-3 ruling, the Supreme Court reversed.

Writing for the majority, Justice Kennedy emphasized the unique nature of racial bias. Unlike other types of jury bias, "racial bias implicates unique historical, constitutional, and institutional concerns" and is "a familiar and recurring evil that, if left unaddressed, would risk systematic injury to the administration of injustice."[68] The Court also found racial bias to be distinct in a pragmatic sense. Safeguards that generally protect the right to an impartial jury, such as *voir dire*, may be less effective in exposing racial bias and may even exacerbate existing prejudice.[69] Thus, where there is clear evidence of racial bias, the Court held, the Sixth Amendment requires an exception to the no-impeachment rule and permits "the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."[70] But the Court limited the scope of this exception. An offhand comment indicating racial bias or hostility is not sufficient to overcome the no-impeachment bar. Instead, "the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."[71]

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented.[72] He analogized the no-impeachment rule to other well-established rules that limit a criminal defendant's ability to introduce evidence, and argued that the no-impeachment rule should not be cast aside lightly.[73] Justice Alito also wrote that the majority's holding runs counter to the Court's precedents and prevents jurisdictions from developing their own evidence rules to address juror bias.[74]

The full impact of the Court's holding remains to be seen. The majority took some comfort in the fact that 17 jurisdictions have already recognized a racial-bias exception.[75] The dissent noted, however, that it would be difficult to measure the difference in the quality of jury deliberations in different jurisdictions and expressed concern that the Court's exception will invite the harms that the no-impeachment rule was designed to prevent.[76]

INEFFECTIVE ASSISTANCE OF COUNSEL

Lee v. United States[77] is the latest in a series of rulings about effective assistance and the immigration consequences of a conviction. *Weaver v. Massachusetts*[78] addresses whether prejudice is presumed when a structural error is raised via an ineffective-assistance claim or whether the defendant must establish prejudice under the *Strickland* standard. And in *Buck v. Davis*,[79] the Court held that defense counsel's decision to call a witness, who testified that one's race increases the probability of future dangerousness, was both deficient and prejudicial.[80]

Jae Lee was charged with possessing ecstasy with intent to distribute. After his attorney assured him that he would not be deported, Lee accepted a plea agreement. But his attorney was mistaken, and Lee was subject to mandatory deportation. The lower courts rejected his ineffective-assistance claim; although Lee established that his attorney acted deficiently, he could not establish prejudice because there was overwhelming evidence of guilt.[81] In a 6-2 decision, the Supreme Court reversed.

Writing for the Court, Chief Justice Roberts began by addressing two types of ineffective-assistance claims. Where a defendant alleges that the attorney's incompetence led to an unreliable judicial proceeding, the defendant must demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[82] But sometimes a defendant alleges that the counsel's deficient performance led to the for-

64. *See*, *e.g.*, Tanner v. United States, 483 U.S. 107 (1987) (refusing to impeach a jury's verdict in spite of evidence that some jurors were under the influence of drugs and alcohol during the trial); Warger v. Shauers, 135 S. Ct. 521 (2014) (same where jury forewoman failed to disclose her pro-defendant bias during *voir dire*). Of course, even under the "no impeachment" rule, evidence is admissible to show that extraneous prejudicial information or outside influences were brought to bear. *See*, *e.g.*, Fed. R. Evid. 606(b).
65. *Id.* at 861.
66. *Id.* at 861-62.
67. *Id.* at 862.
68. *Id.* at 868.
69. *Id.* at 868-69.
70. *Id.* at 869.
71. *Id.*
72. *Id.* at 874, 874 (Alito, J., dissenting). Justice Thomas also wrote separately to argue that the Court's holding contravenes the original understanding of the Sixth or Fourteenth Amendments.
73. *Id.* at 875-77.
74. *Id.* at 878-81.
75. *Id.* at 870.
76. *Id.* at 884-85.
77. 137 S. Ct. 1958 (2017).
78. 137 S. Ct. 1899 (2017).
79. 137 S. Ct. 759 (2017).
80. We are not addressing *Davila v. Davis*, 137 S. Ct. 2058 (2017), which relates to procedural default.
81. *Lee*, 137 S. Ct. at 1963-64.
82. *Id.* at 1964 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984) and Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000)).

