Belmont College of Law Criminal Law Journal
Written Supplemental Materials for 2023 Symposium

The Rural v. Urban Debate: How The Place You Live Can Affect Your Experience With the Criminal Justice System

Panel 1: Charging and pre-conviction procedures
Panel 2: Plea Bargaining and Trial procedures
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Panel One: Charging and Pre-Conviction Procedures

GIDEON V. WAINWRIGHT
372 U.S. 335 * | 83 S. Ct. 792 ** | 9 L. Ed. 2d 799 *** | 1963 U.S. LEXIS 1942 **** | 23 Ohio Op. 2d 258 | 93 A.L.R.2d 733

[*336] [***800] [**792] MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having [****4] broken [***801] and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under [*337] Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a

Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could [**793] be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced [****5] to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." [****6] Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when Betts v. Brady, 316 U.S. 455, was decided by a divided [*338] Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. 370 U.S. 908. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in Betts v. Brady, 316 U.S. 455, be reconsidered?"
I.

The facts upon which Betts claimed that he had been unconstitutionally [***802] denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery [****7] in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. [*339] Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:

"Asserted denial [of due process] is to be tested by an appraisal of [**794] the totality of facts in a given case. That which may, [****8] in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." 316 U.S., at 462.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

II.

[1]The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed [*340] this to mean that in federal courts counsel must be provided [****9] for defendants unable to employ counsel unless the right is competently and intelligently waived. 3 Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." 316 U.S., at 465. In order to decide whether the Sixth Amendment's [***803] guarantee of counsel is of this fundamental nature, the Court in Betts set out and considered "relevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date." 316 U.S., at 465. On the basis of this historical data the Court concluded that "appointment of counsel is [****10] not a fundamental right, essential to a fair trial." 316 U.S., at 471. It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

[*341] [2][3]We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This [****11] same principle was recognized, explained, and applied in Powell v. Alabama, 287 U.S. 45 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in Hurtado v. California, 110 U.S. 516 [**795] (1884),the Fourteenth Amendment "embraced" those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been "specifically dealt with in another part of the federal Constitution." 287 U.S., at 67. In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. [****13] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the [****12] States the Fifth Amendment's command that [*342] private property [***804] shall not be taken for public use without just compensation, 5 the Fourth Amendment's prohibition of unreasonable searches and seizures, 6 and the Eighth's ban on cruel and unusual punishment. On the other hand, this Court in Palko v. Connecticut, 302 U.S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states" and that guarantees "in their origin . . . effective against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption." 302 U.S., at 324-325, 326.

[4][5]We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined [**796] in Betts, had unequivocally declared that "the right to the aid of [*343] counsel is of this fundamental character."[****14] Powell v. Alabama, 287 U.S. 45, 68 (1932).While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years

later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

"We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." Grosjean v. American Press Co., 297 U.S. 233, 243-244 (1936).

And again in 1938 this Court said:

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant [***805] admonition that if the constitutional safeguards it provides be [****15] lost, justice will not 'still be done.'" Johnson v. Zerbst, 304 U.S. 458, 462 (1938). To the same effect, see Avery v. Alabama, 308 U.S. 444 (1940), and Smith v. O'Grady, 312 U.S. 329 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the Betts Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "expressions in the opinions of this court lend color to the argument . . . ." 316 U.S., at 462-463. The fact is that in deciding as it did -- that "appointment of counsel is not a fundamental right, [*344] essential to a fair trial" -- the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, [****16] who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if [****17] the [**797] poor man charged with crime has to face his accusers without a lawyer to assist

him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be [*345] heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, [***806] he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 68-69.

The [****18] Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action notinconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.

[*346] Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in O'Neil v. Vermont, 144 U.S. 323, 362-363, 370-371, as did Justices BLACK, DOUGLAS, Murphy and Rutledge in Adamson v. California, 332 U.S. 46, 71-72, 124. [****19] And see Poe v. Ullman, 367 U.S. 497, 515- 522 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the Slaughter-House Cases, 16 Wall. 36, 118-119, 122, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in Walker v. Sauvinet, 92 U.S. 90, 92. 1 Unfortunately it has never commanded a Court. [**798] Yet, happily, all constitutional questions are always open. Erie R. Co. v. Tompkins, 304 U.S. 64. And what we do today does not foreclose the matter.

[****20] My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. 2 [***807] Mr. Justice Jackson shared that view. 3 [*347] But that view has not prevailed 4 and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

[****21]

Concur by: CLARK; HARLAN

MR. JUSTICE CLARK, concurring in the result.

In Bute v. Illinois, 333 U.S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel but stated that "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." Id., at 674. Prior to that case I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment. 1 At the next Term of the Court Mr. Justice Reed revealed that the Court was divided as to noncapital cases but that "the due process clause . . . requires counsel for all persons charged with serious crimes . . . ." Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). Finally, in Hamilton v. Alabama, 368 U.S. 52 (1961), we said that "when one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." Id., at 55.

[****22] [*348] That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear, both from the language of the Amendment and from this Court's interpretation. See Johnson v. Zerbst, [**799] 304 U.S. 458 (1938). It is equally clear from the above cases, all decided after Betts v. Brady, 316 U.S. 455 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be [***808] deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, Reid v. Covert, 354 U.S. 1 (1957), we held that the [****23] same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, 2 as we noted that:

"Obviously Fourteenth Amendment cases dealing with state action have no application here, but if [*349] they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . .would be as invalid under those cases as it would be in cases of a capital nature." 361 U.S., at 246-247.

[****24] I must conclude here, as in *Kinsella, supra*, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life -- a value judgment not universally accepted 3 -- or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

MR. JUSTICE HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial [****25] than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented "an abrupt break with its own well-considered precedents." Ante, p. 344. In 1932, in Powell v. Alabama, 287 U.S. 45, a capital case, this Court declared that under the particular facts there presented -- "the ignorance and illiteracy of the defendants, their youth, [**800] the circumstances of public hostility . . . and above all that they stood in deadly peril of their lives" (287 U.S., at 71) -- the state court had a duty to assign counsel for [*350] the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, see 287 U.S., at 52, 57-58, 71, and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided Betts v. Brady, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital [***809] trials, while at the same time [****26] insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see Johnson v. Zerbst, 304 U.S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in Powell v. Alabama, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in Powell and in Betts, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the Betts decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. [****27] Such dicta continued to appear in subsequent decisions, and any lingering doubts were finally eliminated by the holding of Hamilton v. Alabama, 368 U.S. 52. In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after Betts, there were cases in which the Court [*351] found special circumstances to be lacking, but usually by a sharply divided vote. 3 [****28] However, no such decision has been cited to us, and I have found none, after Quicksall v. Michigan, 339 U.S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. 4 The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the Betts v. Brady rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. 5 To continue [**801] a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time [****29] has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. [***810] (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

[*352] In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" 6 and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. Roth v. United States, 354 U.S. 476, 496-508 [****30] (separate opinion of this writer). In what is done today I do not understand the Court to depart

from the principles laid down in Palko v. Connecticut, 302 U.S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

STATE V. SCHAEFER
Supreme Court of Wisconsin, April 2, 2008, Filed NO. 2006AP1826-CRAC Reporter 2008 WI 25 * | 308 Wis. 2d 279 ** | 746 N.W.2d 457 *** | 2008 Wisc. LEXIS 18 ****

State of Wisconsin, Plaintiff-Respondent, v. Ronald Schaefer, Defendant-Appellant.

Subsequent History: US Supreme Court certiorari denied by Schaefer v. Wisconsin, 129 S. Ct. 198, 172 L. Ed. 2d 141, 2008 U.S. LEXIS 5520 (U.S., Oct. 6, 2008)

Prior History: [****1] APPEAL from a nonfinal order of the Circuit Court for Waukesha County, Ralph Ramirez, Judge. COURT: Circuit. COUNTY: Waukesha. JUDGE: Ralph Ramirez. (L.C. No. 2006CF621).
State v. Schaefer, 2007 WI 59, 299 Wis. 2d 329, 731 N.W.2d 639, 2007 Wisc. LEXIS 219 (2007)

Disposition: Affirmed.

Overview
The criminal complaint charged defendant with two counts of second-degree sexual assault of a child. He filed a subpoena duces tecum seeking to compel a law enforcement agency to produce information and material related to the litigation before the preliminary examination. Defendant was using the subpoena duces tecum as a discovery tool. The trial court properly granted the State's motion to quash the subpoena duces tecum. The Supreme Court of Wisconsin concluded that a criminal defendant did not have a statutory or constitutional right to compel the production of police investigation reports and nonprivileged materials by subpoena duces tecum prior to the preliminary examination. There was also no compulsory process right to subpoena police investigation reports and nonprivileged materials before the preliminary examination. Therefore, defendant's rights under the Sixth Amendment and Wis. Const. art. I, § 7 were not violated.

Opinion by: DAVID T. PROSSER

Opinion
[*P1] [**286] [***461] DAVID T. PROSSER, J. This case is before the court on certification by the court of appeals pursuant to Wis. Stat. § (Rule) 809.61 (2005-06). 1 It relates to an appeal from a nonfinal order of the [****2] Waukesha County Circuit Court, Ralph M. Ramirez, Judge. Judge Ramirez granted the State's (State) motion to quash a subpoena duces tecum from

defendant Ronald Schaefer (Schaefer) that sought to obtain police investigation reports in Schaefer's case before his preliminary examination.

[*P2] After permitting Schaefer's interlocutory appeal, the court of appeals certified the following question to this court: "Does a criminal defendant have a subpoena right to obtain and copy police investigation reports and nonprivileged materials prior to the preliminary hearing?" This question requires interpretation of several Wisconsin statutes as well as the constitutional rights to compulsory process and effective assistance of counsel.

[*P3] We conclude that a criminal defendant does not have a statutory or constitutional right to compel production of police investigation reports and other nonprivileged materials by subpoena duces tecum prior to the preliminary examination. A criminal defendant who employs the subpoena power in this manner is [**287] attempting to engage in discovery without authority in either civil or [****3] criminal procedure statutes and in conflict with the criminal discovery statutes. Although a reasonable argument can be made for prosecutors to open their files to defendants at an early point in criminal prosecutions, this argument does not translate into an enforceable right to subpoena police investigation reports and nonprivileged materials before a preliminary examination. Consequently, we affirm the order of the circuit court granting the State's motion to quash Schaefer's subpoena duces tecum.

I. FACTS AND PROCEDURAL POSTURE

[*P4] The criminal complaint charged Schaefer with two counts of second-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(2), for conduct that allegedly occurred in 1990. The complaint was signed by Detective Jennifer Toepfer (Toepfer) of the Brookfield Police Department who asserted that she took a statement about the alleged assaults from Kerry M., DOB: 4/6/76, in March 2006 and then conducted an investigation into Kerry's claims.

[*P5] The complaint makes the following allegations: Ronald Schaefer was a teacher and basketball coach at a parochial school in Menomonee Falls. Kerry was a [***462] student at the school. Schaefer was Kerry's basketball coach when [****4] she was in seventh grade. During the 1988-89 school year, Schaefer began to focus attention on Kerry, complimenting her, telling her that she "looked nice," and giving her the nickname "Special K."

[*P6] The next year, Schaefer became Kerry's eighth grade teacher. Following his usual practice of picking an eighth-grade student to serve as a babysitter [**288] for his children, Schaefer selected Kerry. Toward the end of her eighth grade year and continuing into the summer--between March 1990 and August 1990--Kerry had a sexual relationship with Schaefer.

[*P7] Kerry described both her social and sexual encounters with Schaefer over this time period. She reported that Schaefer wrote her notes and poems, which she saved (and

subsequently turned over to Detective Toepfer). Schaefer kissed Kerry and told her that he loved her. When the two called each other at their respective homes, Kerry would hang up if Schaefer's wife answered the telephone, and Schaefer would hang up if one of Kerry's parents answered. Kerry considered Schaefer her first boyfriend. Kerry said that in May 1990 she and Schaefer discussed running away together to Kentucky or Tennessee because "it was ok to get married younger there."

[*P8] Kerry [****5] recounted how Schaefer touched her physically and sexually on several occasions during this period. His touching included hugging, kissing, and performing oral sex on her. On one occasion, after swimming, Kerry and Schaefer had sexual intercourse on a bed at his parents' home in Brookfield. On another occasion, the pair had sexual intercourse in Schaefer's bed while Kerry was babysitting his two children. Kerry had not attained the age of 16 years at the time of any of these incidents and thus could not legally consent.

[*P9] In August 1990, the relationship between Kerry and Schaefer ended when Schaefer told Kerry that they could not see each other anymore because Kerry was starting high school. Kerry later told the detective that she was devastated because she thought Schaefer was her boyfriend.

[*P10] These allegations led the State to file a criminal complaint on May 25, 2006, charging Schaefer [**289] with two counts of second-degree sexual assault of a child. The defendant made his initial appearance on June 1. He posted bond and was advised to have no contact with the victim. He made a second appearance on June 19. At that time a preliminary hearing was scheduled for July 20, 2006, before Waukesha [****6] County Court Commissioner Martin O. Binn.

[*P11] On July 10, Schaefer served a subpoena duces tecum on the "Chief of Brookfield Police Department or Designee," commanding the person to bring the following material before Commissioner Binn on July 13, 2006: "A complete copy of all reports, memorandums, witness interviews and any records related to the investigation and arrest of Ronald Schaefer on suspected criminal offenses relating to the alleged sexual assault of Kerry M. DOB 4/6/76 in 1990." The subpoena duces tecum characterized the "Type of Proceeding" before Commissioner Binn as a "Return of Records."

[*P12] On July 11, the State moved to quash the subpoena. At a hearing on July 13, Commissioner Binn granted the State's motion, indicating that after he reviewed Chapters 805, 885, 970, 971, and 972 of the Wisconsin Statutes, he considered the defendant's subpoena a request for the circuit court to "re-write the discovery statute, [Wis. Stat. §] 971.23." He also noted that the preliminary examination is "not a [***463] mini-trial, and [ ] not a discovery proceeding."

[*P13] The defendant sought de novo review in circuit court. On July 18 Judge Ramirez conducted a hearing and concluded that there is no mechanism [****7] under state statute or the Wisconsin or federal constitutions that specifies that "discovery materials" shall be produced before the preliminary hearing.

[*P14] [**290] On July 19, 2006, Judge Ramirez entered an order granting the State's motion to quash Schaefer's subpoena duces tecum.

[*P15] Schaefer filed a timely petition for leave to appeal, and the court of appeals stayed further proceedings pending appeal. See Wis. Stat. § 809.52.

[*P16] On December 27, 2006, the court of appeals certified the appeal to this court. We accepted certification on February 12, 2007.

II. STANDARD OF REVIEW

[*P17] This case involves questions of statutory interpretation and constitutional law. Statutory interpretation presents a question of law that we review de novo. State v. Floyd, 2000 WI 14, P11, 232 Wis. 2d 767, 606 N.W.2d 155. Similarly, we review constitutional questions, both state and federal, de novo. Custodian of Records for the Legislative Technology Services Bureau v. State, 2004 WI 65, P6, 272 Wis. 2d 208, 680 N.W.2d 792.

III. ANALYSIS

[*P18] This is a discovery case, notwithstanding the defendant's protestations to the contrary. Schaefer's appeal asks this court to approve the subpoena power to effect discovery in a criminal case [****8] prior to the preliminary examination.

[*P19] Schaefer does not claim to be seeking some specific piece of information missing from the complaint so that he can fully respond to the charges. Rather, he is trying to force the State to disclose the evidence against him before it has had an opportunity [**291] to present any of that evidence in court. In effect, Schaefer is asking this court to accommodate all felony defendants who wish to conduct discovery of the state's evidence before their preliminary examinations by vesting these criminal defendants with a new discovery tool. Schaefer's arguments that the state and federal constitutions compel this result unreasonably stretch the boundaries of compulsory process and misapprehend the requirements of effective assistance of counsel.

[*P20] We acknowledge at the outset that the right of an accused to present a defense is fundamental. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). It is embodied in the due process guarantees of the Fifth and Fourteenth Amendments and in the Sixth Amendment's command that the accused shall have compulsory process for obtaining witnesses in his favor. 2 Due process preserves an accused's right to challenge the prosecution's

case [****9] by obtaining evidence tending to establish the accused's innocence or by casting doubt upon the persuasiveness of the prosecution's evidence. 3

[*P21] There are several ways for a criminal defendant to gather information and evidence that may be used in his defense. First, a defendant may request information from the state and other sources on a voluntary basis. A criminal defendant will [***464] often be given information voluntarily when the custodian has no objection to its release. Second, a defendant may conduct his own investigation of the case through interviews, record and data collection, and other lawful [**292] investigatory techniques. In some situations, a person's investigation will begin even before the person is charged with a crime. Third, a person may use information-gathering techniques such as open records requests that are available to non-litigants. A person is not disqualified from using these familiar procedures simply because he becomes a criminal defendant. 4 Fourth, a defendant may employ the subpoena power at pretrial hearings to litigate specific issues, such as the suppression of evidence, [****10] and may also use the subpoena power at trial. Pretrial hearings will have a narrow focus; thus, the evidence sought must be relevant to the issue being litigated and is not likely to be admitted if it fails this test. Finally, a defendant may exercise his discovery rights under the Wisconsin Statutes.

[*P22] Our legislature has codified specific discovery rights for criminal defendants. See Wis. Stat. § 971.23 (listing mandatory disclosures for both the district attorney and [****11] defendant). In theory, these criminal discovery rights attempt to level the playing field between the state and the accused. State v. Maday, 179 Wis. 2d 346, 353, 507 N.W.2d 365 (Ct. App. 1993). Clearly, a defendant has a right to obtain evidence in [**293] the state's possession when that evidence is material and exculpatory. See, e.g., Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The state must turn over material that tends to negate the guilt of the defendant or tends to reduce the defendant's punishment. Nelson v. State, 59 Wis. 2d 474, 479, 208 N.W.2d 410 (1973).

[*P23] Traditionally, however, statutory discovery is designed to assure fairness at a criminal trial. Discovery anticipates a trial at which a fact-finder determines guilt. The court of appeals has stated that "[p]retrial discovery is nothing more than the right of the defendant to obtain access to evidence necessary to prepare his or her case for trial." Maday, 179 Wis. 2d at 354 (citing Britton v. State, 44 Wis. 2d 109, 117, 170 N.W.2d 785, 789 (1969)) (emphasis added). "Providing a defendant with meaningful pretrial discovery underwrites the interest of the state in guaranteeing that the quest for the truth will happen during a fair [****12] trial." Maday, 179 Wis. 2d at 354-55 (emphasis added).

[*P24] A preliminary examination is not a trial. State ex rel. Lynch v. County Ct., Branch III: Cleveland, 82 Wis. 2d 454, 465-66, 262 N.W.2d 773 (1978). Its purpose is not to determine guilt beyond a reasonable doubt. State v. Anderson, 2005 WI 54, P24, 280 Wis. 2d 104, 695 N.W.2d

731. Its purpose is merely to determine if there is probable cause to believe that the defendant has committed a felony. Wis. Stat. § 970.03(1). Hence, when a defendant issues a subpoena with a broad demand [***465] for records before the preliminary examination, he is trying to expand the scope of statutory discovery and move it to a preliminary stage of the criminal proceedings. At this early point, the state has not settled on final charges, may not have completed its [**294] investigation, and may not fully understand the complexities of its own case. While the preliminary examination often affords the defendant new information and detail about the state's evidence, this new information is a byproduct, not the objective, of the preliminary examination. 5

[*P25] This case presents an opportunity to address the relationship between pretrial discovery and the preliminary examination. We begin with a discussion of the nature and purpose of discovery, as well as the purpose and scope of the preliminary examination.

A. Discovery and the Preliminary Examination

[*P26] We begin with discovery because of the character of the information the defendant seeks. Schaefer's "Subpoena and Certificate of Appearance" uses Form 126. His document adds the words "Duces Tecum" under the form's heading. The subpoena is issued to "Chief of Brookfield Police Department or Designee." (Emphasis added.) It demands that the "witness" bring "[a] complete copy of all reports, memorandums, witness interviews and any records related to the investigation and arrest of Ronald Schaefer on suspected criminal offenses or relating to his alleged sexual assault of Kerry M. DOB 4/6/76 [****14] in 1990."

[*P27] The expansive swath of Schaefer's subpoena duces tecum and the subpoena's indifference regarding [**295] which person should appear with the requested information immediately raise questions about the subpoena's purpose. Because Schaefer makes no showing of a particularized need of information for the preliminary examination, his demand to inspect law enforcement files amounts to generalized, unrestricted discovery. This court decided in Lynch that giving defendants the right to compulsory inspection of the state's files before the preliminary examination will impede the orderly process of discovery prescribed by statute, unjustifiably delay the administration of justice, and needlessly complicate the relatively informal procedures of the preliminary examination. Lynch, 82 Wis. 2d at 466. 6

[*P28] [**296] [***466] The Wisconsin Statutes do not define the term "discovery." 7 As a result, we must refer to other authority.