feiture of a proceeding itself, such as a trial. In these circumstances, prejudice can be demonstrated by "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[83] Here, Lee had repeatedly told his attorney that avoiding deportation was the determinative factor for him. Given that accepting the plea agreement would *certainly* lead to deportation, while going to trial would *almost* certainly lead to deportation, it was not irrational for Lee to go to trial. Thus, Lee adequately demonstrated prejudice.[84]

In a dissent joined by Justice Alito, Justice Thomas strongly disagreed.[85] He argued that Lee failed to demonstrate prejudice because there was not a reasonable probability that he would have obtained a more favorable result at trial given the overwhelming evidence of guilt and the absence of a bona fide defense.[86] Justice Thomas warned that the majority's decision "will have pernicious consequences"[87] by undermining the finality of decisions and imposing significant costs. We note that this concern may be somewhat mitigated by the majority's admonition that judges should look to "contemporaneous evidence to substantiate"[88] a defendant's assertion that he would not have accepted a plea deal had he been competently advised.

The defendant in *Weaver* was tried in a courtroom so small that anyone who was not a potential juror was excluded from the room during jury selection. Kentel Weaver's counsel failed to object to the closure at trial or on direct review, but Weaver later filed a motion for a new trial claiming ineffective assistance of counsel. He argued that his attorney's failure to object violated his right to a public trial. The state courts found that Weaver failed to establish that the error was prejudicial.[89] The Supreme Court agreed.

Writing for the majority, Justice Kennedy explained that the case required the reconciliation of two doctrines: structural error and ineffective assistance of counsel. A violation of the right to a public trial is a structural error. If raised at trial and on direct appeal, "the defendant is generally entitled to automatic reversal regardless of the error's actual effect on the outcome."[90] Here, however, the error was raised in an ineffective-assistance-of-counsel claim, and prejudice is not presumed. When a defendant raises a public-trial violation through an ineffective-assistance-of-counsel claim, "the burden is on the defendant to show either a reasonable probability of a different outcome . . . or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair."[91] In the case at bench, Weaver failed to establish prejudice under either test.[92]

The defendant in *Weaver* was tried in a courtroom so small that anyone who was not a potential juror was excluded from the room during jury selection.

Justice Alito concurred, but noted that the Court should not have assumed that prejudice might also be established through a showing of "fundamental unfairness," arguing instead for a straightforward application of the *Strickland* prejudice prong.[93] Justice Thomas agreed with Justice Alito, but wrote separately to question whether the closure of the courtroom during jury selection should be considered a Sixth Amendment violation at all.[94] Justice Gorsuch joined the majority and concurring opinions.

Justices Breyer and Kagan dissented.[95] "[S]ome errors—such as the public-trial error at issue in this case—have been labeled structural because they have effects that are simply too hard to measure."[96] Instead of requiring a defendant to take on an impossible task or require lower courts to determine which kinds of structural errors actually undermine fundamental fairness, the dissenters would grant relief as long as the defendant can establish that an attorney's constitutionally deficient performance produced a structural error.[97]

In the last of the three cases, *Buck*, the Court examined the impact of race-based testimony at the penalty phase of a capital case.[98] Duane Buck was convicted of capital murder. Under Texas law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Defense counsel called a number of witnesses, including a psychologist, Dr. Quijano. Dr. Quijano prepared a written evaluation in which he stated that Buck was statistically more likely to act violently in the future because he was black. Nonetheless, Buck's counsel called Dr. Quijano to the stand, and he testified that Buck's race was known to predict future dangerousness.[99] On cross-examination, Dr. Quijano emphasized that "the race factor, black, increases the future dangerousness for various complicated reasons."[100] The jury returned a sentence of death, which was affirmed on appeal. While Buck's case was on collateral review, the Texas Attorney General issued a statement concerning capital cases in which Dr. Quijano had testified, decrying the use of race in sentencing. The Attorney General confessed error in a number of those cases, but not Buck's.[101] Buck argued that his counsel was inef-

83. *Id.* at 1965 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).
84. *Id.* at 1967-69.
85. *Id.* at 1969, 1969. (Thomas, J., dissenting).
86. *Id.* at 1974.
87. *Id.* at 1974-75.
88. *Id.* at 1967.
89. *Weaver*, 137 S. Ct. at 1906-07.
90. *Id.* at 1910 (internal quotation marks omitted).
91. *Id.* at 1911.
92. *Id.* at 1913.
93. *Id.* at 1914, 1914 (Alito, J., concurring).
94. *Id.* (Thomas, J., concurring).
95. *Id.* at 1916, 1916 (Breyer, J., dissenting).
96. *Id.* (internal quotation marks omitted).
97. *Id.* at 1917-18.
98. 137 S. Ct. at 759.
99. *Id.* at 767-69.
100. *Id.* at 769.
101. *Id.* at 770.

The justices held that the Texas court applied the wrong standard for determining Moore's intellectual disability.

fective for introducing the evidence. Writing for the majority, Chief Justice Roberts agreed.

Dr. Quijano's report in effect said that "the color of Buck's skin made him more deserving of execution" and, the Court found, "[n]o competent defense attorney would introduce such evidence about his own client."[102] Buck also established prejudice under *Strickland*. Although Dr. Quijano only referred to Buck's race twice in his testimony, the Court found that these references were not *de minimis*. Dr. Quijano's testimony tied the probability of future violence to the color of Buck's skin, an immutable characteristic. It also appealed to a powerful racial stereotype. The harm to the defendant was significant whether Dr. Quijano was called as a witness by the prosecution or the defense.[103] In the procedural part of the decision, the majority also held that Buck was entitled to reopen his federal habeas corpus case so that the lower courts could address his ineffective-assistance-of-counsel claim.[104]

Justices Thomas and Alito dissented from the merits and procedural holdings. They principally disagreed with the majority's finding of prejudice under *Strickland*, pointing to the heinous nature of the crime and Buck's lack of remorse.[105]

EIGHTH AMENDMENT

The past Term saw one important ruling on the Eighth Amendment, capital punishment, and intellectual deficits, as well as two summary dispositions.

In *Moore v. Texas*,[106] the Court examined whether a state used the appropriate standard to determine if a defendant is intellectually disabled and may not be executed under *Atkins v. Virginia*.[107] A state habeas court recommended granting relief to Bobby James Moore, but the Texas Court of Criminal Appeals declined to adopt that recommendation, finding that Moore failed to establish his intellectual disability.[108] In an opinion written by Justice Ginsburg, the Court reversed.

The justices held that the Texas court applied the wrong standard for determining Moore's intellectual disability. The states have some flexibility, but not "unfettered discretion," in enforcing the ban on execution of intellectually disabled inmates.[109] Courts should look to the medical community and "current medical standards" to inform their decisions.[110] Here, the Texas court failed to do so in two ways. First, in determining Moore's intellectual functioning, the Texas court did not properly adjust Moore's IQ score of 74 by the test's standard error of measurement. This outcome was irreconcilable with *Hall v. Florida*,[111] which instructed courts to adjust IQ scores to account for the inherent imprecision of the test. If the Texas court had done so, Moore would have been placed within the clinically established range for intellectual functioning deficits.[112] Second, in evaluating Moore's adaptive functioning, the Texas court deviated from prevailing clinical standards by overemphasizing Moore's perceived adaptive strengths rather than his adaptive deficits; it also looked to Moore's adaptive strengths in a controlled setting, which clinicians caution against. The Court also criticized the lower court for continuing to rely on a prior Texas case and its list of "evidentiary factors," which are grounded on lay stereotypes and have not been followed in any contexts other than the death penalty.[113]