[*P29] Black's Law Dictionary defines "discovery" as "[t]he act or process of finding or learning something that was previously unknown" and "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation." Black's Law Dictionary 478 (7th ed. 1999) (emphasis added). The first definition is general; the second relates specifically to legal

proceedings. The California Supreme Court commented on the difference in Arnett v. Dal Cielo, 14 Cal. 4th 4, 56 Cal. Rptr. 2d 706, 923 P.2d 1, 10-11 (Cal. 1996), [****17] in a discussion of civil discovery:

[The word "discover" can be used] in its general sense of finding something out by search or observation. . . .

[D]iscovery also has a specific legal meaning, to wit, the formal exchange of evidentiary information and materials between parties to a pending action. The two meanings of the word are well recognized in the dictionaries. Thus a leading legal dictionary first defines [**297] "discovery" to mean, "In a general sense, the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden." . . . (Black's Law Dict. (6th ed. 1990) p. 466). But the same work also defines the word ["discovery"] in its specifically legal sense, as "[t]he pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial," . . . Even nonlegal dictionaries draw this distinction . . . "3. Law. Data or documents that a party to a legal action is compelled to disclose to another party either prior to or during a proceeding." (Am. Heritage Dict. (2d college ed. 1985) p. 403).

[*P30] Discovery, in the legal sense, is distinguishable from [****18] less formal information-gathering techniques. Discovery is grounded in statute or court rule, is designed to avoid unfairness and surprise in litigation, and may be enforced by judicial orders and sanctions. As a result, discovery, in the legal sense, is subject to reasonable terms and limitations as to timing, convenience, cost, methodology, privilege, and purpose. This is especially true of discovery in criminal cases, for criminal discovery operates on different principles from civil discovery. In criminal discovery, the stakes are different, the purposes are different, the procedures are different, and the disclosure of information is understandably not reciprocal.

[*P31] The essence of "discovery" for purposes of analysis here is "[c]ompulsory [***467] disclosure, at a party's request, of information that relates to the litigation." Black's Law Dictionary 478 (7th ed. 1999). Schaefer's subpoena duces tecum seeks to compel a law enforcement agency to produce information and material "relate[d] to the litigation" before the preliminary examination. Id. Hence, Schaefer is using the subpoena duces tecum as a discovery tool.

[*P32] [**298] We turn now to the preliminary examination. There is no constitutional right [****19] to a preliminary examination. State v. Williams, 198 Wis. 2d 516, 525, 544 N.W.2d 406 (1996). The right to such an examination stems purely from statute. State ex rel. Klinkiewicz v. Duffy, 35 Wis. 2d 369, 373, 151 N.W.2d 63 (1967). As noted above, Wis. Stat. § 970.03 provides

a preliminary examination for the specific purpose of determining whether there is probable cause to believe a felony has been committed by the defendant. Wis. Stat. § 970.03(1).

[*P33] The independent screening function of the preliminary examination serves as a check on the prosecutorial power of the executive branch. An accused has the option to assure that the hearing is scheduled expeditiously so that he may be discharged quickly if the government cannot justify its right to go forward. Klinkiewicz, 35 Wis. 2d at 373.

[*P34] We examined the scope of the preliminary examination in State v. Dunn, 121 Wis. 2d 389, 359 N.W.2d 151 (1984). We emphasized that a preliminary hearing as to probable cause is not a preliminary trial or a full evidentiary trial on the issue of guilt beyond a reasonable doubt. Id. at 396 (citing State v. Hooper, 101 Wis. 2d 517, 544, 305 N.W.2d 110 (1981)). Rather, the preliminary examination is "intended [****20] to be a summary proceeding to determine essential or basic facts as to probability." Dunn, 121 Wis. 2d at 396-97. "[A] preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant." Id. at 398. The preliminary examination is not a mini-trial [**299] on the facts; its purpose is merely to determine whether there is sufficient evidence that charges against a defendant should go forward. See id.

[*P35] Significantly, a defendant may present evidence at a preliminary examination. Wis Stat. § 970.03(5). 8 He may call witnesses to rebut the plausibility of a witness's story and probability that a felony was committed. See Dunn, 121 Wis. 2d at 396-98. In this regard, the defendant must have compulsory process to assure the appearance of his witnesses and their relevant evidence.

[*P36] However, a defendant's right to present [****21] evidence at a preliminary examination is not boundless. In State v. Knudson, 51 Wis. 2d 270, 187 N.W.2d 321 (1971), we held that Knudson's attempt to call two witnesses--the victim's mother and the chief of police--was an effort "to expose inconsistencies in the accounts given by the victim to various people" and impermissible at the preliminary examination. Id. at 280-81. After the victim testified to the factual basis for the charge of child enticement, Knudson sought to impugn the victim's [***468] credibility and, in the process, "gain some valuable information for his defense" by presenting contradictory testimony. Id. at 281. The court described this as pretrial discovery beyond the role of the preliminary examination. Id. See also State ex rel. Funmaker v. Klamm, 106 Wis. 2d 624, 630, 317 N.W.2d [**300] 458 (1982) (observing that "possible weaknesses in [the witness's] identification are matters affecting . . . weight and credibility" and not subjects for the preliminary examination).

[*P37] Because the statutory purpose of the preliminary examination is narrowly focused upon a determination of probable cause, Wis. Stat. § 970.03(1), a defendant's right to present evidence

at the hearing is limited [****22] to "essential facts as to probability" that the alleged offense occurred. Knudson, 51 Wis. 2d at 280 (citing State ex rel. Evanow v. Seraphim, 40 Wis. 2d 223, 228, 161 N.W.2d 369 (1968)). This means that although a defendant may subpoena witnesses and evidence for the preliminary examination, see Wis. Stat. §§ 973.03(5), 972.11(1), and 885.01, his subpoena may be quashed, a witness may not be allowed to testify, or evidence may be excluded if the defendant is unable to show the relevance of the testimony or evidence to the rebut probable cause.

[*P38] When a defendant's subpoena duces tecum seeks all investigatory material in the possession of the police, and the subpoena is returnable before the preliminary examination, the subpoena is fishing for elements of the state's case, see Knudson, 51 Wis. 2d at 280, and is not proper.

[*P39] We do not see how Schaefer's subpoena duces tecum aimed at securing "[a] complete copy of all reports, memorandums, witness interviews and any records related to the investigation and arrest of Ronald Schaefer" can be viewed as a narrow attempt to secure essential information to rebut the State's showing of probable cause. (Emphasis added.) It is plainly an attempt [****23] to effect discovery.

[*P40] [**301] To summarize, we conclude that the purpose of a preliminary examination is limited to an expeditious determination of whether probable cause exists for the state to proceed with felony charges against a defendant. The limited purpose of the preliminary examination does not permit a criminal defendant to compel discovery in anticipation of the hearing. Schaefer's subpoena duces tecum in the instant case is an effort to effect discovery.

B. Statutory Rights to Subpoena Evidence and to Discovery in a Criminal Proceeding

[*P41] Schaefer contends that the analysis above is inconsistent with the broad subpoena power in the Wisconsin Statutes. We disagree. Schaefer's subpoena duces tecum is 1) not authorized by our subpoena statutes, and 2) inconsistent with our criminal discovery statutes.

[*P42] The subpoena power is set out in multiple statutes. For instance:

(A) Wisconsin Stat. § 757.01(1) provides that courts of record shall have power "[t]o issue process of subpoena, requiring the attendance of any witness, . . . to testify in any matter or cause pending or triable in such courts."

(B) Wisconsin Stat. § 885.01(1) authorizes a court to "require the attendance of witnesses and their [****24] production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee

or other person authorized to take testimony in the state." This statute provides a court with general power, at the behest of an attorney, [***469] to subpoena both witnesses and documents. See Wiseman, et al., 9 Wisconsin Practice: Criminal Practice and Procedure § 24.11 (1996).

[**302] (C) Wisconsin Stat. § 805.07(1) provides that "[a] subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding." (Emphasis added.) Wisconsin Stat. § 805.07(2)(a) states that "[a] subpoena may command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein."

[*P43] As a general rule, Wis. Stat. § 972.11(1) makes civil procedure statutes part of the criminal code. The subsection provides that the rules of evidence and practice in civil actions, including Wis. Stat. § 805.07, "shall be applicable in all criminal actions unless the context of a section or rule [****25] manifestly requires a different construction." (Emphasis added.) The subsection then adds: "Chapter[] 885 . . . shall apply in all criminal proceedings." Wis. Stat. § 972.11(1).

[*P44] Considered broadly, courts and attorneys of record have the power to compel the attendance of witnesses and the production of evidence by subpoena in any proceeding. But, unlike present Federal Rule of Civil Procedure 45, Wis. Stat. § 805.07 appears to link the production of documentary evidence with the appearance and testimony of a witness. 9 This is significant [**303] because Wis. Stat. § 805.07(1) authorizes a subpoena for the attendance of a witness "for deposition, hearing or trial." Schaefer is asking this court to establish an additional proceeding, denominated by him as a "Return of Records," that will help the defendant prepare for his preliminary examination without requiring any witness to testify. Our criminal procedure statutes do not contemplate a court proceeding to receive evidence preliminary to a preliminary examination, and our civil procedure statutes neither recognize nor compel such a proceeding.

[*P45] Wisconsin Stat. § 804.09, entitled "Production of documents and things and entry upon land for inspection and other purposes," is the [****27] civil procedure statute that most closely approximates what Schaefer is trying to accomplish in this case. However, § 804.09(1) involves a "request," not a "command," and § 804.09(1) is located in the chapter on "Civil Procedure--Depositions and Discovery." (Emphasis added.) In short, no subpoena statute authorizes Schaefer's action.

[*P46] Schaefer's attempt to utilize the general subpoena power for discovery prior to his preliminary examination also conflicts with Wis. Stat. §§ 971.31(5)(b) and 971.23. [***470] Wisconsin Stat. § 971.23 is the criminal discovery statute. Wisconsin Stat. § 971.31(5)(b) provides [**304] explicitly that in felony actions, "motions under s. 971.23 . . . shall not be

made at a preliminary examination and not until an information has been filed." (Emphasis added.)

[*P47] "[G]enerally where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls." Marder v. Bd. of Regents of Univ. of Wis., 2005 WI 159, P23, 286 Wis. 2d 252, 706 N.W.2d 110. This principle of statutory interpretation aligns with the important qualification in Wis. Stat. § 972.11(1) that a civil practice applies to criminal procedure "unless [****28] the context of a section or rule manifestly requires a different construction." Wis. Stat. § 972.11(1) (emphasis added).

[*P48] Schaefer's statutory argument is that Wis. Stat. § 972.11 allows a criminal defendant access to the civil subpoena duces tecum power embodied in Wis. Stat. § 805.07(2). He asserts that § 972.11 applies the general subpoena power in Wis. Stat. § 885.01 to criminal proceedings. He further contends that the subpoena duces tecum constitutes a "judicial process independent of discovery rules." In view of this argument, if we were to conclude that Schaefer was not attempting to pursue discovery with his subpoena duces tecum, we might have difficulty concluding that his subpoena request was inconsistent with the timing limitation in Wis. Stat. § 971.31(5)(b). 10

[*P49] Wisconsin Stat. § 971.23 sets out the state's discovery obligations. Subsection (1) provides in part:

(1) What a district attorney must disclose to a [**305] defendant. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or [****29] his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state[.]

Wis. Stat. § 971.23(1).

[*P50] Paragraphs (a) through (h) of the statute then outline the specific disclosures the district attorney must make:

(a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.

(b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.

(bm) Evidence obtained in the manner described under s. 968.31(2)(b), if the district attorney intends to use the evidence at trial.

(c) A copy of the defendant's criminal record.

(d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

(e) Any relevant written or recorded statements of a witness named on a list [****30] under par. (d), including any audiovisual [***471] recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary [**306] of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

(f) The criminal record of a prosecution witness which is known to the district attorney.

(g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

(h) Any exculpatory evidence.

Wis. Stat. § 971.23(1)(a)-(h).

[*P51] These mandatory disclosures should be compared to Schaefer's subpoena demand: "A complete copy of all reports, memorandums, witness interviews and any records related to the investigation and arrest of Ronald Schaefer on suspected criminal offenses or relating to the alleged sexual assault of Kerry M. DOB 4/6/76 in 1990." (Emphasis added.)

[*P52] The demands in the defendant's subpoena duces tecum clearly overlap the discovery materials outlined in Wis. Stat. § 971.23. In some respects, [****31] the subpoena demands exceed the discovery materials authorized by the statute. Because the mandatory disclosures outlined in § 971.23(1) include information that is customarily found in police investigative reports or similar records, 11 we are hard pressed to distinguish the defendant's subpoena duces tecum from a discovery demand under Wis. Stat. § 971.23(1).

[*P53] [**307] As noted above, Wis. Stat. § 971.31(5)(b) provides that "[i]n felony actions, motions . . . under s. 971.23 . . . shall not be made at a preliminary examination and not until an information has been filed." (Emphasis added.)

[*P54] Schaefer's subpoena duces tecum arguably is governed by the limitation [****32] on pretrial discovery found in Wis. Stat. § 971.31(5)(b). Schaefer is seeking discovery materials (police records). His subpoena satisfies some of the criteria of a "motion." See Wis. Stat. § 971.30. The police chief's failure to honor the subpoena would likely lead to "an application for an order" to comply. Wis. Stat. § 971.30(1). Black's Law Dictionary defines "motion" as "A written or oral application requesting a court to make a specified ruling or order." Black's Law Dictionary 1031 (7th ed. 1999). In effect, Schaefer has requested the circuit court to order, pursuant to its subpoena power, the Brookfield Chief of Police or designee to appear in court with the documents requested. We think it makes little sense to disregard the timing limitations on discovery in Wis. Stat. § 971.31(5)(b) simply because Schaefer does not rely on Wis. Stat. § 971.23, has tried to exceed the scope of discovery in § 971.23, and has not labeled his subpoena duces tecum as a "motion." To say that Schaefer's subpoena duces tecum is not a "motion" elevates form over substance.

[*P55] This case requires us to interpret several statutes. "[T]he purpose of statutory interpretation is to determine [***472] what the statute [****33] means so that it may be given its full, proper and intended effect." State ex rel. [**308] Kalal v. Cir. Ct. for Dane County, 2004 WI 58, P44, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." Id., P46. Statutes involving the same subject matter "must be construed in a manner that harmonizes them in order to give each full force and effect." Wis. Power & Light Co. v. Pub. Serv. Comm'n of Wis., 2006 WI App 221, P15, 296 Wis. 2d 705, 725 N.W.2d 423.

[*P56] The plain truth is that if we permitted the general subpoena authority to effect discovery in a criminal case before the preliminary examination, there would be nothing left of the limiting conditions in Wis. Stat. §§ 971.23(1) and 971.31(5)(b). This would not be "harmonizing" the general subpoena statutes with the criminal discovery statutes.

[*P57] Wisconsin Stat. § 971.23(1) requires a district attorney to disclose discovery material "within a reasonable time before trial." Requiring the state 12 to disclose discovery material before [****34] the preliminary examination--before the court has even authorized a [**309] trial--is plainly at odds with the statutory scheme. This conclusion about timing is reinforced by the language in Wis. Stat. § 971.31(5)(b) that discovery motions "shall not be made at a preliminary [***473] examination and not until an information has been filed."

[*P58] [**310] Equally important, Wis. Stat. § 971.23 does not require the state to turn over all the information in its possession. For instance, Wis. Stat. § 971.23(1)(d) requires the state to disclose "[a] list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment

only." If Schaefer were entitled to obtain by subpoena duces tecum the names of all witnesses who have surfaced in the police reports as well as their statements, his need--and [****37] the need of all defendants--for § 971.23 discovery would be substantially reduced. Section 971.23(1) would then be used primarily to make sure that the state discloses any new information that it obtains and reveals its trial strategy, i.e., what witnesses and physical evidence the state plans to present at trial and what evidence it has decided not to present.

[*P59] It must be noted that the limitations on the scope of discovery in Wis. Stat. § 971.23(1) may not always prevail against a subpoena duces tecum after an information is filed. We have previously implied that a subpoena duces tecum may have to be honored if the defendant shows a "particularized need" for information in the possession of the state. See Lynch, 82 Wis. 2d at 466-68. That is not the case here. The defendant has no statutory subpoena right to obtain and copy police investigation reports and nonprivileged materials prior to his preliminary examination.

C. Constitutional Rights to Compulsory Process and Effective Assistance of Counsel

[*P60] Schaefer also raises challenges under the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. First, he argues that the rights to compulsory [****38] process [**311] found in both of these constitutional provisions include the right to access and copy police investigation reports and nonprivileged materials prior to a preliminary hearing. Second, he argues that his Sixth Amendment right to effective assistance of counsel cannot be satisfied without his attorney having access to these materials before the preliminary examination.

[*P61] We address these challenges in turn and conclude that Schaefer has no state or federal constitutional right to obtain and copy police investigation reports and nonprivileged materials by subpoena prior to his preliminary hearing.

1. Right to Compulsory Process

[*P62] The Sixth Amendment to the United States Constitution provides that the accused in a criminal proceeding shall have the right "to have compulsory process for obtaining witnesses in his favor." 13 U.S. const. amend. VI. Similarly, the Wisconsin [***474] Constitution [**312] provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process to compel the attendance of witnesses in his behalf[.]" Wis. Const. art. 1, § 7. Although this court has the prerogative to afford greater protection to a criminal defendant under a provision of [****39] the Wisconsin Constitution than is mandated by an equivalent provision in the United States Constitution, State v. Doe, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977), the court tends to interpret and apply equivalent provisions in the same manner. See State v. Agnello, 226 Wis. 2d 164, 180-81, 593 N.W.2d 427 (1999) (stating that "[w]here . . . the

language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where no difference in intent is discernible, Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court's construction of the federal constitution").

[*P63] In Washington v. Texas (1967), the Supreme Court explained that the right to compulsory process is plainly "the right to present a defense[.]" Washington, 388 U.S. at 19. The Court reviewed a criminal defendant's Sixth Amendment challenge to two Texas statutes that prohibited persons charged or convicted as co-participants in the same crime from testifying for one another, even though there was no bar to their testifying for the state. Id. at 16-17. The Court held that this statutory scheme violated the defendant's right to compulsory process for obtaining witnesses at trial:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the [**313] truth lies. [****41] Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Id. at 19 (emphasis added). Thus, compulsory process for securing favorable witnesses is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." Id. at 17-18. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

[*P64] Twenty years after Washington, the Court noted that it has "had little occasion to discuss the contours of the Compulsory Process Clause." 14 Pennsylvania v. Ritchie, 480 U.S. 39, 55, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). In Ritchie, the Court reviewed Sixth Amendment claims of a criminal defendant convicted of various sexual offenses against his daughter. Id. at 39. The defendant, Ritchie, sought pretrial discovery--via subpoena--of ostensibly confidential [****42] records from Children and Youth Services (CYS), a Pennsylvania protective agency. Id. at 43. Ritchie claimed [***475] he was entitled to review CYS's file to discover information that might be useful in contradicting testimony favorable to the state. Id. at 53. Because it noted that defense counsel was able to cross-examine [**314] all trial witnesses fully, the Court determined that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause. Id. at 54.

[*P65] The Court then turned to the compulsory process claim. The Court acknowledged that Sixth Amendment applicability to discovery disputes was unsettled; hence, it utilized a due

process analysis. Id. at 56. The Court said it had articulated "some of the specific rights" secured by the Compulsory Process Clause of the Sixth Amendment. [****43] Id. "Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Id. (emphasis added).

[*P66] The Court was reluctant to establish an unconditional discovery right under the Sixth Amendment. Thus, it analyzed the case on Fourteenth Amendment due process grounds. The Court concluded that the Compulsory Process Clause "provides no greater protections in this area than those afforded by due process." Ritchie, 480 U.S. at 56. Stated another way, unless due process requires defense access to specific evidence, the Compulsory Process Clause cannot provide substitute authority for such access.

[*P67] These comments by the Court point the compass of the Compulsory Process Clause toward a defendant's right to the compelled production of evidence in anticipation of trial, not in anticipation of a preliminary examination. Professor LaFave has observed that "[t]he Compulsory Process Clause naturally suggests some constitutional entitlement to trial evidence." 5 Wayne R. LaFave, et al., Criminal Procedure § 24.3(a), [****44] at 469 (2d ed. 1999) (emphasis added).

[*P68] [**315] Thus, our holding in Lynch, founded upon due process, applies here and circumscribes a criminal defendant's compulsory process right to access the state's files prior to his preliminary examination.

[*P69] In Lynch, we held that, under the Due Process Clause, a criminal defendant has no right to inspect the state's files for the existence of exculpatory evidence prior to a preliminary examination. Lynch, 82 Wis. 2d at 465-68. The constitutional right to such exculpatory material "is in the right to a fair trial guaranteed by [due process]." Id. at 465 (citing United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). We concluded:

Inspection of the state's files by the defense at this early stage, where there has been no showing of particularized need for inspection, can serve only as an opportunity for generalized, unrestricted discovery, rather than as a device for the constitutionally mandated disclosure of specific exculpatory material. Such discovery will impede the orderly processes of discovery prescribed by statute, see: secs. 971.23 to 971.25, Stats., and will circumvent the legislative determinations reflected [****45] in those statutes; will unjustifiably delay the administration of justice; and will needlessly complicate the relatively informal procedures applicable at this early stage of a prosecution. This harm is inherent in the order of the county court.

[***476] Lynch, 82 Wis. 2d at 466 (footnote omitted).

[*P70] We conclude that Lynch controls the compulsory process challenge in the instant case. There is no compulsory process right to subpoena police investigation reports and nonprivileged materials before the preliminary examination.

[*P71] [**316] Schaefer asserts that if Lynch applies, he has demonstrated a "particularized need" for access to police records because of a "sixteen year delay in charging and its consequent effect on memory." We are not persuaded. An extended period of time between commission of the alleged offense and the filing of a criminal complaint may provide justification for subpoena access to police investigatory records under extraordinary circumstances. See Lynch, 82 Wis. 2d at 466. However, in Schaefer's case, the criminal complaint is sufficiently detailed to allow him to identify the complainant 15 and the alleged circumstances of the charges and to prepare to rebut the plausibility of the [****46] complainant's accusations and probable cause. The lengthy span of time since the alleged offenses will not incapacitate this defendant from preparing for the preliminary examination, and it does not justify the unbridled access to police investigatory materials that the defendant seeks.

[*P72] We note that this court has also addressed compulsory process in the context of a circuit court's subpoena ordering two newspaper reporters to appear at a pretrial hearing regarding the identities of their sources for several stories they wrote about a murder. State ex rel. Green Bay Newspaper Co. v. Cir. Ct., Branch 1, Brown County, 113 Wis. 2d 411, 415-16, 335 N.W.2d 367 (1983). We concluded that the circuit court erred when it ordered in camera disclosure of the reporters' sources and held the reporters in contempt for refusing to disclose this information. Id. at 429.

[*P73] [**317] Weighing the defendant's right to compulsory process for witnesses in his favor [****47] against the journalist's qualified nondisclosure privilege, we recognized that "a criminal defendant does not have an unqualified right to subpoena witnesses." Id. at 420. We observed that "[f]or the constitutional right to compulsory process to be invoked, a defendant must, if the subpoena is challenged, show there is a reasonable probability that the subpoenaed witnesses' testimony will be competent, relevant, material and favorable to his defense." Id. at 420-21. 16

[*P74] We went on to analyze the efficacy of the circuit court's order requiring in camera disclosure of reporter sources, concluding that the facts of the case did not suggest a need for such disclosure. We outlined a procedure for the circuit court to evaluate compulsory process rights implicated by desired evidence based upon whether "the evidence is necessary to the defense." Id. at 423. "Information is necessary to the defense if it tends to support [****48] the theory of defense which the defendant intends to assert at trial." Id. (emphasis added).

[*P75] [***477] The Green Bay Newspaper case evaluated compulsory process rights in terms of their relationship to trial evidence. Inasmuch as a criminal defendant does not have an unqualified right to require the appearance of any and all persons as witnesses for a trial, and a defendant's right to compulsory process at trial must satisfy certain standards, see id. at 420-21, we conclude a fortiori that the compulsory process [**318] rights of a criminal defendant at a preliminary stage of the criminal proceedings also must be subject to reasonable restrictions. See United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413, (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."). We have previously observed that "even though a defendant's right to present certain evidence is constitutionally protected, that right may have to 'bow to accommodate other legitimate interests in the criminal trial process.'" State v. Pulizzano, 155 Wis. 2d 633, 653, 456 N.W.2d 325 (1990) (quoting Chambers, 410 U.S. at 295). In our view, there is a legitimate interest in preserving [****49] the statutory scheme that prescribes pretrial discovery limitations under Wis. Stat. §§ 971.31(5)(b) and 971.23. Therefore, we decline to expand a criminal defendant's compulsory process rights to encompass a right to subpoena police reports and other non-privileged investigatory materials for examination and copying in anticipation of a preliminary hearing.

[*P76] Schaefer suggests that we adopt a procedure in which Wisconsin circuit courts would review subpoena duces tecum materials prior to the preliminary examination to resolve disputes regarding privilege, relevance, and materiality. He notes that Illinois has adopted such a procedure, see People ex rel. Fisher v. Carey, 77 Ill. 2d 259, 396 N.E.2d 17, 32 Ill. Dec. 904 (Ill. 1979), and he urges Wisconsin to follow suit.

[*P77] We respectfully decline this invitation. In Carey, the Illinois Supreme Court concluded that:

Subpoenaed material should be sent directly to the court because the subpoena is a judicial process or court writ, whereas discovery is the parties' procedure, a distinguishable concept under our rules. . . . The court then determines the relevance and materiality of the materials, and whether they are privileged, as well as whether [**319] the subpoena is unreasonable [****50] or oppressive. The State's attorney, of course, must be fully aware of the records sought from the investigative agency by the subpoena in order for him to object.

Carey, 396 N.E.2d at 19-20 (citation omitted) (emphasis added). 17

[*P78] The underlined language implies that the Illinois court established a proceeding--before the preliminary hearing--to hear objections and settle evidentiary disputes, even though Illinois rules at the time precluded the use of a subpoena to circumvent formal discovery (which was not scheduled to go into effect until "following indictment or information."). Id. at 19; see 58 Ill. 2d

Rule 411, 65 Ill. 2d Rule 412(g). The Carey court appears to have concluded that its ruling was constitutionally required.

[*P79] The Illinois Supreme Court's analysis is clearly supportive of Schaefer's position. On the other hand, the Illinois Supreme Court's analysis does not square with subsequent decisions of the United [***478] States Supreme Court, most notably Ritchie. The analysis also [****51] conflicts with our decision in Lynch. The Illinois court's heavy reliance on United States v. Burr, 25 Fed. Cas. 30, F. Cas. No. 14692d (C.C.D. Va. 1807), is intriguing, but that decision has no precedential value for us because it is not a decision by the United States Supreme Court, and it predated modern discovery rules.

[*P80] In United States v. Nixon, one of only a handful of Supreme Court cases to discuss and apply Burr, the Court commented that the subpoena duces [**320] tecum "was not intended to provide a means of discovery for criminal cases[.]" United States v. Nixon, 418 U.S. 683, 698, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). The Court construed the federal subpoena duces tecum provision, Federal Rule of Criminal Procedure Rule 17(c), as requiring, among other things, that "the application [be] made in good faith and [] not intended as a general 'fishing expedition.'" Id. at 699.

[*P81] As an additional matter of public policy, Schaefer notes that at least one county in Wisconsin, Washington County, conducts a pretrial status hearing where discovery material is customarily exchanged prior to the preliminary examination. We acknowledge the benefits that such an "open file" policy may produce in terms of an increased number of defense waivers of [****52] the preliminary examination as well as eventual guilty pleas. 18 As one commentator has observed, however, "[t]hough some prosecutors maintain an 'open file' policy, granting defenders access to the prosecution's case files, this is purely a policy choice on the prosecutor's part, not a legal right of defendants." David Luban, Are Criminal Defenders Different?, 91 Mich. L. Rev. 1729, 1738 (1993). No existing state statute or compulsory process provision of either the United States Constitution or the Wisconsin Constitution commands the state to divulge the entirety of police investigatory [**321] files to an accused before an information has been filed against him.

[*P82] Accordingly, we hold that Schaefer has no right to subpoena police reports and other non-privileged investigatory materials prior to his preliminary hearing under either the Compulsory Process Clause of the Sixth Amendment to the United States Constitution or Article 1, Section 7 of the Wisconsin Constitution.

2. Right to Effective Assistance of Counsel

[*P83] Finally, Schaefer contends that he is entitled to subpoena police reports and other investigatory materials to safeguard his right to effective assistance of counsel, which also is guaranteed by the Sixth Amendment to the United States Constitution. 19

[*P84] [***479] A defendant is [****54] entitled to the assistance of counsel at all critical stages of prosecution. United States v. Wade, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). In State v. Wolverton, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), we adopted the view of the Supreme Court that a preliminary hearing is a critical stage in the criminal process. Wolverton, 193 Wis. 2d at 252 (citing Coleman v. Alabama, 399 U.S. 1, 9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970)). Consequently, every defendant [**322] charged with a felony in Wisconsin is constitutionally entitled to the assistance of counsel at a preliminary hearing. Wolverton, 193 Wis. 2d at 253. We also observed, however, that "[a]lthough the right to counsel at a preliminary hearing is constitutionally guaranteed, the right to a preliminary hearing is purely statutory." Id. at 253 n.11 (citing State v. Moats, 156 Wis. 2d 74, 83, 457 N.W.2d 299 (1990)). This factor influences our analysis.

[*P85] In considering Schaefer's right to effective assistance of counsel at a preliminary examination, we must keep in mind the narrow purpose of the hearing. " [T]he limited scope of the preliminary hearing compresses the contours of the sixth amendment." Wiseman, et al., 9 Wisconsin Practice: Criminal Practice and Procedure § 8.12 (1996). "In [****55] particular, the defendant's right to present evidence and cross-examine the state's witnesses is severely limited by the summary nature of the preliminary hearing." Id.

[*P86] Schaefer's argument is somewhat unusual because he poses a prospective challenge to effective assistance of counsel. Schaefer argues that his defense counsel cannot be effective at a future preliminary examination without access to police reports and other similar materials, not that his counsel was ineffective in the past for lack of access to such evidence. To address Schaefer's position on the merits would require this court to hypothesize, in the abstract, what actions by defense counsel are necessary to preserve a criminal defendant's right to effective assistance of counsel at a preliminary examination. To adopt Schaefer's position would require us to create a per se rule that defense counsel is ineffective when counsel fails to subpoena police reports and other similar materials prior to a preliminary examination.

[*P87] [**323] This court operates under the principles adopted by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish a claim of ineffective assistance of counsel under Strickland, the [****56] defendant must demonstrate that: (1) defense counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment; and (2) this deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable. Strickland, 466 U.S. at 687.

[*P88] The primary consideration on the first prong is whether a reasonable basis existed for the lawyer's conduct. State v. Rock, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979). On the second prong, counsel will not be deemed ineffective unless the defendant is prejudiced by the lawyer's action or failure to act. State v. Felton, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). Since Schaefer's Sixth Amendment challenge is prospective, he must demonstrate that he would be prejudiced per se by defense counsel's inability to subpoena police reports prior to the preliminary hearing. See, e.g., United States v. Cronic, 466 U.S. 648, 659-60, 104 S. Ct. 2039, 80 [***480] L. Ed. 2d 657 (1984) (noting that prejudice is presumed where there is no "likelihood that any lawyer, even a fully competent one, could provide effective assistance" under a particular set of facts).

[*P89] Schaefer cites State v. Harper, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973), [****57] in which we said that effective counsel "must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." In so holding, we expressly approved of the 1971 American Bar Association Project on Standards [**324] For Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function, as a means of evaluating counsel's performance. See Harper, 57 Wis. 2d at 557 n.8. Schaefer places emphasis on ABA Standard 4.1:

4.1 Duty to investigate. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Harper, 57 Wis. 2d at 553 n.3 (emphasis added). He argues that the Standard's use of the word "prompt," coupled with our comment that "[t]he lawyer who is ignorant of [****58] the facts of the case incapacitates himself to serve his client effectively," id. at 553, should persuade us to hold that police records must be provided to defense counsel before the preliminary examination to preserve the defendant's Sixth Amendment rights.

[*P90] We cannot adopt Schaefer's argument. Harper can be distinguished by the fact the case concerned defense counsel's performance at trial, not his investigatory acumen prior to the preliminary examination. Id. at 551. ABA Standard 4.1, although calling for defense counsel to "explore all avenues" and "include efforts to secure information in the possession of the prosecution and law enforcement authorities," does not compel us to conclude that Schaefer's attorney would be ineffective if he failed to procure police investigative materials (including police reports) prior to Schaefer's preliminary examination.

[*P91] [**325] An attorney's performance at the preliminary examination does not define the level of performance expected of defense counsel at later stages of the proceeding. A "preliminary hearing is not a full evidentiary trial and [] the purpose of a preliminary examination is only to determine whether further criminal proceedings are justified." [****59] State v. Akins, 198 Wis. 2d 495, 512, 544 N.W.2d 392 (1996) (citing Taylor v. State, 55 Wis. 2d 168, 172-73, 197 N.W.2d 805 (1972)). Given the limited scope and purpose of the preliminary examination, a defendant's counsel may waive the hearing entirely, or deliberately decline to ask certain questions that would be relevant. We cannot say that Schaefer's counsel would be hand-cuffed and rendered ineffective by failing to procure police reports prior to Schaefer's preliminary examination.

[*P92] Defense counsel is not barred from conducting significant investigation into the case before the preliminary examination to rebut the plausibility of a witness's story and probable cause. This investigation would likely be based on the details in the complaint and information supplied by the defendant. In this case, nothing prevents counsel from identifying and seeking [***481] to interview the complainant's classmates and teammates, as well as Schaefer's co-workers and family. We note that the failure of classmates to corroborate the complainant's claim of sexual assaults would not undermine the plausibility of her story at the preliminary examination. Witness statements that do corroborate the complainant's [****60] claims are likely to be disclosed to the defendant before trial.

[*P93] Schaefer cannot reasonably argue that information contained in March 2006 police reports would offer indispensable information about the [**326] complainant's story that is not stated or implied in the May 2006 criminal complaint. The principal benefits to be gained from review of the police investigation file would be to determine the names of additional persons whom the police interviewed and whether the police had uncovered corroborating evidence. We cannot say that Schaefer's defense counsel will be ineffective at the preliminary examination without this information.

[*P94] Therefore, we hold that Schaefer has no Sixth Amendment right, based on effective assistance of counsel, to subpoena police reports and other non-privileged materials prior to his preliminary examination.

IV. CONCLUSION

[*P95] We conclude that a criminal defendant does not have a statutory or constitutional right to compel the production of police investigation reports and nonprivileged materials by subpoena duces tecum prior to the preliminary examination. A criminal defendant who employs the subpoena power in this manner is attempting to engage in discovery without [****61] authority in either civil or criminal procedure statutes and in conflict with criminal discovery statutes. Although a reasonable argument can be made for prosecutors to open their files to defendants at

an early point in criminal prosecutions, this argument does not translate into an enforceable right to subpoena police investigation reports and nonprivileged materials before a preliminary examination.

[*P96] Accordingly, we affirm the order of the circuit court granting the State's motion to quash Schaefer's subpoena duces tecum.

[**327] By the Court.--The order of the circuit court is affirmed.

Concur by: SHIRLEY S. ABRAHAMSON

Concur

[*P97] SHIRLEY S. ABRAHAMSON, C.J. (concurring). The question presented is whether a criminal defendant has a subpoena right to obtain and copy police investigation reports prior to the preliminary hearing. 20

[*P98] My answer to the question is "no," and I affirm the order of the circuit court. My answer is the same as that reached by the majority opinion. I reach this answer, however, by a shorter, more direct route than that taken by the majority opinion. My route avoids the majority opinion's case-stretching, law-making, and almost entirely dicta-laden detour through the fields of discovery and preliminary examination in criminal cases.

[*P99] The majority opinion appears to be more interested in developing law about preliminary examinations and discovery [***482] (both before and after an information is filed) than in answering the question of law posed by the instant case. I therefore do not join the majority opinion.

[*P100] I reason as follows:

(A) No statute gives the defendant a subpoena right to obtain and copy police investigation reports prior to the preliminary hearing.

[**328] (B) The defendant's claimed constitutional rights of compulsory process and effective assistance of counsel do not support the defendant's right to a subpoena for police files under the circumstances of the instant case.

(C) Although the defendant and the third-party brief [****63] of amici curiae (the Office of State Public Defender and the Innocence Project) raise serious questions about the reliability and fairness of preliminary examinations and trials when a criminal defendant is not given access to police records prior to the preliminary hearing, I am reluctant to conclude that this case is an

appropriate one in which to rule, as a matter of the inherent or superintending powers of this court, that unless good cause exists, law enforcement should give an accused access to police reports before the preliminary examination. The policy arguments of the defendant and the amici do, however, deserve further and serious attention, as the State's brief suggests, from this court in its rule making authority or from the legislature.

[*P101] I do not address the question whether the defendant may obtain the documents at issue by other means such as a request made under Wisconsin's open records law. The open records law is not raised in the present case. We should not pre-judge issues that are neither raised nor briefed and that may be pending in other cases. 21 Unfortunately, in footnote 4, the majority [**329] opinion weighs in on this unbriefed and unraised issue, suggesting that [****64] the provisions of Wisconsin's open records [***483] law are qualified by several provisions, including Wis. Stat. § (Rule) 905.09. 22 The majority opinion misreads § (Rule) 905.09. Although § (Rule) 905.09 creates an evidentiary privilege regarding law enforcement records, the rule explicitly states that this privilege does not apply "to the extent" that law enforcement records are "available by law to a person other than the federal government, a state or subdivision thereof." 23 The [**330] Judicial Council Committee's Note to the Supreme Court order establishing § (Rule) 905.09 explains that the evidentiary privilege for law enforcement records "is qualified by the phrase 'to the extent available by law' to preserve the supremacy of s. 19.21 permitting examination of public records and documents." 24 See 59 Wis. 2d R1, R142-43 (1973). It is the open records law that qualifies § (Rule) 905.09, not the converse as the majority opinion implies.

A

[*P102] The defendant relies upon Wis. Stat. § 885.01, a civil statute, to argue [****68] that his subpoena is a [**331] judicial process authorized by statute. According to the defendant, the civil subpoena statute applies to his criminal proceeding under Wis. Stat. § 972.11(1). Section 972.11(1) provides that the rules of evidence and practice in civil actions shall be applicable in criminal proceedings "unless the context of a section or rule manifestly requires a different construction." Furthermore, § 972.11(1) explicitly states, without any qualification about the context of a section or rule, that chapter 885 "shall apply in all criminal proceedings." 25 The subpoena statute, § 885.01, is part of chapter 885. Even if one reads § 972.11(1) as applying chapter 885 "unless the context of a section or rule manifestly requires a different construction," the context of § 885.01 does not "manifestly require[] a different construction" [***484] in the instant case. I therefore turn to § 885.01.

[*P103] Statutory interpretation in the present case begins with the text of Wis. Stat. § 885.01. Unfortunately, the majority opinion is fairly well along before it cursorily examines the subpoena statute at PP41-44.

[*P104] Wisconsin Stat. § 885.01(1) provides that a subpoena may be issued to require the attendance of witnesses and their production of lawful instruments of evidence in "any action, matter or proceeding or to be examined into before [enumerated persons] or other person authorized to take testimony in the state." Section 885.01(1) provides in full as follows:

885.01. The subpoena need not be sealed, and may be signed and issued as follows:

[**332] (1) By any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, [****70] committee or other person authorized to take testimony in the state. 26

[*P105] Section 885.02 prescribes the form of the subpoena, including a subpoena requiring the production of evidence.

[*P106] The defendant used the standard court form for subpoenas adopted pursuant to Wis. Stat. § (Rule) 971.025 by the Judicial Conference under § (Rule) 758.18(1). The standard court form for subpoenas is substantially the same as the form for subpoenas prescribed in § 885.02.

[*P107] The subpoena was issued by the clerk of circuit court of Waukesha County. 27 The subpoena requires the witness named (here the chief of police) to appear and give evidence at the type of proceeding described in the subpoena (here the proceeding was simply denominated a "Return of Records"). 28 A copy of the subpoena is attached.

[*P108] [**333] The defendant's subpoena does not satisfy the applicable statutes because the subpoena did not require the Brookfield police chief, in the words of Wis. Stat. § 885.01(1), to attend an "action, matter or proceeding pending or to be examined into before" the court. The Return of Records proceeding set forth in the subpoena is not a proceeding known in this state and is not described in the subpoena or briefs. Defense counsel explained in the circuit court that rather than have the subpoenaed records delivered to her office (a procedure for which she cites no authority), she used the subpoena to raise before the circuit court the legal issue of whether she could obtain the records by subpoena and expected the State to move to quash the subpoena.

[*P109] [***485] The defendant does not cite any statute providing for any court proceeding in which a criminal defendant or his or her attorney receives a witness's testimony [****72] or documents in or out of court prior to the preliminary examination. The defendant nevertheless argues that a witness or evidence may be subpoenaed for the sole purpose of producing

documents prior to the preliminary examination. I disagree with the defendant under the circumstances of the present case.

[*P110] The defendant's subpoena in the present case seeking documents from a potential witness does not command the witness "to attend an action, matter or proceeding pending or to be examined into before" the commissioner or court under Wis. Stat. § 885.01(1) to be held on July 13, 2006. No hearing was to take place on July 13, 2006. Defense counsel obtained a return date for purposes of completing the subpoena [**334] form, but no hearing at which the witness was to appear and testify was scheduled. The circuit court recognized this flaw in the subpoena demand, observing, "I am asked here today . . . to in essence create some type of new beast, some new creature not provided by the statute . . . whether we call it a return of records or a review of records or production of records." 29

[*P111] No witness's testimony or lawful instrument of evidence, whether provided by the police chief or any other witness, was required in the Return of Records proceeding. The court commissioner was not to consider any matter in respect to which the Brookfield police chief might have supplied relevant testimony or produced relevant evidence. The sole apparent purpose of the Return of Records proceeding, according to the defendant, was to determine the validity of the defendant's demand that there be a transfer of information and documents from the Brookfield police chief to the defendant and to transfer the information and documents to the defendant if the court determined that the defendant's demand was valid.