Chief Justice Roberts, joined by Justices Alito and Thomas, dissented.[114] Agreeing that the Texas evidentiary factors were flawed, he still would have upheld the Texas court's decision because Moore's IQ score was above 70.[115] The Chief Justice also criticized the majority for excessively relying on the medical standards and not providing adequate guidance to states seeking to determine the bounds of intellectual disability.[116]

In addition to *Moore*, the justices also issued two summary dispositions in Eighth Amendment cases. In *Virginia v. LeBlanc*,[117] the Court considered a follow-up to *Graham v. Florida*,[118] which requires states to give juvenile offenders convicted of nonhomicide offenses a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation. The Court ruled that under the deferential federal habeas corpus standards, it was not objectively unreasonable to find that Virginia's geriatric release program met *Graham*'s requirements.[119] In the other summary disposition, *Bosse v. Oklahoma*,[120] the Court reversed a state court's conclusion that *Booth v. Maryland*[121] was overturned. *Booth* prohibits a capital sentencing jury from considering victim impact evidence that does not "relate directly to the circumstances of the crime."[122] *Payne v. Tennessee*[123] partially overruled *Booth*, but *Booth* remains good law and still prohibits victim-impact evidence that relates to characterizations and opinions about the crime and the defendant.[124] It is "this Court's prerogative alone to overrule one of its precedents."[125]

102. *Id.* at 775.
103. *Id.* at 775-77.
104. *Id.* at 778, 780.
105. *Id.* at 780, 782-83 (Thomas, J., dissenting).
106. 137 S. Ct. 1039 (2017).
107. 536 U.S. 304 (2002).
108. *Moore*, 137 S. Ct. at 1044.
109. *Moore*, 137 S. Ct. at 1052-53 (citations omitted).
110. *Id.* at 1049.
111. 134 S. Ct. 1986, 1998 (2014).
112. *Moore*, 137 S. Ct. at 1048-50.
113. *Id.* at 1051-53.
114. 137 S. Ct. at 1053, 1053 (Roberts, C.J., dissenting).
115. *Id.* at 1060-61.
116. *Id.* at 1057-58.
117. 137 S. Ct. 1726 (2017) (per curiam).
118. 560 U.S. 48 (2010).
119. *LeBlanc*, 137 S. Ct. at 1729. The Court expressed no view on the merits of the underlying Eighth Amendment claim were it presented on direct review.
120. 137 S. Ct. 1 (2016) (per curiam).
121. 482 U.S. 496 (1987).
122. *Id.* at 501-02.
123. 501 U.S. 808 (1991).
124. 501 U.S. at 817.
125. 137 S. Ct. at 2 (internal quotations omitted).

FIRST AMENDMENT

The Court also issued one of its first opinions to examine the relationship between the First Amendment and the Internet, *Packingham v. North Carolina*.[126]

In 2002, North Carolina made it a felony for a registered sex offender to access commercial social-networking websites that allow minors to create accounts.[127] Lester Gerard Packingham, a registered sex offender, was convicted of violating this statute after he wrote a Facebook post thanking God for dismissing his traffic ticket.[128] Packingham challenged his conviction on First Amendment grounds, and a unanimous Court agreed.