[*P112] The majority opinion interprets the subpoena statutes as I do and concludes as I do: "In short, no subpoena statute authorizes Schaefer's action." Majority op., P45. 30

[*P113] [**335] Nevertheless the majority opinion marches onward. Not satisfied with its holding that the defendant has no statutory authority for the subpoena, the majority opinion embarks upon a confusing and ultimately fruitless discussion of the criminal discovery statutes, §§ 971.23 and 971.31(5)(b), declaring that the defendant's subpoena is "inconsistent with our criminal discovery statutes." See majority op., P41.

[*P114] Interestingly, the defendant lays no claim to a discovery right under either [***486] the criminal discovery statute, § 971.23, or the civil statutes, Wis. Stat. §§ 804.01(2) [****75] and 804.09, to obtain the materials demanded in his subpoena. I agree with the defendant that neither the civil discovery statutes nor § 971.23, entitled "Discovery and inspection," applies in the present case to authorize the subpoena.

[*P115] Nevertheless the majority devotes almost one-half of its opinion to analyzing our criminal discovery statutes and the nature and purpose of discovery in general. See majority op., PP18-40, 46-59. The majority opinion's lengthy discussion of the criminal discovery statute, Wis.

Stat. § 971.23, in relation to the present case, ignores the text of § 971.23 and related statutes and will likely confuse the law.

[*P116] The text of Wis. Stat. § 971.23 is clearly not applicable to the instant case. The defendant is clearly [**336] correct in not trying to rely on § 971.23, and the majority opinion clearly errs in reaching out to apply the criminal discovery statutes to the present case.

[*P117] First, motions for discovery under § 971.23 may be made only after the information is filed. See § 971.31(5)(b). The subpoena in the present case is not a motion (although the majority opinion at P54 nearly declares the subpoena a motion). 31 Moreover, no information has been filed in the [****76] present case.

[*P118] Second, Wis. Stat. § 971.23 governs discovery and the district attorney. It governs what a district attorney shall disclose to a criminal defendant. 32 The [**337] present case involves disclosure by a police chief to the defendant. Nothing in the text of § 971.23 governs disclosure by law enforcement agencies to a criminal defendant.

[*P119] The majority opinion ignores the plain language of Wis. Stat. § 971.23 governing district attorneys and toys with the idea of adding the words "law enforcement officers" to § 971.23, asserting in a footnote that this court is "reluctant to treat the police department and the district attorney's office as separate entities" for purposes of § 971.23(1) because the police and the district [****78] attorney are "related" for purposes of this statute. 33 The majority does not explain why the relationship between the two separate entities for purposes [***487] of a statutory provision does not mean simply that the two entities should be treated as separate but related entities for purposes of the statute.

[*P120] The majority opinion errs in musing that law enforcement and the district attorney perhaps may be treated as one. In our system of government, law enforcement and the district attorney's office are two separate entities, with separate functions and subject to different codes of conduct, although the two often work together. 34 TV's Law & Order gets it right: "In the [**338] criminal justice system, the people are represented by two separate yet equally important groups: the police, who investigate crime, and the district attorneys, who prosecute the offenders." The legislature has treated these separate entities differently in the criminal discovery statutes, using Wis. Stat. § 971.23 to govern defendants' rights against district attorneys. Section 971.23 does not govern the question of defendants' similar rights against law enforcement agencies. This court should not, [****79] as the majority opinion appears to do, disturb the relationship of law enforcement and district attorneys in the Wisconsin criminal justice system. 35

[*P121] [**339] [***488] The majority opinion twists and bends to avoid the plain language of the discovery statute as the text of the statutes proves inconvenient to the majority's unclear theses about discovery in criminal cases. Because the majority opinion's analysis is so [**340] badly at odds with the plain language of the criminal discovery statutes, the majority cannot bring itself to reach any actual holding regarding what the criminal discovery statutes mean and how they should be applied to the present case. The majority opinion concludes not that the criminal discovery statutes actually apply to and forbid the defendant's subpoena, but rather that the criminal discovery statutes are "inconsistent" with the subpoena; 36 not that the subpoena is governed by Wis. Stat. § 971.31(5)(b), but rather that it is "arguably" governed by that provision; 37 not that the subpoena is a "motion," [****83] but rather that it "satisfies some of the criteria of a 'motion'"; 38 and not that the district attorney and police department are a single entity for purposes of § 971.31(5)(b), but rather that the two entities are "related" and "linked." 39

[*P122] The majority opinion's lengthy analysis ultimately comes up empty. In the face of the plain text of the criminal statutes, the majority opinion cannot hold that the criminal discovery statutes apply to the defendant's subpoena.

[*P123] The majority opinion's contortionist interpretation and slippery phrasing are unnecessary. A straightforward, simple reading of the subpoena statutes demonstrates that the defendant's subpoena was properly quashed by the circuit court. As the majority opinion itself appears to conclude, the criminal discovery statutes do not govern the defendant's subpoena to law enforcement officers; the criminal discovery statutes are fully consistent with the subpoena statutes for [**341] purposes of the instant case; and the criminal discovery statutes need not be discussed at all in the instant case. The majority opinion fabricates a need to "harmonize" the two sets of statutes, 40 but the [****84] majority opinion never identifies a single inconsistency between the two sets of statutes that needs harmonization.

[*P124] The majority opinion's interpretation of our criminal discovery statutes ignores the text of Wis. Stat. § 971.23 and § 971.31(5)(b) and risks creating undue confusion in the law governing discovery and preliminary examinations in criminal cases in this state.

[*P125] For the reasons I have set forth, I conclude that no statute allows the defendant to have the benefit of the subpoena at issue in the present case. I therefore conclude that the subpoena at issue is not authorized by any statute and is of no force and effect.

B

[*P126] The defendant argues for access to the police chief's documents under the [***489] Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. 41 Indeed, the constitutional argument is the major argument in his brief. He argues

that the right to compulsory process includes the right to access and copy police investigation reports prior to the preliminary examination as a matter of the [**342] right to defend and that the right to effective assistance of counsel at the preliminary examination cannot be satisfied without [****85] the defense attorney having these materials before the preliminary examination.

[*P127] The defendant argues that the allegations in the present case are very stale and involve memories of events sixteen years earlier; that under these circumstances he needs the information subpoenaed to prepare for the probable cause preliminary examination; and that the subpoenaed documents are valuable tools that could be used to test the plausibility of witnesses' testimony at the preliminary examination, a critical phase of the prosecution. I do not view this explanation as demonstrating a particularized need for inspection allowed under the Lynch case.

[*P128] I agree with the defendant that the effective assistance of counsel requires the time and ability to investigate and prepare. 42 I conclude, however, that the defendant's inability to access full information prior to the preliminary examination [****86] in the instant case does not necessarily implicate the defendant's federal constitutional right to a fair preliminary examination and does not implicate the defendant's right to effective assistance of counsel in light of the purpose and scope of the preliminary examination and a defendant's limited rights at the preliminary examination.

[*P129] Although the records subpoenaed may be relevant to the probable cause determination, may enable defense counsel to fashion a vital impeachment tool for use in cross-examining the state's witnesses at trial, may preserve testimony favorable to the accused, or may allow preparation of a proper defense at trial, I [**343] am not convinced that the defendant's inability to obtain the subpoenaed information before the preliminary examination in the present case rises to a federal constitutionally protected claim. As Professor Mary Prosser has detailed, the United States Supreme Court has limited the pretrial information required to be given to the defendant. 43 The Court has largely limited prosecutors' constitutional discovery obligations to exculpatory evidence and has focused on the adversarial [****87] nature of the relationship between the district attorney and defense counsel rather than on the question of the reliability of outcomes in criminal cases. 44

[*P130] I cannot conclude that material in law enforcement files would be treated differently than material in the district attorney's files for federal constitutional purposes. I do not explore whether the Wisconsin constitution grants the defendant a right to information before a preliminary examination.

[***490] C

[*P131] The office of the State Public Defender and the Wisconsin Innocence Project join in a non-party brief, often referred to as an amicus brief. They argue (as the defendant does in his brief) that it is sound public policy to permit a criminal defendant access to police records prior to the preliminary hearing. The amici assert that such a practice is used in other states and communities, and in the federal system.

[*P132] The amici contend that such a practice (1) would lead to fewer wrongful prosecutions and convictions by better equipping innocent defendants to [**344] challenge the State at [****88] the preliminary examination; (2) would help to reinforce the principle that police investigation should be viewed as objective and non-adversarial fact gathering; and (3) would render more fair the preliminary hearing, a proceeding in which the State currently wields an informational advantage, and the trial.

[*P133] The briefs of the defendant and amici advise the court that some district attorneys in Wisconsin already maintain an "open file" system permitting a defendant broad access to information in their possession and that some states, communities, and federal courts allow defendants access to information early in the process.

[*P134] Based on these policy arguments and the experience in other jurisdictions, the defendant and amici ask this court to establish a procedure allowing defendants access to non-privileged police records before the preliminary hearing to determine their relevance. 45

[*P135] The State argues that any change in procedure should come "through the normal legislative process, or through this court's formal rule-making process." 46 According to the State, "[i]t would be highly inappropriate for this court to use this [****89] lone appeal as the vehicle for creating such a radical change in criminal procedure." 47

[*P136] The Wisconsin Constitution confers upon this court superintending authority over all Wisconsin courts. 48 We have traditionally construed our superintending [**345] power broadly as authority to control litigation in the courts. 49 Our superintending authority, however, is not lightly invoked. 50 This court ordinarily has refused to modify rules of practice or procedure on appeal. 51

[*P137] The defendant and the amici raise troubling questions about the reliability and fairness of preliminary examinations and trials when a criminal defendant is not given access to police records and all non-privileged information early in the process. The criminal justice system must be reliable to convict the guilty and to prevent wrongful conviction of the innocent. The Innocence Projects across the country [****90] have demonstrated that wrongful convictions do occur, even in Wisconsin. 52 The ideal in our legal system is that "[s]ociety wins not only when the guilty are convicted [***491] but when criminal trials are fair." 53 Indeed, "the more we

learn about the incidence of wrongful convictions, the less it makes sense to deprive a defendant of access to relevant evidence" at the earliest possible opportunity. 54 The majority opinion acknowledges the wisdom of law enforcement and district attorneys adopting the practice proposed by the defendant. See majority op., P81.

[*P138] [**346] The instant case presents, however, a question of first impression, not a question that this court has had occasion to consider or address previously. 55 I am not convinced that this case is an appropriate one in which to rule, as a matter of the inherent or superintending power of this court, that unless good cause exists, law enforcement should give an accused access to police reports before a preliminary examination. Under these circumstances, I therefore [****91] conclude that this court should not in the instant case invoke its superintending authority by establishing a procedure allowing defendants access to non-privileged law enforcement records prior to the preliminary hearing.

[*P139] For the reasons set forth, I write separately. My reasoning and conclusions can be summarized as follows:

(A) None of the subpoena statutes and no other statute gives a subpoena right to the defendant to obtain and copy police investigation reports prior to the preliminary hearing.

(B) The defendant's claim of a constitutional right to compulsory process or effective assistance of counsel do not support the defendant's right to a subpoena for police files under the circumstances of the instant case.

(C) Although the defendant and the third-party brief of amici curiae (the Office of State Public Defender and the Innocence Project) raise serious questions about the reliability and fairness of preliminary examinations [****92] and trials when a criminal defendant is [**347] not given access to police records prior to the preliminary hearing, I am reluctant to conclude that this case is an appropriate one in which to rule, as a matter of the inherent or superintending powers of this court, that unless good cause exists, law enforcement should give an accused access to police reports before the preliminary examination. The policy arguments of the defendant and the amici do, however, deserve further and serious attention, as the State's brief suggests from this court in its rule making authority or from the legislature.

[*P140] I am authorized to state that Justices ANN WALSH BRADLEY and LOUIS B. BUTLER, JR. join this opinion. [**348]

UNITED STATES V. ARMSTRONG
Supreme Court of the United States, February 26, 1996, Argued ; May 13, 1996, Decided, No. 95-157.

Reporter
517 U.S. 456 * | 116 S. Ct. 1480 ** | 134 L. Ed. 2d 687 *** | 1996 U.S. LEXIS 3239 **** | 64 U.S.L.W. 4305 | 96 Cal. Daily Op. Service 3351 | 9 Fla. L. Weekly Fed. S 559

UNITED STATES, PETITIONER v. CHRISTOPHER LEE ARMSTRONG ET AL.

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Reported at: 1995 U.S. App. LEXIS 4040.

Disposition: 48 F.3d 1508, reversed and remanded.

Case Summary

Procedural Posture
Government appealed from an order of the United States Court of Appeals for the Ninth Circuit affirming the trial court's order dismissing the indictments against respondents for drug and firearms offenses, challenging the court's decision regarding a selective-prosecution claim.

Overview
Respondents were indicted on charges of conspiring to possess and distribute more than 50 grams of cocaine base, and federal firearms offenses. Respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they were African American. The appellate court affirmed the trial court's order of dismissal, holding that a defendant was not required to show that government had failed to prosecute others who were similarly situated. The Court granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim. The Court reversed because respondents failed to show that government declined to prosecute similarly situated suspects of other races. The phrase "defendant's defense," as used in Fed. R. Crim. P. 16(a)(1)(C), does not encompass allegations of selective prosecution.

Outcome
The Court reversed and remanded the judgment of the appellate court which affirmed the trial court's order of dismissal.

Decision

Blacks prosecuted for drug offenses held to have failed to satisfy threshold showing required for discovery in support of selective-prosecution claim, by failing to show that government had declined to prosecute others similarly situated.

Summary
Some federal criminal defendants were indicted in the United States District Court for the Central District of California on firearms charges and on drug conspiracy charges involving cocaine base ("crack"). The defendants (1) filed a motion for discovery or for dismissal of the indictment; (2) alleged that they had been selected for federal prosecution because they were black; and (3) offered an affidavit with an accompanying "study," to the effect that in every one of the 24 cases involving similar drug charges and closed by a federal public defender's office during the prior year, the defendant had been black. The District Court granted the motion and ordered some discovery from the government in support of the selective-prosecution claim. The government filed a motion for reconsideration. The defense response included (1) an affidavit by one of the defendants' attorneys, who alleged that an intake coordinator at a drug treatment center had told the attorney that there were an equal number of Caucasian users and dealers to minority users and dealers; (2) an affidavit from a criminal defense attorney, who alleged that in his experience, many nonblacks were prosecuted in state court for crack offenses; and (3) a newspaper article which reported that federal "crack criminals"--almost all of whom were said to be black--were being punished far more severely than if they had been caught with powder cocaine. The District Court denied the motion for reconsideration. When the government indicated that it would not comply with the discovery order, the court dismissed the case. On appeal, a panel of the United States Court of Appeals for the Ninth Circuit reversed, expressing the view that in order to obtain discovery in support of a selective-prosecution claim, defendants must provide a colorable basis for believing that others similarly situated have not been prosecuted (21 F3d 1431). However, on rehearing en banc, the Court of Appeals affirmed the order of dismissal and expressed the view that (1) for discovery purposes, a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated, and (2) in the case at hand, the District Court judge's discovery order was within her discretion (48 F3d 1508).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Rehnquist, Ch. J., joined by O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg JJ., and joined in pertinent part by Breyer, J., as to holdings 2 and 3 below, it was held that (1) Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure authorizes defendants to examine government documents material to the preparation of the defendants' defense against the government's case-in-chief, but not government documents material to the preparation of selective-prosecution claims; (2) on the assumption that discovery from the government in support of a federal criminal defendant's claim of selective prosecution--on the unjustifiable basis of race, religion, or other arbitrary classification, in violation of the equal protection

component of the due process clause of the Federal Constitution's Fifth Amendment--is available to the defendant if the defendant can make the appropriate threshold showing, then in a case which does not involve direct admissions by prosecutors of discriminatory purpose, the defendant is required to produce some evidence that similarly situated defendants of other races have not been prosecuted, in order to satisfy the discriminatory-effect element of the required threshold showing; and (3) under this standard, the defendants in the case at hand had failed to satisfy the threshold showing, by failing to show that the government had declined to prosecute similarly situated suspects of other races.

Souter, J., concurring, joined in the Supreme Court's discussion of Rule 16 of the Federal Rules of Criminal Procedure only to the extent of its application to the issue in the case at hand.

Ginsburg, J., concurring, expressed the view that she did not read the Supreme Court's opinion as foreclosing Rule 16 issues not tendered for review.

Breyer, J., concurring in part and concurring in the judgment, expressed the view that while Rule 16 should not be read to limit a criminal defendant's discovery rights to documents related to the government's case-in-chief, the failure of the defendants in the case at hand to find some instances in which the government had not prosecuted similarly situated Caucasians amounted to a failure to make the threshold showing required by Rule 16 in respect to materiality.

Stevens, J., dissenting, expressed the view that--while the facts presented by the defendants in support of their selective-prosecution claim were not sufficient to prove their defense or to give them a right to discovery under Rule 16 or under the District Court's inherent power to order discovery--the District Court judge did not exceed her powers or abuse her discretion in concluding that the evidence was sufficiently disturbing to order discovery that might help to explain the conspicuous racial pattern of cases before the judge's court.

Syllabus

In response to their indictment on "crack" cocaine and other federal charges, respondents filed a motion for discovery or for dismissal, alleging that they were selected for prosecution because they are black. The District Court granted the motion over the Government's argument, among others, that there was no evidence or allegation that it had failed to prosecute nonblack defendants. When the Government indicated it would not comply with the discovery order, the court dismissed the case. The en banc Ninth Circuit affirmed, holding that the proof requirements for a selective-prosecution claim do not compel a defendant to demonstrate that the Government has failed to prosecute others who are similarly [****2] situated.

Held: For a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races. Pp. 461-471.

(a) Contrary to respondents' contention, Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases, does not support the result reached by the Ninth Circuit in this case. Rule 16(a)(1)(C) -- which, inter alia, requires the Government to permit discovery of documents that are "material to the preparation of the . . . defense" or "intended for use by the government as evidence in chief" -- applies only to the preparation of the "defense" against the Government's case in chief, not to the preparation of selective-prosecution claims. This reading creates a perceptible symmetry between the types of documents referred to in the Rule. Moreover, its correctness is established beyond peradventure by Rule 16(a)(2), which, as relevant here, exempts from discovery the work product of Government attorneys and agents made in connection with the case's investigation. Respondents' construction of "defense" [****3] as including selective-prosecution claims is implausible: It creates the anomaly of a defendant's being able to examine all Government work product under Rule 16(a)(1)(C), except that which is most pertinent, the work product in connection with his own case, under Rule 16(a)(2). Pp. 461-463.

(b) Under the equal protection component of the Fifth Amendment's Due Process Clause, the decision whether to prosecute may not be based on an arbitrary classification such as race or religion. Oyler v. Boles, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501. In order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. Ibid. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. Ah Sin v. Wittman, 198 U.S. 500, 49 L. Ed. 1142, 25 S. Ct. 756. Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712, and Hunter v. Underwood, 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916, distinguished. Although Ah Sin involved federal review of a state conviction, a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the [****4] core powers of the Executive Branch of the Federal Government, the power to prosecute. Discovery imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. Assuming that discovery is available on an appropriate showing in aid of a selective-prosecution claim, see Wade v. United States, 504 U.S. 181, 118 L. Ed. 2d 524, 112 S. Ct. 1840, the justifications for a rigorous standard of proof for the elements of such a case thus require a correspondingly rigorous standard for discovery in aid of it. Thus, in order to establish entitlement to such discovery, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. In this case, respondents have not met this required threshold. Pp. 463-471.

Counsel: Solicitor General Days argued the cause for the United States. With him on the briefs were Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben, Irving L. Gornstein, and Kathleen A. Felton.

Barbara E. O'Connor, by appointment of the Court, 516 U.S. 1007, argued the cause for respondents. With her on the brief for respondents Martin et al. were Maria E. Stratton, Timothy C. Lannen, by appointment of the Court, 516 U.S. 1007, David Dudley, Bernard J. Rosen, and Eric Schnapper. Joseph F. Walsh, by appointment of the Court, 516 U.S. 1007, filed a brief for respondent Rozelle. *

Judges: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined, and in which BREYER, J., joined in part. SOUTER, J., post, p. 471, and GINSBURG, J., post, p. 471, filed concurring opinions. BREYER, J., filed an opinion concurring in part and concurring in the judgment, post, p. 471. STEVENS, J., filed a dissenting opinion, post, p. 476.

Opinion by: REHNQUIST

Opinion
[***694] [*458] [**1483] [****5] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A] [2A] [3A]In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the [***695] same, in violation of 21 U.S.C. §§ 841 and 846 (1988 ed. and Supp. IV), and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents [****6] carrying firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found [*459] more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a "Paralegal Specialist," employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case. 1

[****7] [**1484] The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation "that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them." App. 150. The District Court granted the motion. It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses. Id., at 161-162.

The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits [*460] and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained [****8] in an affidavit that the decision to prosecute met the general criteria for prosecution, because

"there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby [***696] indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations." Id., at 81.

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "large-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." J. Featherly & E. Hill, Crack Cocaine Overview 1989; App. 103.
In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of caucasian [****9] users and dealers to minority users and dealers." Id., at 138. Respondents also submitted

an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, id., at 141, and a newspaper article reporting that federal "crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, [*461] and almost every single one of them is black," Newton, Harsher Crack Sentences Criticized as Racial Inequity, Los Angeles Times, Nov. 23, 1992, p. 1; App. 208-210.

The District Court denied the motion for reconsideration. When the Government indicated it would not comply with the court's discovery order, the court dismissed the case. 2

[****10] A divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, holding that, because of the proof requirements for a selective-prosecution claim, defendants must "provide a colorable basis for believing that 'others similarly situated have not been prosecuted'" to obtain discovery. 21 F.3d 1431, 1436 (1994) (quoting United States v. Wayte, 710 F.2d 1385, 1387 (CA9 1983), aff'd, 470 U.S. 598, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985)). The Court of Appeals voted to rehear the case en banc, and the en banc panel affirmed the District Court's order of dismissal, holding that "a defendant is not required to demonstrate that the government [**1485] has failed to prosecute others who are similarly situated." 48 F.3d 1508, 1516 (1995) (emphasis deleted). We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim. 516 U.S. 942 (1995).

[1B]Neither the District Court nor the Court of Appeals mentioned Federal Rule of Criminal Procedure 16, which by its terms governs discovery in criminal cases. Both parties now discuss the Rule in their briefs, and respondents contend that it supports the result reached by the Court of Appeals. Rule 16 provides, in pertinent [****11] part:

"Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, [***697] photographs, tangible objects, [*462] buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Fed. Rule Crim. Proc. 16(a)(1)(C).

Respondents argue that documents "within the possession . . . of the government" that discuss the government's prosecution strategy for cocaine cases are "material" to respondents' selective-prosecution claim. Respondents argue that the Rule applies because any claim that "results in nonconviction" if successful is a "defense" for the Rule's purposes, and a successful selective-prosecution claim has that effect. Tr. of Oral Arg. 30.
We reject this argument, because we conclude that in the context of Rule 16 "the defendant's defense" means the defendant's response to the Government's case in chief. While it might be

argued that as a general matter, the concept [****12] of a "defense" includes any claim that is a "sword," challenging the prosecution's conduct of the case, the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the "shield-only" reading. If "defense" means an argument in response to the prosecution's case in chief, there is a perceptible symmetry between documents "material to the preparation of the defendant's defense," and, in the very next phrase, documents "intended for use by the government as evidence in chief at the trial."

If this symmetry were not persuasive enough, paragraph (a)(2) of Rule 16 establishes beyond peradventure that "defense" in paragraph (a)(1)(C) can refer only to defenses in response to the Government's case in chief. Rule 16(a)(2), as relevant here, exempts from defense inspection "reports, memoranda, or other internal government documents made [*463] by the attorney for the government or other government agents in connection with the investigation or prosecution of the case."

Under Rule 16(a)(1)(C), a defendant may examine documents material to his defense, but, under Rule 16(a)(2), [****13] he may not examine Government work product in connection with his case. If a selective-prosecution claim is a "defense," Rule 16(a)(1)(C) gives the defendant the right to examine Government work product in every prosecution except his own. Because respondents' construction of "defense" creates the anomaly of a defendant's being able to examine all Government work product except the most pertinent, we find their construction implausible. We hold that Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case in chief, but not to the preparation of selective-prosecution claims.

[2B] [3B]In Wade v. United States, 504 U.S. 181, 118 L. Ed. 2d 524, 112 S. Ct. 1840 (1992), we considered whether a federal court may review a Government decision not to file a motion to reduce a defendant's sentence for substantial assistance to the prosecution, to determine whether the Government based its decision on the defendant's race or religion. In holding that such a decision was reviewable, we assumed that discovery [***698] would be available if the defendant could make the appropriate threshold showing, although we concluded that the defendant in that case [****14] did not make such a showing. See id., at 186. [**1486] We proceed on a like assumption here.

[2C] [4A] A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption," cf. United States v. Mezzanatto, 513 U.S. 196,

203, 130 L. Ed. 2d 697, 115 S. Ct. 797 [*464] (1995), that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

[4B] [5] A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. Heckler v. Chaney, 470 U.S. 821, 832, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). The Attorney General and United States Attorneys retain "'broad discretion'" to enforce the Nation's criminal laws. Wayte v. United States, 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380, n. 11, 73 L. Ed. 2d 74, 102 S. Ct. 2485 (1982)). They have this latitude because they are designated by statute as [****15] the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "the presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978).

[2D] [4C] [6] [7A]Of course, a prosecutor's discretion is "subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114, 125, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979).One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, Bolling v. Sharpe, 347 U.S. 497, 500, 98 L. Ed. 884, 74 S. Ct. 693 (1954), is that the decision whether to prosecute may not be based on [****16] "an unjustifiable standard such as race, religion, or other arbitrary classification," Oyler v. Boles, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and [*465] oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. Yick Wo v. Hopkins, 118 U.S. 356, 373, 30 L. Ed. 220, 6 S. Ct. 1064 (1886).

[7B] [8] In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." Chemical Foundation, supra, at 14-15. [***699] We explained in Wayte why courts are "properly hesitant to examine the decision whether to prosecute." 470 U.S. at 608. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis [****17] the courts are competent to undertake." Id., at 607. It also stems from a concern not to unnecessarily impair the

performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." Ibid.

[7C] [**1487] The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." Id., at 608.The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." Ibid.; accord, Oyler, supra, at 456. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. This requirement has been established in our case law since Ah Sin v. Wittman, 198 U.S. 500, 49 L. Ed. 1142, 25 S. Ct. 756 (1905). Ah Sin, a subject of China, petitioned a California state court for a writ of habeas corpus, seeking discharge from imprisonment under a San Francisco County [*466] [****18] ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. Id., at 503. He alleged in his habeas petition "that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise.'" Id., at 507. We rejected his contention that this averment made out a claim under the Equal Protection Clause, because it did not allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." Id., at 507-508.

[4D] [7D]The similarly situated requirement does not make a selective-prosecution claim impossible to prove. Twenty years before Ah Sin, we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. Yick Wo, 118 U.S. at 374. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in [****19] wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings "under similar conditions." Ibid. We explained in Ah Sin why the similarly situated requirement is necessary:

"No latitude of intention should be indulged in a case like this. There [***700] should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the Yick Wo case, but that it was made so by the manner of its administration. This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a Federal court is invoked [*467] to interfere with the course of criminal justice of a State." 198 U.S. at 508 (emphasis added).

Although Ah Sin involved federal review of a state conviction, we think a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the core powers of the Executive Branch of the Federal Government, the power to prosecute.
[****20] Respondents urge that cases such as Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), and Hunter v. Underwood, 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985), cut against any absolute requirement that there be a showing of failure to prosecute similarly situated individuals. We disagree. In Hunter, we invalidated a state law disenfranchising persons convicted of crimes involving moral turpitude. Id., at 233. Our holding was consistent with ordinary equal protection principles, including the similarly situated requirement. There was convincing direct evidence that the State had enacted the provision for the purpose of disenfranchising blacks, id., at 229-231, and indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites: Blacks were "'by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under'" the law in question, id., at 227 (quoting Underwood v. Hunter, 730 F.2d 614, 620 (CA11 1984)). Hunter thus affords no support for respondents' position.

[9] [**1488] In Batson, we considered "the standards for assessing a prima facie case in the context of discriminatory selection of [****21] the venire" in a criminal trial. 476 U.S. at 96.We required a criminal defendant to show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race" and that this fact, the potential for abuse inherent in a peremptory strike, and "any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Ibid. During jury selection, the entire res gestae take place in front of the trial [*468] judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a "pattern" of singling out members of a single race for peremptory challenges. See id., at 97. He is in a position to discern whether a challenge to a black juror has evidentiary significance; the significance may differ if the venire consists mostly of blacks or of whites. Similarly, if the defendant makes out a prima facie case, the prosecutor is called upon to justify only decisions made in the very case then before the court. See id., at 97-98. The trial judge need not review prosecutorial [***701] [****22] conduct in relation to other venires in other cases.

[2E]Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like "colorable basis," "substantial threshold showing," Tr. of Oral Arg. 5, "substantial and concrete basis," or "reasonable likelihood," Brief for Respondents Martin et al. 30. However, the many labels for this showing conceal the degree of consensus about the evidence necessary [****23] to meet it. The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense," discriminatory effect and discriminatory intent. United States v. Berrios, 501 F.2d 1207, 1211 (CA2 1974).

[*469] [2F] [3C]In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. 48 F.3d at 1516. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law. United States v. Parham, 16 F.3d 844, 846-847 (CA8 1994); United States v. Fares, 978 F.2d 52, 59-60 (CA2 1992); United States v. Peete, 919 F.2d 1168, 1176 (CA6 1990); C. E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1437-1438 (CA10 1988); United States v. [****24] Greenwood, 796 F.2d 49, 52-53 (CA4 1986); United States v. Mitchell, 778 F.2d 1271, 1277 (CA7 1985). As the three-judge panel explained, "'selective prosecution' implies that a selection has taken place." 21 F.3d at 1436. 3

[2G] [3D]

[10]The Court of Appeals reached its decision in part because it started "with the presumption that people of all races commit all types of crimes -- not with the premise that any [**1489] type of crime is the exclusive province of any particular racial or ethnic group." 48 F.3d at 1516-1517.It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing [****25] Comm'n, [***702] 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, ibid.; and 91% of those convicted for pornography or prostitution were white, id., at 41 (Table 13). Presumptions [*470] at war with presumably reliable statistics have no proper place in the analysis of this issue.

[2H] [3E]The Court of Appeals also expressed concern about the "evidentiary obstacles defendants face." 48 F.3d at 1514.But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated

members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold -- a credible showing of different treatment of similarly situated persons -- adequately balances the Government's [****26] interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. Berrios, supra, at 1211. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore [*471] reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Concur by: SOUTER; [****27] GINSBURG; BREYER (In Part)

Concur
JUSTICE SOUTER, concurring.

I join the Court's opinion, but in its discussion of Federal Rule of Criminal Procedure 16 only to the extent of its application to the issue in this case.

JUSTICE GINSBURG, concurring.

I do not understand the Court to have created a "major limitation" on the scope of discovery available under Federal Rule of Criminal Procedure 16. See post, at 475 (BREYER, J., concurring in part and concurring in judgment). As I see it, the Court has decided a precise issue: whether the phrase "defendant's defense," as used in Rule 16(a)(1)(C), encompasses allegations of selective prosecution. I agree with the Court, for reasons the opinion states, that subdivision (a)(1)(C) does not apply to selective prosecution claims. The Court was not called upon to decide

[***703] here whether Rule 16(a)(1)(C) applies in any other context, for example, to affirmative defenses unrelated to the merits. With the caveat that I do not read today's opinion as precedent foreclosing issues not tendered for review, I join the Court's opinion.

JUSTICE BREYER, concurring in part and concurring in the judgment.

I write separately because, in my view, Federal Rule [****28] of Criminal Procedure 16 does not limit a defendant's discovery rights to documents related to the Government's case in chief. Ante, at 462-463. The Rule says that "the government shall permit the defendant to inspect and copy" certain physical items (I [**1490] shall summarily call them "documents") "which are material to the preparation of the defendant's defense." Fed. Rule Crim. Proc. 16(a)(1)(C). A "defendant's defense" can take many forms, including (1) a simple response [*472] to the Government's case in chief, (2) an affirmative defense unrelated to the merits (such as a Speedy Trial Act claim), (3) an unrelated claim of constitutional right, (4) a foreseeable surrebuttal to a likely Government rebuttal, and others. The Rule's language does not limit its scope to the first item on this list. To interpret the Rule in this limited way creates a legal distinction that, from a discovery perspective, is arbitrary. It threatens to create two full parallel sets of criminal discovery principles. And, as far as I can tell, the interpretation lacks legal support.

The Court bases its interpretation upon what it says is a "perceptible symmetry," ante, at 462, between two phrases in Rule 16(a)(1)(C) -- the [****29] phrase "material to the preparation of the defendant's defense," and the next phrase, "intended for use by the government as evidence in chief at the trial." To test the Court's argument, consider these two phrases in context. The Rule says:

"Upon request of the defendant the government shall permit the defendant to inspect and copy [documents and other items] . . . which [1] are material to the preparation of the defendant's defense or [2] are intended for use by the government as evidence in chief at the trial, or [3] were obtained from or belong to the defendant." Fed. Rule Crim. Proc. 16(a)(1)(C).

Though symmetry may reside in the eye of the beholder, I can find no relevant symmetry here. Rather, the language suggests a simple three-part categorization of the documents and other physical items that the Rule requires the Government to make available to the defendant. From a purely linguistic perspective, there is no more reason to import into the first category a case-in-chief-related limitation (from the second category) than some kind of defendant's-belongings-related limitation (from the third category).
Rule 16 creates these three categories for a reason that [****30] belies "symmetry" -- namely, to specify two sets of items (the [*473] Government's case in chief evidence, the defendant's belongings) that the Government must make available to the defendant without a preliminary showing of "materiality." The Rule's first category creates a residual classification (items

"material to the preparation of the defendant's defense") that require a preliminary "materiality" showing. The Committee thought, however, that "limiting the rule to [***704] situations in which the defendant can show that the evidence is material seems unwise. . . . For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant." Advisory Committee's Notes on Fed. Rule Crim. Proc. 16, 18 U.S.C. App., p. 762 (second and third categories added to specify that, without a special showing of materiality, certain items are almost always "material") (citing 1 C. Wright, Federal Practice and Procedure § 254, p. 510, n. 58, p. 513, n. 70 (1969)). Nothing in the Notes, or in the Rule's language, suggests that the residual category of items "material [****31] to the preparation of the defendant's defense," means to cover only those items related to the case in chief.

The only other reason the majority advances in support of its "case in chief" limitation concerns a later part of the Rule, paragraph 16(a)(2). As relevant here, that paragraph exempts Government attorney work product from certain of Rule 16's disclosure requirements. In the majority's view, since (1) a defendant asserting a valid "selective prosecution" defense would likely need prosecution work product to make his case, but (2) the Rule exempts prosecution work product from discovery, then (3) the Rule must have some kind of implicit limitation (such as a "case in chief" limitation) that makes it irrelevant to defense efforts to assert "selective prosecution" defenses.

The majority's conclusion, however, does not follow from its premises. For one thing, Rule 16's work-product exception [*474] may itself contain implicit exceptions. After all, "the privilege derived from the work-product doctrine is not absolute." United States [**1491] v. Nobles, 422 U.S. 225, 239, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975); see also 8 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 2022, p. 324 (2d ed. 1994) [****32] (in civil context, work product "is discoverable only on a substantial showing of 'necessity or justification'") (quoting Hickman v. Taylor, 329 U.S. 495, 510, 91 L. Ed. 451, 67 S. Ct. 385 (1947)); J. Ghent, Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A. L. R. 3d 412, 465-469, § 25 (1971) (in civil context, work-product protection is not absolute, but is a "qualified privilege or immunity"). To the extent such a reading permits a defendant to obtain "work product" in an appropriate case (say, with a strong prima facie showing of selective prosecution), the Court's problem does not exist. Of course, to read the work-product exception as containing some such implicit exception itself represents a departure from the Rule's literal language. But, is it not far easier to believe the Rule's authors intended some such small implicit exception to an exception, consistent with the language and purpose of the Rule, than that they intended the very large exception created by the Court?

For another thing, even if one reads the work-product exception literally, the Court's problem disappears as long as courts can supplement Rule 16 discovery with discovery based upon other

[****33] legal principles. The language of the work-product exception suggests the possibility of such supplementation, for it says, not that work product is "exemp[t]" from discovery, ante, at 462, [***705] but that "this rule" does not authorize discovery of the prosecutor's work product. Fed. Rule Civ. Proc. 16(a)(2). The Advisory Committee's Notes make clear that the Committee believed that other rules of law may authorize (or require) discovery not mentioned in the Rule. See, e. g., Advisory Committee's Notes on Rule 16, 18 U.S.C. App., pp. 762, 763 (discussion of Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), which the Rule does not codify); [*475] 18 U.S.C. App., p. 761 ("[Rule 16] is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases"); see also 2 C. Wright, Federal Practice and Procedure § 254, p. 81, and n. 60 (2d ed. 1982) ("Because Brady is based on the Constitution, it overrides court-made rules of procedure. Thus the work-product immunity for discovery in Rule 16(a)(2) prohibits discovery under Rule 16 but it does not alter the prosecutor's [****34] duty to disclose material that is within Brady") (footnotes omitted). Of course, the majority, in a sense, reads the Rule as permitting supplementation, but it does more. It goes well beyond the added (say, constitutionally related) rule supplementation needed to overcome its problem; instead, it shrinks the Rule by unnecessarily creating a major limitation on its scope.

Finally, and in any event, here the defendants sought discovery of information that is not work product. See ante, at 459. Thus, we need not decide whether in an appropriate case it would be necessary to find an implicit exception to the language of Rule 16(a)(2), or to find an independent constitutional source for the discovery, or to look for some other basis.

In sum, neither the alleged "symmetry" in the structure of Rule 16(a)(1)(C), nor the work-product exception of Rule 16(a)(2), supports the majority's limitation of discovery under Rule 16(a)(1)(C) to documents related to the Government's "case in chief." Rather, the language and legislative history make clear that the Rule's drafters meant it to provide a broad authorization for defendants' discovery, to be supplemented if necessary in an appropriate [****35] case. Whether or not one can also find a basis for this kind of discovery in other sources of law, Rule 16(a)(1)(C) provides one such source, and we should consider whether the defendants' discovery request satisfied the Rule's requirement that the discovery be "material to the preparation of the defendant's defense."

[*476] I believe that the defendants' request did not satisfy this threshold. Were the "selective prosecution" defense valid in this case -- i. e., were there "clear evidence," United States v. Chemical Foundation, Inc., 272 U.S. 1, 14, 71 L. Ed. 131, 47 S. Ct. 1 (1926), that the Federal Government's prosecutorial policy "had a discriminatory effect and . . . [**1492] was motivated by a discriminatory purpose," Wayte v. United States, 470 U.S. 598, 608, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985), it should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African Americans, but also some instances in

which the Federal Government did not prosecute similarly situated caucasians. The defendants' failure to do so, for the reasons the Court sets forth, amounts to a failure to make the necessary threshold showing in respect [***706] to materiality. See 2 C. Wright, Federal Practice [****36] and Procedure § 254, pp. 66-67 (2d ed. 1982); United States v. Balk, 706 F.2d 1056, 1060 (CA9 1983); United States v. Johnson, 577 F.2d 1304, 1309 (CA5 1978); United States v. Murdock, 548 F.2d 599, 600 (CA5 1977).

Dissent by: STEVENS

Dissent
JUSTICE STEVENS, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926). Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. Oyler v. Boles, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). For that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled. As the Court notes, however, the scope of judicial review of particular exercises of that discretion is not fully defined. See ante, at 469, n. 3.

[*477] The United States Attorney for the Central District of California is a member and an officer of the bar [****37] of that District Court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a District Judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern. I agree with the Court that Rule 16 of the Federal Rules of Criminal Procedure is not the source of the District Court's power to make the necessary inquiry. I disagree, however, with its implicit assumption that a different, relatively rigid rule needs to be crafted to regulate the use of this seldom-exercised inherent judicial power. See Advisory Committee's Notes on Rule 16, 18 U.S.C. App., p. 761 (Rule 16 is "not intended to limit the judge's discretion to order broader discovery in appropriate cases").

The Court correctly concludes that in this case the facts presented to the District Court in support of respondents' claim that they had been singled out for prosecution because of their race were not sufficient to prove that defense. Moreover, I agree [****38] with the Court that their showing was not strong enough to give them a right to discovery, either under Rule 16 or under the District Court's inherent power to order discovery in appropriate circumstances. Like Chief Judge Wallace of the Court of Appeals, however, I am persuaded that the District Judge did not

abuse her discretion when she concluded that the factual showing was sufficiently disturbing to require some response from the United States Attorney's Office. See 48 F.3d 1508, 1520-1521 (CA9 1995). Perhaps the discovery order was broader than necessary, but I cannot agree with the Court's apparent conclusion that no inquiry was permissible.

The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial [*478] vigilance over certain types of drug prosecutions. First, the Anti-Drug [***707] Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine. 1 Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence [****39] of 10 years in prison that applies to the distribution of 5,000 grams [**1493] of powder cocaine. 2 The Sentencing Guidelines extend this ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine. 3 These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders. 4 United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 145 (Feb. 1995) (hereinafter Special Report).