Writing for the Court, Justice Kennedy explained that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen."[129] The Court has historically protected the right to speak in places that are important for the exchange of views, such as streets or parks. Noting that cyberspace, and social media in particular, fills a similar role, the Court wrote that it "must exercise extreme caution" before limiting First Amendment protections to such vast networks.[130] The Court assumed that the North Carolina statute was content-neutral.[131] Thus, the law was subject to intermediate scrutiny and must not "burden substantially more speech than is necessary to further the government's legitimate interests."[132] Applying this standard, the justices found that the government had a legitimate interest in protecting children from sexual abuse, but the statute was overly broad. Even if the Court were to limit the scope of the statute to Facebook and other similar social networks, the statute enacted an unprecedented prohibition on First Amendment speech.[133] States, of course, are free to enact more specific and narrow laws, such as prohibiting a sex offender from contacting a minor or using a website to gather information about a minor.[134]

In a concurrence joined by Chief Justice Roberts and Justice Thomas, Justice Alito expressed his disapproval of the majority's "undisciplined dicta."[135] Although he agreed that the North Carolina law was overly broad, he criticized the majority for equating the entirety of the Internet with public streets and parks. Justice Alito focused on the fact that the the North Carolina law encompasses a large number of websites that are most unlikely to facilitate to commission of a sex crime against a child, such as Amazon, the Washington Post, and WebMD.[136] Limiting a registered sex offender's access to such websites would not appreciably advance the State's goal of protecting children from recidivist sex offenders.[137]

FEDERAL CIVIL-RIGHTS-ACTIONS — BIVENS

The justices also made it more difficult for plaintiffs to bring civil-rights axctions against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents*.

The justices also made it more difficult for plaintiffs to bring civil-rights actions against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents*.[138] In *Ziglar v. Abbasi*,[139] the Court again addressed claims brought by non-citizens who were held at the Metropolitan Detention Center in New York post 9/11, based on tips provided to the FBI. The plaintiffs, six men of Arab or South Asian descent, alleged that their detention under harsh conditions violated the substantive-due-process and equal-protection components of the Fifth Amendment, among other provisions.[140] In a 4-2 ruling authored by Justice Kennedy, the Court rejected the plaintiffs' *Bivens* claim against three high-level Department of Justice officials.

The majority held that separation-of-powers principles are central to the question whether a party may assert a new implied cause of action under the Constitution. Henceforth, "a [new] *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'"[141] "Special factors" might include burdens on government employees, projected costs and consequences, or the existence of alternative remedial structures.[142] Whether a case presents a new cause of action, rather than one fitting within an already established *Bivens* context, may turn on circumstances such as the officer's rank; the right at issue; the generality of the official action; existing judicial guidance for the officer; the statute or other legal authority under which the officer operated; the risk of disruptive intrusion by the judiciary; and other factors.[143] Because this case is meaningfully different from previous *Bivens* cases and because it necessarily implicates special factors, the Court refused to allow the plaintiffs' detention claims to proceed under *Bivens*.[144]

Justice Breyer and Justice Ginsburg dissented, arguing that the plaintiffs' claims did not arise in a "new context" and were not "expanding" the scope of the *Bivens* remedy.[145] Even if the context were "fundamentally different," the dissent still would have permitted the plaintiffs' claims because no alternative remedy was available for them, at least for a considerable time, and there were no special factors that counsel hesitation.[146]

126. 137 S. Ct. 1730 (2017).
127. *Id.* at 1733; N.C. Gen. Stat. Ann. § 14-202.5 (2015).
128. 137 S. Ct. at 1734.
129. *Id.* at 1735.
130. *Id.* at 1736.
131. *Id.*
132. *Id.* (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2535 (2014).)
133. *Id.* at 1737.
134. *Id.*
135. *Id.* at 1738, 1738 (Alito, J., concurring).
136. *Id.* at 1741.
137. *Id.* at 1743.
138. 403 U.S. 388 (1971).
139. 137 S. Ct. 1843 (2017). Justices Sotomayor, Kagan, and Gorsuch did not participate in the case.
140. *Id.* at 1853-54.
141. *Id.* at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980) and *Bivens*, 403 U.S. at 396).
142. *Id.* at 1858.
143. *Id.* at 1860.
144. *Id.* at 1860-63.
145. *Id.* at 1872, 1872, 1876 (Breyer, J., dissenting).
146. *Id.* at 1879-80.