[*479] [****40] Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that [****41] do, none has established as stark a differential as the Federal Government. See id., at x, 129-138. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount. 5

[****42] Finally, it is undisputed that the brunt of the elevated federal penalties [***708] falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they [*480] represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. Id., at 39, 161. During the first 18 months of full guideline implementation, the sentencing disparity between black and white defendants grew from preguideline levels: Blacks on average received sentences over 40% longer than whites. See Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? 6-7 (Dec. 1993). Those figures represent a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing. The Sentencing

Commission acknowledges that the heightened crack penalties are a "primary cause of the growing disparity between sentences for Black and White federal defendants." Special Report 163.

[**1494] The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack [****43] offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

Respondents submitted a study showing that of all cases involving crack offenses that were closed by the Federal Public Defender's Office in 1991, 24 out of 24 involved black defendants. To supplement this evidence, they submitted affidavits from two of the attorneys in the defense team. The first reported a statement from an intake coordinator at a local drug treatment center that, in his experience, an [*481] equal number of crack users and dealers were caucasian as belonged to minorities. App. 138. The second was from David R. Reed, counsel for respondent Armstrong. Reed was both [****44] an active court-appointed attorney in the Central District of California and one of the directors of the leading association of criminal defense lawyers who practice before the Los Angeles County courts. Reed stated that he did not recall "ever handling a [crack] cocaine case involving non-black defendants" in federal court, nor had he even heard of one. Id., at 140. He further stated that "there are many crack cocaine sales cases prosecuted in state court that do involve racial groups other than blacks." Id., at 141 (emphasis in original).

The majority discounts the probative value of the affidavits, claiming that they recounted "hearsay" and reported "personal conclusions based on anecdotal evidence." Ante, at 470. But the Reed affidavit plainly contained more than [***709] mere hearsay; Reed offered information based on his own extensive experience in both federal and state courts. Given the breadth of his background, he was well qualified to compare the practices of federal and state prosecutors. In any event, the Government never objected to the admission of either affidavit on hearsay or any other grounds. See 48 F.3d at 1518, n. 8. It was certainly within the District [****45] Court's discretion to credit the affidavits of two members of the bar of that Court, at least one of whom had presumably acquired a reputation by his frequent appearances there, and both of whose statements were made on pains of perjury.

The criticism that the affidavits were based on "anecdotal evidence" is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in

order to receive mere discovery in cases like this one. Certainly evidence based on a drug counselor's personal observations or on an attorney's practice in two sets of courts, state and federal, can "'tend to show the existence'" of a selective prosecution. Ante, at 468.

[*482] Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and [****46] demand information from the Government's files to support or refute respondents' evidence. The presumption that some whites are prosecuted in state court is not "contradicted" by the statistics the majority cites, which show only that high percentages of blacks are convicted of certain federal crimes, while high percentages of whites are convicted of other federal crimes. See ante, at 469-470. Those figures are entirely consistent with the allegation of selective prosecution. The relevant comparison, rather, would be with the percentages of blacks and whites who commit those crimes. But, as discussed above, in the case of crack [**1495] far greater numbers of whites are believed guilty of using the substance. The District Court, therefore, was entitled to find the evidence before her significant and to require some explanation from the Government. 6

[*483] [****47] In sum, I agree with the Sentencing Commission that "while the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100-to-1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have [***710] dramatic effects." Special Report 138. 7 The severity of the penalty heightens both the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement. Cf. McCleskey v. Kemp, 481 U.S. 279, 366, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987) (STEVENS, J., dissenting). In this case, the evidence was sufficiently disturbing to persuade the District Judge to order discovery that might help explain the conspicuous racial pattern of cases before her Court. I cannot accept the majority's conclusion that the District Judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.

[****48]

Panel Two: Plea Bargaining and Trial Procedures

BRADY V. UNITED STATES

397 U.S. 742 * | 90 S. Ct. 1463 ** | 25 L. Ed. 2d 747 *** | 1970 U.S. LEXIS 45 ****

[*743] [***753] [**1466] MR. JUSTICE WHITE delivered the opinion of the Court.
In 1959, petitioner was charged with kidnaping in violation of 18 U. S. C. § 1201 (a). Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea. [*744] [****4] Petitioner [***754] was sentenced to 50 years' imprisonment, later reduced to 30.

[****5] In 1967, petitioner sought relief under 28 U. S. C. § 2255, claiming that his plea of guilty was not voluntarily given because § 1201 (a) operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the [**1467] trial judge had not fully complied with Rule 11 of the Federal Rules of Criminal Procedure.

[****6] [*745] After a hearing, the District Court for the District of New Mexico denied relief. According to the District Court's findings, petitioner's counsel did not put impermissible pressure on petitioner to plead guilty and no representations were made with respect to a reduced sentence or clemency. The court held that § 1201 (a) was constitutional and found that petitioner decided to plead guilty when he learned that his codefendant was going to plead guilty: petitioner pleaded guilty "by reason of other matters and not by reason of the statute" or because of any acts of the trial judge. The court concluded that "the plea was voluntarily and knowingly made."

[1A]The Court of Appeals for the Tenth Circuit affirmed, determining that the District Court's findings were supported by substantial evidence and specifically approving the finding that petitioner's plea of guilty was voluntary. 404 F.2d 601 (1968). We granted certiorari, 395 U.S. 976 (1969), to consider the claim that the Court of Appeals was in error in not reaching a contrary result on the authority of this [****7] Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968). We affirm.

[***755] I

In *United States v. Jackson, supra*, the defendants were indicted under § 1201 (a). The District Court dismissed the § 1201 (a) count of the indictment, holding [*746] the statute unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. This Court held the statute valid, except for the death penalty provision; with respect to the latter, the Court agreed with the trial court "that the death penalty provision . . . imposes an impermissible burden upon the exercise of a constitutional right . . . ." 390 U.S., at 572. The problem was to determine "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." 390 U.S., at 581. The inevitable effect of the provision was said to be to discourage assertion of the [**1468] Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment [****8] right to demand a jury trial. Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision "needlessly penalize[d] the assertion of a constitutional right," 390 U.S., at 583, and was therefore unconstitutional.

[2]Since the "inevitable effect" of the death penalty provision of § 1201 (a) was said by the Court to be the needless encouragement of pleas of guilty and waivers of jury trial, Brady contends that Jackson requires the invalidation of every plea of guilty entered under that section, at least when the fear of death is shown to have been a factor in the plea. Petitioner, however, has read far too much into the Jackson opinion.

The Court made it clear in *Jackson* that it was not holding § 1201 (a) inherently coercive of guilty pleas: "the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that [*747] every defendant [****9] who enters a guilty plea to a charge under the Act does so involuntarily." 390 U.S., at 583. Cited in support of this statement, 390 U.S., at 583 n. 25, was Laboy v. New Jersey, 266 F.Supp. 581 (D. C. N. J. 1967), where a plea of guilty (non vult) under a similar statute was sustained as voluntary in spite of the fact, as found by the District Court, that the defendant was greatly upset by the possibility of receiving the death penalty.

Moreover, the Court in *Jackson* rejected a suggestion that the death penalty provision of § 1201 (a) be saved by prohibiting in capital kidnaping cases all guilty pleas and jury waivers, "however clear [the defendants'] guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings." "That jury waivers and guilty pleas may occasionally be rejected" was no ground for automatically rejecting all guilty pleas under the statute, for such a rule "would rob the criminal process of much of its flexibility." 390 U.S., at 584.

[***756] [3A] [****10] Plainly, it seems to us, Jackson ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. Jackson prohibits the imposition of the death penalty under § 1201 (a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." See Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[3B]

[****11]

[*748] [4]
[5] [6] [7]That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do [**1469] so -- hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or a judge. [****12] Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. On neither score was Brady's plea of guilty invalid.

[****13] [*749] II

[***757] [8]The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

[9]The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. Cf. Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954). One of these circumstances was the possibility [****14] of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong

case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. 7 But [*750] even if we assume that Brady [**1470] would not have pleaded guilty except for the death penalty provision of § 1201 (a), this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

[10] [****15] The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

[11] [12]Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental [****16] coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty. Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly [***758] higher penalty for [*751] the crime charged if a conviction is obtained after the State is put to its proof.

[13]Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is [****17] advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, 8 as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather

than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

[****18] The [**1471] issue we deal with is inherent in the criminal law and its administration because guilty pleas are not [*752] constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious -- his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages -- the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. 9 It is this mutuality of advantage that perhaps explains the fact that [****19] at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, 10 a great many of them no [***759] doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

[14]Of course, that the prevalence of guilty pleas is explainable does not necessarily [****20] validate those pleas or [*753] the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

[15]A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.

[16] *Bram v. United States, 168 U.S. 532 (1897)*, [****21] held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be "'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" 168 U.S., at 542-543. More recently, *Malloy v. Hogan, 378 U.S. 1 (1964)*, carried forward the Bram definition of compulsion

in the course of holding applicable to the States the Fifth Amendment privilege [**1472] against compelled self-incrimination.

[****22] [*754] Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona, 384 U.S. 436 (1966)*, held that the possibly coercive atmosphere of the police station could not be counteracted by the [***760] presence of counsel or other safeguards.
[****23] Brady's situation bears no resemblance to Bram's. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to [*755] the requirements of the law with respect to guilty pleas. Brady's plea, unlike Bram's confession, was voluntary.

[17] [18]The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

"'LBA] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments [****24] made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).' 242 F.2d at page 115."

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.

[****25] [*756] III

[**1473] [19]The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there [***761] was nothing to indicate that he was incompetent or

otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years. Brady was aware of precisely what he was doing when he admitted that he had kidnaped the victim and had not released her unharmed.

It is true that Brady's counsel advised him that § 1201 (a) empowered the jury to impose the death penalty and that nine years later in *United States v. Jackson, supra*, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

[20]

[****26] [21][22][23]Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly [*757] sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent [****27] misrepresentation or other impermissible conduct by state agents, cf. *Von Moltke v. Gillies, 332 U.S. 708 (1948)*, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

[24]The fact that Brady did not anticipate *United States v. Jackson, supra,* does not impugn the truth or reliability [****28] [**1474] of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are [*758] necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions [***762] against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves [****29] that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth.
[1B]

Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful.

Affirmed.

MR. JUSTICE BLACK, while adhering to his belief that *United States v. Jackson, 390 U.S. 570*, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

MCCARTHY V. UNITED STATES

394 U.S. 459 * | 89 S. Ct. 1166 ** | 22 L. Ed. 2d 418 *** | 1969 U.S. LEXIS 3280 **** | 69-1 U.S. Tax Cas. (CCH) P9312 | 23 A.F.T.R.2d (RIA) 1048

[*460] [***422] [**1168] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case involves the procedure that must be followed under Rule 11 of the Federal Rules of Criminal Procedure before a United States District Court [****5] may accept a guilty plea and the remedy for a failure to follow that procedure.

On April 1, 1966, petitioner was indicted on three counts in the United States District Court for the Northern District of Illinois for violating § 7201 of the Internal Revenue Code. He was charged with "wilfully and knowingly" attempting to evade tax payments of $ 928.74 for 1959 (count 1), $ 5,143.70 for 1960 (count 2), and $ 1,207.12 for 1961 (count 3). At his arraignment [*461] two weeks later, petitioner, who was represented by retained counsel, pleaded not guilty

to each count. The court scheduled his trial for June 30; but on June 29, it granted the Government's motion to postpone the trial because of petitioner's illness. The trial was rescheduled for July 15.

On that day, after informing the court that he had "advised . . . [petitioner] of the consequences of a plea," defense counsel moved to withdraw petitioner's plea of not guilty to count 2 and to enter a plea of guilty to that count. The District Judge asked petitioner if he desired to plead guilty and if he understood that such a plea waived his right to a jury trial and subjected him to imprisonment [****6] for as long as five years and to a fine as high as $ 10,000. Petitioner stated that he understood these consequences and wanted to plead guilty. The Government consented to this plea change and informed the court that if petitioner's plea of guilty to count 2 were accepted, the Government would move to dismiss counts 1 and 3. Before the plea was accepted, however, the prosecutor asked the judge to inquire [***423] whether it had been induced by any threats or promises. In response to the judge's inquiry, petitioner replied that his plea was not the product of either. He stated that it was entered of his "own volition." The court ordered a presentence investigation and continued the case to September 14, 1966.

At the commencement of the sentencing hearing on September 14, petitioner asserted that his failure to pay taxes was "not deliberate" and that they would have been paid if he had not been in poor health. The prosecutor [****7] stated that the "prime consideration" for the Government's agreement to move to dismiss counts 1 and 3 was petitioner's promise to pay all taxes, penalties, and [*462] interest. The prosecutor then requested the court to refer expressly to this agreement. After noting that petitioner possessed sufficient attachable assets to meet these obligations, the court imposed a sentence of one year and a fine of $ 2,500. Petitioner's counsel immediately moved to suspend the sentence. He emphasized that petitioner, who was then 65 years of age, was in poor health and contended that his failure to pay his taxes had resulted from his "neglectful" and "inadvertent" method of bookkeeping during a period when he had been suffering [**1169] from a very serious drinking problem. Consequently, asserted petitioner's counsel, "there was never any disposition to deprive the United States of its due." The judge, however, after indicating he had examined the presentence report, stated his opinion that "the manner in which [petitioner's] books were kept was not inadvertent." He declined, therefore, to suspend petitioner's sentence.

[****8] On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner argued that his plea should be set aside because it had been accepted in violation of Rule 11 of the Federal Rules of Criminal Procedure. Specifically, petitioner contended (1) that the District Court had accepted his plea "without first addressing [him] . . . personally and determining that the plea [was] . . . made voluntarily with understanding of the nature of the charge . . . ," 3 [****9] and (2) that the court had entered judgment without determining "that there [was] . . . a factual basis for the plea." 4 [*463] In affirming petitioner's conviction, 5 the Court of Appeals

held that the District Judge had complied with Rule 11. The court implied that the Rule did not require the District Judge to address petitioner personally to determine if he understood the nature of the charge. The court also concluded [***424] that the colloquy at the sentencing hearing demonstrated that the judge had satisfied himself by an examination of the presentence report that the plea had a factual basis.

[****10]

[1][2][3]Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts, [****11] and because of a conflict in the courts of appeals over the effect of a district court's failure to follow the provisions of the Rule, 8 we granted certiorari. 390 U.S. 1038 (1968). We agree with petitioner that the District Judge did not comply with Rule 11 in this case; and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United [*464] States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal.

I.

[**1170] [4A]Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea. At oral argument, however, counsel for the Government repeatedly conceded that the judge did not personally inquire whether petitioner understood the nature of the charge. At one point, counsel stated quite explicitly: "The subject on which he [the District Judge] did not directly address the defendant, which is raised here, is the question of the defendant's understanding of the charges." Nevertheless, the Government argues that since petitioner stated his desire to plead guilty, and since he was informed of the consequences of his plea, the District Court "could properly assume that petitioner was entering that plea with a complete understanding of the charge against him." 9 (Emphasis added.)

[4B]

[5A]

[*465] [6]We cannot accept this argument, which completely ignores the two purposes of Rule 11 and the reasons for its recent amendment. First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, 10 it is designed to assist the district [****13] judge in making the constitutionally [***425] required determination that a defendant's guilty

plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

[****14] Prior to the 1966 amendment, however, not all district judges personally interrogated defendants before accepting their guilty pleas. 13 With an awareness of the confusion over the Rule's requirements in this respect, the draftsmen amended it to add a provision "expressly [*466] requir[ing] the court to address the defendant personally." 14 This clarification of the judge's responsibilities quite obviously furthers both of the Rule's purposes. By personally interrogating the defendant, not only will the judge be better able to [**1171] ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack.

[7][8][9] These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. 15 [****16] For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst, 304 U.S. 458, 464 (1938)*. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. 16 Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

[*467] [10]Thus, in addition to directing the judge to inquire into the defendant's [***426] understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." 18 [****17] Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

[5B] [11A]

To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's

voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge.

[11A]

[****18] [*468] II.

[**1172] Having decided that the Rule has not been complied with, we must also determine the effect of that noncompliance, an issue that has engendered a sharp difference of opinion among the courts of appeals. In *Heiden v. United States, 353 F.2d 53 (1965)*, the Court of Appeals for the Ninth Circuit held that when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew. 21 Other courts of appeals, however, have consistently rejected this holding, either expressly 22 [****20] or tacitly. 23 Instead, they have adopted the approach [*469] [***427] urged by the Government, which is to place upon the Government the burden of demonstrating from the record of the Rule 11 hearing that the guilty plea was voluntarily entered with an understanding of the charge. See, e. g., *Halliday v. United States, 380 F.2d 270 (C. A. 1st Cir. 1967); Lane v. United States, 373 F.2d 570 (C. A. 5th Cir. 1967)*. In these circuits, if voluntariness cannot be determined from the record, the case is remanded [****19] for an evidentiary hearing on that issue. See, e. g., *Kennedy v. United States, 397 F.2d 16 (C. A. 6th Cir. 1968); Halliday v. United States, supra.*

[12]We are persuaded that the Court of Appeals for the Ninth Circuit has adopted the better rule. From the defendant's perspective, the efficacy of shifting the burden of proof to the Government at a later voluntariness hearing is questionable. In meeting its burden, the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises. This prima facie case for voluntariness is likely to be treated as [****21] irrebuttable in cases such as this one, where the defendant's reply is limited to his own plaintive allegations that he did not understand the nature of the charge and therefore failed to assert a valid defense or to limit his guilty plea only to a lesser included offense. No matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing.

[13]Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." *Heiden v. United States, supra, at 55.* The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his [*470] action are to

be eliminated at the outset . . . ." Ibid. As the Court of Appeals for the Sixth Circuit explained in discussing what it termed the "persuasive rationale" of Heiden: "When the [**1173] ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided . . . ." [****22] Waddy v. Heer, 383 F.2d 789, 794 (1967). There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.

[14]The wisdom of Rule 11's requirements and the difficulty of achieving its purposes through a postconviction voluntariness hearing are particularly apparent in this case. Petitioner, who was 65 years old and in poor health at the time he entered his plea, had been suffering from a serious drinking problem during the time he allegedly evaded his taxes. He pleaded guilty to a crime that requires a "knowing and willful" attempt to defraud the Government of its tax money; 25 yet, throughout his sentencing hearing, he and his counsel insisted that his acts were merely "neglectful," "inadvertent," and committed without [***428] "any disposition to deprive the United States of its due." Remarks of this nature cast considerable doubt on the Government's assertion that petitioner pleaded guilty with full awareness of the nature of the charge. Nevertheless, confronted with petitioner's statement that he entered his plea of his "own [****23] volition," his counsel's statement that he explained the nature of the charges, and evidence that petitioner did owe the Government back taxes, both the District Court and the Court of Appeals concluded that petitioner's guilty plea was voluntary.

[15A]Despite petitioner's inability to convince the courts below that he did not fully understand the charge against [*471] him, it is certainly conceivable that he may have intended to acknowledge only that he in fact owed the Government the money it claimed without necessarily admitting that he committed the crime charged; for that crime requires the very type of specific intent that he repeatedly disavowed. See *Sansone v. United States, 380 U.S. 343 (1965).* Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear of record, it is also possible that if petitioner [****24] had been adequately informed he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors.

[15B]

On the other hand, had the District Court scrupulously complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's own replies to the court's inquiries might well have attested to his understanding of the essential elements of the crime charged, including the requirement of specific intent, and to his knowledge of the acts which formed the basis for the charge. Otherwise, it would be apparent [****25] to the court that the plea could not be accepted. Similarly, it follows that, if the record had been developed properly,

and if it demonstrated that petitioner entered his plea freely and intelligently, his subsequent references to neglect and inadvertence could have been summarily dismissed as nothing more than overzealous supplications for leniency.

[16]We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are [*472] designed to facilitate a more [**1174] accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, [****26] district judges take the few minutes necessary to inform them of their rights [***429] and to determine whether they understand the action they are taking.

We therefore reverse the judgment of the Court of Appeals for the Seventh Circuit and remand the case for proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT.

The relevant portion of the colloquy at the Rule 11 hearing on July 15 is as follows:

"Mr. Sokol [petitioner's counsel]: . . . If the Court please, I have advised Mr. McCarthy of the consequences of a plea. At this time, in his behalf I would like to withdraw the plea of not guilty heretofore entered to Count 2, and enter a plea of guilty to Count 2. There are three Counts.

"The Court: Is that satisfactory to the government?

"Mr. Hughes [Government counsel]: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

[*473] "The Court: There will be a disposition in regard to the other Count?

"Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

"The Court: Not until the plea is accepted and there is a judgment thereon.

"Mr. Hughes: Correct.

"The Court: This is [****27] tax evasion, five and ten?

"Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $ 10,000.

"The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?

"Defendant McCarthy: Yes, your Honor.
"The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

"Defendant McCarthy: Yes, your Honor.

"The Court: You understand you may be fined in an amount not in excess of $ 10,000?

"Defendant McCarthy: Yes, your Honor.

"The Court: Knowing all that, you still persist in your plea of guilty?

"Defendant McCarthy: Yes, your Honor.

"The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

"Now, in regard to Counts 1 and 3?

[*474] [****28] " [**1175] Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

[***430] "Mr. Sokol: No, no promises or threats.

"The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

"Defendant McCarthy: No, your Honor.

"The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

"Defendant McCarthy: I beg your pardon?

"The Court: Has anybody threatened you to enter a plea of guilty?

"Defendant McCarthy: That's right, of my own volition, your Honor.

"The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand."

APPENDIX B TO OPINION OF THE COURT.

The colloquy at the September 14 sentencing hearing included the following:

"Mr. Sokol [petitioner's counsel]: . . . If the Court please, apart from the wrecking of his physical health that has attended a number of the problems that relate to the drinking in this case, this man has experienced a kind of punishment, self-inflicted, which almost [****29] is a categorical listing of how he flees, actually, and I use that word advisedly, flees from consequence to punishment to additional consequence. It is a sad thing when at the age of sixty-five a man who has been able to rear, with the help of his wife, a fine family, has to leave a legacy such as this. I submit to the Court that he needs [*475] no deterrent. I cannot imagine a man -- apart from the conventional contrition, he has actively sought out help in order to overcome what has become a very, very serious physical and psychological problem.

"When I spoke with Mr. Sanculius [the probation officer], I knew that we had given to him some reference to the fact and some attestations of the facts, supported the facts, that there had been a very, very serious psychological problem here.

"With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended -- in other words, he was open and he answered all questions readily.

"The Court: Yes, but his books were in such shape that it made it very difficult to -- and that, in my opinion, was not inadvertent.

[****30] . . . .

"Mr. Sokol: . . . When a man is neglectful and adopts a kind of a devious way of secreting himself from the government, that is one thing, and we are mindful they are kind of indicia of fraud. But where a man's pattern is neglect of not only something like this -- he is sloppy with respect to that, but in gross, in gross, unaccountable, so to speak.

"There was no direct relationship to the consequences of taxation. Now, I would like to point out in that connection that when the investigation commenced it zeroed in, and very, very properly, there was a disclosure made from the very, very first that in the case of the Blue Cross check, the matter of depositing that in a second account actually had absolutely nothing whatever to do with the government. At that [***431] time he had been very, very deeply involved in a protracted drinking situation [*476] and had been in the hospital for several weeks. [**1176] His family, in order to avoid the matter of him really needing somebody to lead him around by the nose said, and his wife said, 'You have to put yourself under the jurisdiction of your brother,' and there was some indication that he was supposed to deposit [****31] this and he would not have disposition over his own assets. They did not feel that he could look out for himself. He was oppressed, and there is no sense in going over how people become so. In this particular case with a history after sixty-five years of this kind of a situation, one can perhaps guess without going into Freudian terms he was oppressed, and in order to free himself -- and this had nothing to do with the government -- in order to free himself from what he felt was a trap situation where he, at the age of sixtytwo or sixty-three was being treated like a little boy, he put it in a different bank account. But there was never any disposition to deprive the United States of its due.

"He has never acted, actually, in what you would call normal consequence, because an interview with this man, even once, indicates that if he has -- and it is like a little boy -- if he has the consequence lying before him he says, 'Oh, yes.'
. . . .

"Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence ofwhat can best be described as gross neglect, and criminal neglect, if you please.

"I could not have, in good conscience, recommended that [****32] he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that --

[*477] "The Court: It took place over a series of four years, didn't it, Counsel?

"Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

"The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.

"Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel in the case, who was guiding him and he was on the right path. No, he had -- I want to point out to the Court that this has occurred. This is fait accompli."

Concur by: BLACK

MR. JUSTICE BLACK, concurring.
[****33] I concur, though not without some doubt, in the reversal of the judgment of conviction in this case. Rule 11 of the Federal Rules of Criminal Procedure requires that the trial judge personally address a defendant who pleads guilty in order to ascertain if he understands the nature of the crime of which he has pleaded guilty. In this case the trial [***432] judge did not personally address the defendant but seems to have accepted the statement of the defendant's lawyer that he had advised the petitioner of the consequences of a plea of guilty. I base my concurrence in the judgment not upon any "supervisory power" of this Court, however, but exclusively on the failure of the judge to first address the defendant personally, as required by Rule 11.

Panel Three: Sentencing and Conviction

UNITED STATES V. DAVIS
Supreme Court of the United States, April 17, 2019, Argued; June 24, 2019, Decided, No. 18-431. Reporter 139 S. Ct. 2319 * | 204 L. Ed. 2d 757 ** | 2019 U.S. LEXIS 4210 *** | 27 Fla. L. Weekly Fed. S 1031 | 2019 WL 2570623

UNITED STATES, Petitioner v. MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
United States v. Davis, 903 F.3d 483, 2018 U.S. App. LEXIS 25486 (5th Cir. Tex., Sept. 7, 2018)

Disposition: 903 F. 3d 483, affirmed in part, vacated in part, and remanded.

Syllabus
[*2321] Respondents Maurice Davis and Andre Glover were charged with multiple counts of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery. They were also charged under 18 U. S. C. §924(c), which authorizes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal "crime of violence or drug trafficking crime." §924(c)(1)(A). "Crime of violence" is defined in two subparts: the elements clause, §924(c)(3)(A), and the residual clause, §924(c)(3)(B). The residual clause in turn defines a "crime of violence" as a felony "that by its nature, involves a substantial risk that [**762] physical force against the person or property of another may be used in the course of committing the offense." Ibid. A jury convicted the men on most of the underlying charges and on two separate §924(c) charges for brandishing a firearm in connection with their crimes. The Fifth Circuit initially rejected their argument that §924(c)s residual clause is unconstitutionally vague, but on remand in light of Sessions v. Dimaya, 584 U. S. ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, the court reversed course and held §924(c)(3)(B) unconstitutional. It then held that Mr. Davis's and Mr. Glover's [***2] convictions on the §924(c) count charging robbery as the predicate crime of violence could be sustained under the elements clause, but that the other count--which charged conspiracy as a predicate crime of violence--could not be upheld because it depended on the residual clause.

Held: Section 924(c)(3)(B)

is unconstitutionally vague. Pp. ___ - ___, 204 L. Ed. 2d, at 766-778.

(a) In our constitutional order, a vague law is no law at all. The vagueness doctrine rests on the twin constitutional pillars of due process and separation of powers. This Court has recently applied the doctrine in two cases involving statutes that bear more than a passing resemblance to §924(c)(3)(B)s residual clause-Johnson v. United States, 576 U. S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, which [*2322] addressed the residual clause of the Armed Career Criminal Act (ACCA), and Sessions v. Dimaya, which addressed the residual clause of 18 U. S. C. §16. The residual clause in each case required judges to use a "categorical approach" to determine whether an offense qualified as a violent felony or crime of violence. Judges had to disregard how the defendant actually committed the offense and instead imagine the degree of risk that would attend the idealized " 'ordinary case' " of the offense. Johnson, 576 U. S., at ___, 135 S. Ct. 2551,

192 L. Ed. 2d 569, 580. The Court held in each case that the imposition of criminal punishments cannot be made [***3] to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." The government and lower courts have long understood §924(c)(3)(B) to require the same categorical approach. Now, the government asks this Court to abandon the traditional categorical approach and hold that the statute commands a case-specific approach that would look at the defendant's actual conduct in the predicate crime. The government's case-specific approach would avoid the vagueness problems that doomed the statutes in Johnson and Dimaya and would not yield to the same practical and Sixth Amendment complications that a case-specific approach under the ACCA and §16 would, but this approach finds no support in §924(c)s text, context, and history. Pp. ___ - ___, 204 L. Ed. 2d, at 766-768.

(b) This Court has already read the nearly identical language of §16(b) to mandate a categorical approach. See Leocal v. Ashcroft, 543 U. S. 1, 7, 125 S. Ct. 377, 160 L. Ed. 2d 271. And what is true of §16(b) seems at least as true of §924(c)(3)(B). The government claims that the singular term "offense" carries the "generic" meaning in connection with the elements clause but a "specific act" meaning in connection with the residual clause, but nothing in §924(c)(3)(B) rebuts [**763] the presumption that the single term "offense" bears a consistent meaning. This reading is [***4] reinforced by the language of the residual clause itself, which speaks of an offense that, "by its nature," involves a certain type of risk. Pp. ___ - ___, 204 L. Ed. 2d, at 768-770.

(c) The categorical reading is also reinforced by §924(c)(3)(B)s role in the broader context of the federal criminal code. Dozens of federal statutes use the phrase "crime of violence" to refer to presently charged conduct. Some cross-reference §924(c)(3)s definition, while others are governed by the virtually identical definition in §16. The choice appears completely random. To hold that §16(b) requires the categorical approach while §924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code. Pp. ___ - ___, 204 L. Ed. 2d, at 770-771.

(d) Section 924(c)(3)(B)s history provides still further evidence that it carries the same categorical-approach command as §16(b). When Congress enacted the definition of "crime of violence" in §16 in 1984, it also employed the term in numerous places in the Act, including §924(c). The two statutes, thus, were originally designed to be read together. And when Congress added a definition of "crime of violence" to §924(c) in 1986, it copied the definition from §16 without making any material changes to the language of the residual clause, which would have been a bizarre way of suggesting [***5] that the two clauses should bear drastically different meanings. Moreover, §924(c) originally prohibited the use of a firearm in connection with any federal felony, before Congress narrowed §924(c) in 1984 by limiting its predicate offenses to "crimes of violence." The case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. Pp. ___ - ___, 204 L. Ed. 2d, at 771-773.

[*2323] (e) Relying on the canon of constitutional avoidance, the government insists that if the case-specific approach does not represent the best reading of the statute, it is nevertheless the Court's duty to adopt any "fairly possible" reading to save the statute from being unconstitutional. But it is doubtful the canon could play a proper role in this case even if the government's reading were "possible." This Court has sometimes adopted the narrower construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly, but it has not invoked the canon to expand the reach of a criminal statute in order to save it. To do so would risk offending the very same due process and separation of powers principles on which the vagueness doctrine itself rests and would sit [***6] uneasily with the rule of lenity's teaching that ambiguities about a criminal statute's breadth should be resolved in the defendant's favor. Pp. ___ - ___, 204 L. Ed. 2d, at 773-775.

903 F. 3d 483, affirmed in part, vacated in part, and remanded.

Counsel: Eric J. Feigin argued the cause for petitioner. Brandon E. Beck argued the cause for respondents.

Judges: Gorsuch, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Kavanaugh, J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined, and in which Roberts, C. J., joined as to all but Part II-C.

Opinion by: GORSUCH

Opinion
[**764] Justice Gorsuch delivered the opinion of the Court.

[1] In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer [***7] law to take its place, but to treat the law as a nullity and invite Congress to try again.

Today we apply these principles to 18 U. S. C. §924(c). [2] That statute threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes. But which other federal crimes? The statute's residual clause points to those felonies "that by [their]

nature, involv[e] a substantial risk that [*2324] physical force against the person or property of another may be used in the course of committing the offense." §924(c)(3)(B). Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague. So today the government attempts a new and alternative reading designed to save the residual clause. But this reading, it turns out, cannot be squared with the statute's text, context, and history. Were we to adopt it, we would be effectively stepping outside our role as judges and writing a new law rather than applying the one Congress adopted.

I

After Maurice Davis and Andre Glover committed a string of gas station robberies in Texas, [***8] a federal prosecutor charged both men with multiple counts of robbery affecting interstate commerce in violation of the Hobbs Act, 18 U. S. C. §1951(a), and one count of conspiracy to commit Hobbs Act robbery. The prosecutor also charged Mr. Davis with being a felon in possession of a firearm. In the end, a jury acquitted Mr. Davis of one robbery charge and otherwise found the men guilty on all counts. And these convictions, none of which are challenged here, authorized the court to impose prison sentences of up to 70 years for Mr. Davis and up to 100 years for Mr. Glover.

But that was not all. This appeal concerns additional charges the government pursued against the men under §924(c). [3] That statute authorizes heightened criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." §924(c)(1)(A). The statute proceeds to define the term "crime of violence" in two subparts—the first known as the elements clause, and the second the residual clause. According to §924(c)(3), a crime of violence is "an offense that is a felony" and

[**765] "(A) has as an element the use, attempted use, or threatened use of physical force against [***9] the person or property of another, or

"(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Violators of §924(c) face a mandatory minimum sentence of five years in prison, over and above any sentence they receive for the underlying crime of violence or drug trafficking crime. The minimum sentence rises to 7 years if the defendant brandishes the firearm and 10 years if he discharges it. Certain types of weapons also trigger enhanced penalties—for example, a

defendant who uses a short-barreled shotgun faces a minimum sentence of 10 years. And repeat violations of §924(c) carry a minimum sentence of 25 years. 1
At trial, the government argued that Mr. Davis and Mr. Glover had each committed two separate §924(c) violations by brandishing a short-barreled shotgun in connection with their crimes. Here, too, the jury agreed. These convictions yielded a mandatory minimum sentence for each man of 35 years, which had to run consecutively [*2325] to their other sentences. Adding the §924(c) mandatory minimums to its discretionary sentences for their other crimes, the district court ultimately sentenced Mr. Glover to more [***10] than 41 years in prison and Mr. Davis to more than 50 years.

On appeal, both defendants argued that §924(c)'s residual clause is unconstitutionally vague. At first, the Fifth Circuit rejected the argument. United States v. Davis, 677 Fed. Appx. 933, 936 (2017) (per curiam). But after we vacated its judgment and remanded for further consideration in light of our decision in Sessions v. Dimaya, 584 U. S. ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018), striking down a different, almost identically worded statute, the court reversed course and held §924(c)(3)(B) unconstitutional. 903 F. 3d 483, 486 (2018) (per curiam). It then held that Mr. Davis's and Mr. Glover's convictions on one of the two §924(c) counts, the one that charged robbery as a predicate crime of violence, could be sustained under the elements clause. But it held that the other count, which charged conspiracy as a predicate crime of violence, depended on the residual clause; and so it vacated the men's convictions and sentences on that count.

Because the Fifth Circuit's ruling deepened a dispute among the lower courts about the constitutionality of §924(c)'s residual clause, we granted certiorari to resolve the question. 586 U. S. ___, 138 S. Ct. 1979, 201 L. Ed. 2d 239 (2018). 2

[**766] II
[4] Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See Dimaya, 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 570 (plurality opinion); id., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (Gorsuch, [***11] J., concurring in part and concurring in judgment) 138 S. Ct. 1204, 200 L. Ed. 2d 549. Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. Connally v. General Constr. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926); see Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510 (1914). Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." United States v. Hudson, 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide. See Kolender v. Lawson, 461 U. S. 352, 357-358, 103 S. Ct. 1855, 75 L. Ed.

2d 903, and n. 7 (1983); United States v. L. Cohen Grocery Co., 255 U. S. 81, 89-91, 41 S. Ct. 298, 65 L. Ed. 516 (1921); United States v. Reese, 92 U. S. 214, 221, 23 L. Ed. 563 (1876).

In recent years, this Court has applied these principles to two statutes that bear more than a passing resemblance to §924(c)(3)(B)'s residual clause. In Johnson v. United States, 576 U. S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the [*2326] Court addressed the residual clause of the Armed Career Criminal Act (ACCA), which defined a "violent felony" to include offenses that presented a "serious potential risk of physical injury to another." §924(e)(2)(B)(ii). The ACCA's residual clause required judges to use a form of what we've called the "categorical approach" to determine whether an offense qualified as a violent felony. [***12] Following the categorical approach, judges had to disregard how the defendant actually committed his crime. Instead, they were required to imagine the idealized "'ordinary case'" of the defendant's crime and then guess whether a "'serious potential risk of physical injury to another'" would attend its commission. Id., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 578). Johnson held this judicial inquiry produced "more unpredictability and arbitrariness" when it comes to specifying unlawful conduct than the Constitution allows. Id., at ___-___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 579).

Next, in Sessions v. Dimaya, we considered the residual clause of 18 U. S. C. §16, which defines a "crime of violence" for purposes of many federal statutes. Like §924(c)(3), §16 contains an elements clause and a residual clause. The only difference is that §16's elements clause, unlike §924(c)(3)'s elements clause, isn't limited to felonies; but there's no material difference in the language or scope of the statutes' residual [**767] clauses. 3 As with the ACCA, our precedent under §16's residual clause required courts to use the categorical approach to determine whether an offense qualified as a crime of violence. Dimaya, 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549; see Leocal v. Ashcroft, 543 U. S. 1, 7, 10, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). And, again as with the ACCA, we held that §16's residual clause was unconstitutionally vague because it required courts "to picture the kind of [***13] conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 561) (internal quotation marks omitted).

What do Johnson and Dimaya have to say about the statute before us? Those decisions teach that [4] the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." But does §924(c)(3)(B) require that sort of inquiry? The government and lower courts have long thought so. For years, almost everyone understood §924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and §16. 4 Today, the government [*2327] acknowledges that, if this understanding is correct, then §924(c)(3)(B) must be held unconstitutional too.

But the government thinks it has now found a way around the problem. In the aftermath of our decisions holding the residual clauses of the ACCA and §16(b) unconstitutionally vague, the government "abandon[ed] its longstanding position" that §924(c)(3)(B) requires a categorical analysis and began urging lower courts to "adopt a new 'case specific' method" that would look to "the 'defendant's actual conduct' [***14] in the predicate offense." 903 F. 3d, at 485. Now, the government tries the same strategy in this Court, asking us to abandon the traditional categorical approach and hold that the statute actually commands the government's new case-specific approach. So, while the consequences in this case may be of constitutional dimension, the real question before us turns out to be one of pure statutory interpretation.

In approaching the parties' dispute over the statute's meaning, we begin by acknowledging that the government is right about at least two [**768] things. First, a case-specific approach would avoid the vagueness problems that doomed the statutes in Johnson and Dimaya. In those cases, we recognized that there would be no vagueness problem with asking a jury to decide whether a defendant's "'real-world conduct'" created a substantial risk of physical violence. Dimaya, 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 561, 606); see Johnson, 576 U. S., at ___, ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569. Second, a case-specific approach wouldn't yield the same practical and Sixth Amendment complications under §924(c) that it would have under the ACCA or §16. Those other statutes, in at least some of their applications, required a judge to determine whether a defendant's prior conviction was for a "crime of violence" or "violent felony." In that context, [***15] a case-specific approach would have entailed "reconstruct[ing], long after the original conviction, the conduct underlying that conviction." Id., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 582). And having a judge, not a jury, make findings about that underlying conduct would have "raise[d] serious Sixth Amendment concerns." Descamps v. United States, 570 U. S. 254, 269-270, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). By contrast, a §924(c) prosecution focuses on the conduct with which the defendant is currently charged. The government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime. So it wouldn't be that difficult to ask the jury to make an additional finding about whether the defendant's conduct also created a substantial risk that force would be used.

But all this just tells us that it might have been a good idea for Congress to have written a residual clause for §924(c) using a case-specific approach. It doesn't tell us whether Congress actually wrote such a clause. To answer that question, we need to examine the statute's text, context, and history. And when we do that, it becomes clear that the statute simply cannot support the government's newly minted case-specific theory.

III

A

Right out of the gate, the government faces a challenge. This [***16] Court, in a unanimous opinion, has already read the nearly identical language of 18 U. S. C. §16(b) to mandate a categorical approach. And, importantly, the Court did so without so much as mentioning the practical and constitutional [*2328] concerns described above. Instead, the Court got there based entirely on the text. In Leocal, the Court wrote:

"In determining whether petitioner's conviction falls within the ambit of §16, the statute directs our focus to the 'offense' of conviction. See §16(a) (defining a crime of violence as 'an offense that has as an element the use . . . of physical force against the person or property of another' (emphasis added)); §16(b) (defining the term as 'any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense' (emphasis added)). This language requires us to look to the elements and the [**769] nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." 543 U. S., at 7, 125 S. Ct. 377, 160 L. Ed. 2d 271.

Leocal went on to suggest that burglary would always be a crime of violence under §16(b) "because burglary, by its nature, involves a substantial risk that the burglar [***17] will use force against a victim in completing the crime," regardless of how any particular burglar might act on a specific occasion. Id., at 10, 125 S. Ct. 377, 160 L. Ed. 2d 271 (emphasis added); see also Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 563) (plurality opinion) (reaffirming that "§16(b)'s text . . . demands a categorical approach"). And what was true of §16(b) seems to us at least as true of §924(c)(3)(B): It's not even close; [6] the statutory text commands the categorical approach.

Consider the word "offense." It's true that "in ordinary speech," this word can carry at least two possible meanings. It can refer to "a generic crime, say, the crime of fraud or theft in general," or it can refer to "the specific acts in which an offender engaged on a specific occasion." Nijhawan v. Holder, 557 U. S. 29, 33-34, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009). But the word "offense" appears just once in §924(c)(3), in the statute's prefatory language. And everyone agrees that, in connection with the elements clause, the term "offense" carries the first, "generic" meaning. Cf. id., at 36, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (similar language of the ACCA's elements clause "refers directly to generic crimes"). So reading this statute most naturally, we would expect "offense" to retain that same meaning in connection with the residual clause. After all, "[i]n all but the most unusual situations, a single use of a statutory phrase must have [***18] a fixed meaning." Cochise Consultancy, Inc. v. United States ex rel. Hunt, 587 U. S. ___, ___, 139 S. Ct. 1507, 203 L. Ed. 2d 791, 798 (2019).