Abbasi is a very important case for suits brought against federal officers. *Abbasi* has already been applied in *Hernandez v. Mesa*,[147] a closely watched case of a cross-border shooting by a U.S. Border Patrol agent. There, the justices remanded to the Court of Appeals to apply *Abbasi* and determine whether there was an implied cause of action under *Bivens*.

FEDERAL CRIMINAL AND IMMIGRATION LAW

The Court decided three interesting federal criminal cases on the scope of liability for criminal acts or forfeitures, plus one about removability from the United States following a conviction for statutory rape. All four were unanimous decisions.

The defendant in *Shaw v. United States*[148] was convicted of "defraud[ing] a financial institution." He argued that the statute did not cover his conduct because he only sought to obtain funds belonging to a bank depositor rather than the bank itself. The Court rejected this claim, ruling that a bank has property rights in accounts it holds and the statute does not require an intent to cause the bank financial harm.[149] *Salman v. United States*[150] holds that a conviction for insider trading under the Securities and Exchange Act does not require that the tipper receive something of pecuniary or like value in exchange for a gift of information to family or friends. *Honeycutt v. United States*[151] addresses whether, under the federal drug-crime forfeiture statute, a defendant convicted in a conspiracy may be held jointly and severally liable for property that a co-conspirator derived from the crime. After noting that joint and several liability is a creature of tort law, the justices found that forfeiture under the federal statute is limited to property that the defendant actually acquired as a result of the crime.[152]

The question in the immigration case, *Esquivel-Quintana v. Sessions*,[153] was whether a conviction under a statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old is an "aggravated felony" and grounds for removal from the United States. In making that determination, a court takes a categorical approach—examining the statute of conviction (not the conduct)—and decides whether the least of the criminalized conduct fits within the federal definition of the crime. The Court determined that "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16."[154] Thus, "[a]bsent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16" is not an aggravated felony supporting removal "regardless of the age differential between the two participants."[155]

THE CURRENT TERM

If the 2016-2017 Term was a bit of a snoozer, the 2017-2018 may have a blockbuster docket—and the Court is fully constituted. The past Term may have been the calm before a coming storm. The justices will consider whether the Fifth Amendment is violated when compelled statements are used at a probable-cause hearing, but not at trial;[156] whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim;[157] and whether defense counsel can concede an accused's guilt at trial over the accused's express objection.[158] But the Court's Fourth Amendment docket has captured much attention, and rightfully so.

The most significant criminal-law case in the current Term may well be *Carpenter v. United States*,[159] which asks whether officers need a warrant to obtain historical cell-site records. In *Carpenter*, investigators went to a service provider and acquired 127 days of Carpenter's call records, as well as the locations of the cell towers to which his phone connected. The records contained an average of 101 location points per day for more than four months' time. The evidence was used to place Carpenter near the scene of four robberies. The case may give the Court an opportunity to consider the application of the "third-party doctrine" to longer-term cell-site location information. In addition to *Carpenter*, the Court will also weigh whether an officer may enter private property without a warrant to search a vehicle parked a few feet from a house,[160] and whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive but is not listed on the rental agreement.[161]

Stay tuned for a very eventful Term with a new Court!

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147. 137 S. Ct. 2003 (2017).
148. 137 S. Ct. 462 (2016).
149. Id. at 466-67.
150. 137 S. Ct. 420, 428 (2016).
151. 137 S. Ct. 1626 (2017).
152. Id. at 1631, 1635.
153. 137 S. Ct. 1562 (2017).
154. Id. at 1568.
155. Id. at 1572.
156. City of Hays, Kansas v. Voght, No. 16-1495.
157. Lozman v. City of Riviera Beach, Florida, No. 17-21.
158. McCoy v. Louisiana, No. 16-8255, argued January 17, 2018.
159. No. 16-402, argued November 29, 2017.
160. Collins v. Virginia, No. 16-1027, argued January 9, 2018.
161. Byrd v. United States, No. 16-1371, argued January 9, 2018.