To prevail, the government admits it must persuade us that the singular term "offense" bears a split personality in §924(c), carrying the "generic" meaning in connection with the elements

clause but then taking on the "specific act" meaning in connection with the residual clause. And, the government suggests, this isn't quite as implausible as it may sound; sometimes the term "offense" can carry both meanings simultaneously. To illustrate its point, the government posits a statute defining a "youthful gun crime" as "an offense that has as an element the use of a gun and is committed by someone under the age of 21." Tr. of Oral Arg. 16. This statute, the government suggests, would leave us little choice but to understand the single word "offense" as encompassing both the generic crime and the manner of its commission on a specific occasion. To which we say: Fair enough. It's possible for surrounding text to make clear that "offense" carries a double meaning. But absent evidence to the contrary, we presume the term is being used consistently. And nothing in §924(c)(3)(B) comes close to rebutting that presumption.

[*2329] Just the opposite. [7] The language of the residual clause itself reinforces [***19] the conclusion that the term "offense" carries the same "generic" meaning throughout the statute. Section 924(c)(3)(B), just like §16(b), speaks of an offense that, "by its nature," involves a certain type of risk. And [**770] that would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct. As both sides agree, the "nature" of a thing typically denotes its "'normal and characteristic quality,'" Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 563) (quoting Webster's Third New International Dictionary 1507 (2002)), or its "'basic or inherent features,'" United States v. Barrett, 903 F. 3d 166, 182 (CA2 2018) (quoting Oxford Dictionary of English 1183 (A. Stevenson ed., 3d ed. 2010)). So in plain English, when we speak of the nature of an offense, we're talking about "what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 563); see Leocal, 543 U. S., at 7, 125 S. Ct. 377, 160 L. Ed. 2d 271 (contrasting the "nature of the offense" with "the particular facts [of] petitioner's crime"). 5

Once again, the government asks us to overlook this obvious reading of the text in favor of a strained one. It suggests that the statute might be referring to the "nature" of the defendant's conduct on a particular occasion. But while this reading may be linguistically feasible, [***20] we struggle to see why, if it had intended this meaning, Congress would have used the phrase "by its nature" at all. The government suggests that "by its nature" keeps the focus on the offender's conduct and excludes evidence about his personality, such as whether he has violent tendencies. But [8] even without the words "by its nature," nothing in the statute remotely suggests that courts are allowed to consider character evidence—a type of evidence usually off-limits during the guilt phase of a criminal trial. Cf. Fed. Rule Evid. 404.

B

Things become clearer yet when we consider §924(c)(3)(B)'s role in the broader context of the federal criminal code. As we've explained, [9] the language of §924(c)(3)(B) is almost identical to the language of §16(b), which this Court has read to mandate a categorical approach. And we

normally presume that the same language in related statutes carries a consistent meaning. See, e.g., Sullivan v. Stroop, 496 U. S. 478, 484, 110 S. Ct. 2499, 110 L. Ed. 2d 438 (1990).

This case perfectly illustrates why we do that. There are dozens of federal statutes that use the phrase "crime of violence" to refer to presently charged conduct rather than a past conviction. Some of those statutes cross-reference the definition of "crime of violence" in §924(c)(3), while others are governed by the virtually identical [***21] definition in §16. The choice appears completely random. Reading the similar language in §924(c)(3)(B) and §16(b) similarly yields sensibly congruent applications across all these other statutes. But if we accepted the government's invitation to reinterpret §924(c)(3)(B) as alone endorsing a case-specific approach, [**771] we would produce [*2330] a series of seemingly inexplicable results.

Take just a few examples. If the government were right, Congress would have mandated the case-specific approach in a prosecution for providing explosives to facilitate a crime of violence, 18 U. S. C. §844(o), but the (now-invalidated) categorical approach in a prosecution for providing information about explosives to facilitate a crime of violence, §842(p)(2). It would have mandated the case-specific approach in a prosecution for using false identification documents in connection with a crime of violence, §1028(b)(3)(B), but the categorical approach in a prosecution for using confidential phone records in connection with a crime of violence, §1039(e)(1). It would have mandated the case-specific approach in a prosecution for giving someone a firearm to use in a crime of violence, §924(h), but the categorical approach in a prosecution for giving a minor a handgun to use in a crime of violence, §924(a)(6)(B)(ii). It would [***22] have mandated the case-specific approach in a prosecution for traveling to another State to acquire a firearm for use in a crime of violence, §924(g), but the categorical approach in a prosecution for traveling to another State to commit a crime of violence, §1952(a)(2). And it would have mandated the case-specific approach in a prosecution for carrying armor-piercing ammunition in connection with a crime of violence, §924(c)(5), but the categorical approach in a prosecution for carrying a firearm while "in possession of armor piercing ammunition capable of being fired in that firearm" in connection with a crime of violence, §929(a)(1).

There would be no rhyme or reason to any of this. Nor does the government offer any plausible account why Congress would have wanted courts to take such dramatically different approaches to classifying offenses as crimes of violence in these various provisions. To hold, as the government urges, that §16(b) requires the categorical approach while §924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code.

C

Section 924(c)(3)(B)'s history provides still further evidence that [10] it carries the same categorical-approach command as §16(b). It's no accident that the language of the two laws is

almost exactly [***23] the same. The statutory term "crime of violence" traces its origins to the Comprehensive Crime Control Act of 1984. There, Congress enacted the definition of "crime of violence" in §16. §1001(a), 98 Stat. 2136. It also "employed the term 'crime of violence' in numerous places in the Act," Leocal, 543 U. S., at 6, 125 S. Ct. 377, 160 L. Ed. 2d 271, including in §924(c). §1005(a), 98 Stat. 2138. At that time, Congress didn't provide a separate definition of "crime of violence" in §924(c) but relied on §16's general definition. The two statutes, thus, were originally designed to be read together.

Admittedly, things changed a bit over time. Eventually, Congress expanded §924(c)'s predicate offenses to include drug trafficking crimes as well as crimes of violence. §§104(a)(2)(B)-(C), 100 Stat. 457. When it did so, Congress added a subsection-specific definition of "drug trafficking crime" in §924(c)(2)—and, perhaps thinking that both terms should be defined in the same place, it also added a subsection-specific definition [**772] of "crime of violence" in §924(c)(3). §104(a)(2)(F), id., at 457. But even then, Congress didn't write a new definition of that term. Instead, it copied and pasted the definition from §16 without making any material changes to the language of the residual clause. The government suggests that, in doing so, Congress "intentionally separated" and "decoupled" [*2331] the two definitions. [***24] Brief for United States 34, 37. But importing the residual clause from §16 into §924(c)(3) almost word for word would have been a bizarre way of suggesting that the two clauses should bear drastically different meanings. [11] Usually when statutory language "'is obviously transplanted from . . . other legislation,'" we have reason to think "'it brings the old soil with it.'" Sekhar v. United States, 570 U. S. 729, 733, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013).

What's more, when Congress copied §16(b)'s language into §924(c) in 1986, it proceeded on the premise that the language required a categorical approach. By then courts had, as the government puts it, "beg[u]n to settle" on the view that §16(b) demanded a categorical analysis. Brief for United States 36-37. Of particular significance, the Second Circuit, along with a number of district courts, had relied on the categorical approach to hold that selling drugs could never qualify as a crime of violence because "[w]hile the traffic in drugs is often accompanied by violence," it can also be carried out through consensual sales and thus "does not by its nature involve substantial risk that physical violence will be used." United States v. Diaz, 778 F. 2d 86, 88 (1985). Congress moved quickly to abrogate those decisions. But, notably, it didn't do so by directing a case-specific approach or changing [***25] the language courts had read to require the categorical approach. Instead, it accepted the categorical approach as given and simply declared that certain drug trafficking crimes automatically trigger §924 penalties, regardless of the risk of violence that attends them. §§104(a)(2)(B)-(C), 100 Stat. 457.

The government's reply to this development misses the mark. The government argues that §16(b) had not acquired such a well-settled judicial construction by 1986 that the reenactment of its language in §924(c)(3)(B) should be presumed to have incorporated the same construction. We

agree. See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A., 559 U. S. 573, 590, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (interpretations of three courts of appeals "may not have 'settled' the meaning" of a statute for purposes of the reenactment canon). But Congress in 1986 did more than just reenact language that a handful of courts had interpreted to require the categorical approach. It amended §924(c) specifically to abrogate the results of those decisions, without making any attempt to overturn the categorical reading on which they were based. And that would have been an odd way of proceeding if Congress had thought the categorical reading erroneous.

There's yet one further and distinct way in which §924(c)'s history undermines the government's case-specific reading of the residual [***26] clause. As originally enacted in 1968, §924(c) prohibited the use of a firearm in connection with any federal felony. §102, 82 Stat. 1224. The 1984 amendments narrowed §924(c) by limiting its predicate offenses to "crimes of [**773] violence." But the case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. After all, how many felonies don't involve a substantial risk of physical force when they're committed using a firearm—let alone when the defendant brandishes or discharges the firearm?

Recognizing this difficulty, the government assures us that a jury wouldn't be allowed to find a felony to be a crime of violence solely because the defendant used a firearm, although it could consider the firearm as a "factor." Tr. of Oral Arg. 8. But the government identifies no textual basis for this rule, and exactly how it would work in practice is anyone's guess. The government says, for example, that [*2332] "selling counterfeit handbags" while carrying a gun wouldn't be a crime of violence under its approach. Id., at 9. But why not? Because the counterfeit-handbag trade is so inherently peaceful that there's no substantial risk of a violent confrontation with dissatisfied customers, [***27] territorial competitors, or dogged police officers? And how are jurors supposed to determine that? The defendant presumably knew the risks of his trade, and he chose to arm himself. See United States v. Simms, 914 F. 3d 229, 247-248 (CA4 2019) (en banc) (refusing to "condem[n] jurors to such an ill-defined inquiry"). Even granting the government its handbag example, we suspect its approach would result in the vast majority of federal felonies becoming potential predicates for §924(c) charges, contrary to the limitation Congress deliberately imposed when it restricted the statute's application to crimes of violence.

D

With all this statutory evidence now arrayed against it, the government answers that it should prevail anyway because of the canon of constitutional avoidance. Maybe the case-specific approach doesn't represent the best reading of the statute—but, the government insists, it is our

duty to adopt any "'fairly possible'" reading of a statute to save it from being held unconstitutional. Brief for United States 45. 6

We doubt, however, the canon could play a proper role in this case even if the government's reading were "possible." True, when presented with two "fair alternatives," this Court has sometimes adopted the narrower construction [***28] of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. United States v. Rumely, 345 U. S. 41, 45, 47, 73 S. Ct. 543, 97 L. Ed. 770 (1953); see, e.g., Skilling v. United States, 561 U. S. 358, 405-406, 130 S. Ct. 2896, 177 L. Ed. 2d 619, and n. 40 (2010); United States v. Lanier, 520 U. S. 259, 265-267, 117 S. Ct. 1219, 137 L. Ed. 2d 432, and n. 6 (1997). But no one before us has identified a case in [**774] which this Court has invoked the canon to expand the reach of a criminal statute in order to save it. Yet that is exactly what the government seeks here. Its case-specific reading would cause §924(c)(3)(B)'s penalties to apply to conduct they have not previously been understood to reach: categorically nonviolent felonies committed in violent ways. See Simms, 914 F. 3d, at 256-257 (Wynn, J., concurring). 7

[*2333] Employing the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests. See supra, at ___ - ___, 204 L. Ed. 2d, at 766. Everyone agrees that Mr. Davis and Mr. Glover did many things that Congress had declared to be crimes; and no matter how we rule today, they will face substantial prison sentences for those offenses. But does §924(c)(3)(B) require them to suffer additional punishment, on top of everything else? Even if you think it's possible to read the statute to impose such additional punishment, it's impossible to say that Congress surely intended that result, or that the law gave [***29] Mr. Davis and Mr. Glover fair warning that §924(c)'s mandatory penalties would apply to their conduct. [13] for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.

Employing the canon as the government wishes would also sit uneasily with [14] the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." United States v. Wiltberger, 18 U.S. 76, 5 Wheat. 76, 95, 5 L. Ed. 37 (1820) (Marshall, C. J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Ibid.; see Lanier, 520 U. S., at 265-266, and n. 5, 117 S. Ct. 1219, 137 L. Ed. 2d 432. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive

reading of a criminal statute [**775] would place these traditionally sympathetic [***30] doctrines at war with one another. 8

IV

What does the dissent have to say about all this? It starts by emphasizing that §924(c)(3)(B) has been used in "tens of thousands of federal prosecutions" since its enactment 33 years ago. Post, at ___, 204 L. Ed. 2d, at 779 (opinion of Kavanaugh, J.). And the dissent finds it "surprising" and "extraordinary" that, after all those prosecutions over all that time, the statute could "suddenly" be deemed unconstitutional. Post, ___ - ___, 204 L. Ed. 2d, at 779-785. But the government concedes that §924(c)(3)(B) is unconstitutional if it means what everyone has understood it to mean in nearly all of those prosecutions over all those years. So the only way the statute can be saved is if we were "suddenly" to give it a new meaning different from the one it has borne for the last three decades. And if we could do that, it would indeed be "surprising" and "extraordinary."

[*2334] The dissent defends giving this old law a new meaning by appealing to intuition. It suggests that a categorical reading of §924(c)(3)(B) is "unnatural" because "[i]f you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, 'Well, tell me how it went down—what happened?'" Post, at ___, 204 L. Ed. 2d, at 786 (some internal quotation marks omitted). Maybe so. [***31] But the language in the statute before us isn't the language posited in the dissent's push poll. Section 924(c)(3)(B) doesn't ask about the risk that "a particular crime posed" but about the risk that an "offense . . . by its nature, involves." And a categorical reading of this categorical language seemed anything but "unnatural" to the unanimous Court in Leocal or the plurality in Dimaya. 9 Nor did the government think the categorical reading of §924(c)(3)(B) "unnatural" when it embraced that reading for decades. The dissent asks us to overlook the government's prior view, explaining that the government only defended a categorical reading of the statute "when it did not matter for constitutional vagueness purposes"—that is, before Johnson and Dimaya identified constitutional problems with the categorical approach. Post, at ___ , 204 L. Ed. 2d, at 799. But isn't that exactly the point? Isn't it at least a little revealing that, when the government had no motive to concoct an alternative reading, even it thought the best reading of §924(c)(3)(B) demanded a categorical analysis?

If this line of attack won't work, the dissent tries another by telling us that we have "not fully account[ed] for [**776] the long tradition of substantial-risk criminal statutes." [***32] Post, at ___, 204 L. Ed. 2d, at 799. The dissent proceeds to offer a lengthy bill of particulars, citing dozens of state and federal laws that do not use the categorical approach. Post, at ___ - ___, 204 L. Ed. 2d, at 782-784, and nn. 4-17. But what does this prove? Most of the statutes the dissent

cites impose penalties on whoever "creates," or "engages in conduct that creates," or acts under "circumstances that create" a substantial risk of harm; others employ similar language. Not a single one imposes penalties for committing certain acts during "an offense . . . that by its nature, involves" a substantial risk, or anything similar. Marching through the dissent's own catalog thus only winds up confirming that [15] legislatures know how to write risk-based statutes that require a case-specific analysis—and that §924(c)(3)(B) is not a statute like that.

When the dissent finally turns to address the words Congress actually wrote in §924(c)(3)(B), its main argument seems to be that a categorical reading violates the canon against superfluity. On this account, reading "offense" generically in connection with the residual clause makes the residual clause "duplicate" the elements clause and leaves it with "virtually nothing" to do. Post, at ___ , 204 L. Ed. 2d, at 790. But that is a surprising assertion coming from the dissent, which [***33] devotes several pages to describing the "many" offenders who have been convicted under the residual clause using the categorical approach but who "might not" be prosecutable under the elements clause. Post, at ___ - ___, 204 L. Ed. 2d, at 797-799. It is also wrong. As this Court has long understood, [16] the residual clause, read categorically, "sweeps more broadly" than the elements clause—potentially reaching offenses, like burglary, that do not have violence as an element but that arguably create a substantial risk of violence. Leocal, 543 U. S., at 10, 125 S. Ct. 377, 160 L. Ed. 2d 271. So even [*2335] under the categorical reading, the residual clause is far from superfluous.

Without its misplaced reliance on the superfluity canon, there is little left of the dissent's textual analysis. The dissent asserts that the phrase "by its nature" must "focu[s] on the defendant's actual conduct"—but only because this "follows" from the dissent's earlier (and mistaken) superfluity argument. Post, at ___, 204 L. Ed. 2d, at 791. Next, the dissent claims that "the word 'involves'" and "the phrase 'in the course of committing the offense'" both support a case-specific approach. Post, at ___, 204 L. Ed. 2d, at 791. But these words do not favor either reading: It is just as natural to ask whether the offense of robbery ordinarily "involves" a substantial risk that violence will [***34] be used "in the course of committing the offense" as it is to ask whether a particular robbery "involved" a substantial risk that violence would be used "in the course of committing the offense." If anything, the statute's use of the present and not the past tense lends further support to the categorical reading. 10 The dissent thinks it significant, too, that the statute before us "does not use the term 'conviction,'" [**777] post, at ___, 204 L. Ed. 2d, at 792; but that word is hardly a prerequisite for the categorical approach, as Dimaya makes clear. Remarkably, the dissent has nothing at all to say about §924(c)(3)'s history or its relationship with other criminal statutes; it just ignores those arguments. And when it comes to the constitutional avoidance canon, the dissent does not even try to explain how using that canon to criminalize conduct that isn't criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers. Instead, the dissent seems willing to consign "'thousands'" of defendants to prison for "years—potentially decades,"

not because it is certain or even likely that Congress ordained those penalties, but because it is merely "possible" [***35] Congress might have done so. Post, at ___, ___ - ___, 204 L. Ed. 2d, at 797, 798-799. In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.

In the end, the dissent is forced to argue that holding §924(c)(3)(B) unconstitutional would invite "bad" social policy consequences. Post, at ___, 204 L. Ed. 2d, at 799. In fact, the dissent's legal analysis only comes sandwiched between a lengthy paean to laws that impose severe punishments for gun crimes and a rogue's gallery of offenses that may now be punished somewhat less severely. See post, at ___ - ___ , ___ - ___ , 204 L. Ed. 2d, at 778-779, 797-800. The dissent acknowledges that "the consequences cannot change our understanding of the law." Post, at ___, 204 L. Ed. 2d, at 799. But what's the point of all this talk of "bad" consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals? Even taken on their own terms, too, the dissent's policy concerns are considerably overblown. While the dissent worries that our ruling may elicit challenges to past §924(c) convictions [*2336] , post, at ___, 204 L. Ed. 2d, at 798, the dissent's preferred approach—saving §924(c)(3)(B) by changing its meaning—would also call into question countless convictions premised on the categorical reading. And defendants whose §924(c) convictions [***36] are overturned by virtue of today's ruling will not even necessarily receive lighter sentences: As this Court has noted, [17] when a defendant's §924(c) conviction is invalidated, courts of appeals "routinely" vacate the defendant's entire sentence on all counts "so that the district court may increase the sentences for any remaining counts" if such an increase is warranted. Dean v. United States, 581 U. S. ___, ___, 137 S. Ct. 1170, 197 L. Ed. 2d 490, 498 (2017).

Of course, too, Congress always remains free to adopt a case-specific approach to defining crimes of violence for purposes of §924(c)(3)(B) going forward. As Mr. Davis and Mr. Glover point out, one easy way of [**778] achieving that goal would be to amend the statute so it covers any felony that, "based on the facts underlying the offense, involved a substantial risk" that physical force against the person or property of another would be used in the course of committing the offense. Brief for Respondents 46 (quoting H. R. 7113, 115th Cong., 2d Sess. (2018); emphasis deleted); see also Tr. of Oral Arg. 19 (government's counsel agreeing that this language would offer "clearer" support for the case-specific approach than the current version of the statute does). The dissent's catalog of case-specific, risk-based criminal statutes supplies plenty [***37] of other models Congress could follow. Alternatively still, Congress might choose to retain the categorical approach but avoid vagueness in other ways, such as by defining crimes of violence to include certain enumerated offenses or offenses that carry certain minimum penalties. All these options and more are on the table. But these are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.

*
We agree with the court of appeals' conclusion that [18] §924(c)(3)(B) is unconstitutionally vague. At the same time, exactly what that holding means for Mr. Davis and Mr. Glover remains to be determined. After the Fifth Circuit vacated their convictions and sentences on one of the two §924(c) counts at issue, both men sought rehearing and argued that the court should have vacated their sentences on all counts. In response, the government conceded that, if §924(c)(3)(B) is held to be vague, then the defendants are entitled to a full resentencing, not just the more limited remedy the court had granted them. The Fifth Circuit has deferred ruling on the rehearing petitions pending our decision, so we remand the case to allow [***38] the court to address those petitions. The judgment below is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: KAVANAUGH

Dissent
Justice Kavanaugh, with whom Justice Thomas and Justice Alito join, and with whom The Chief Justice joins as to all but Part II-C, dissenting.

Crime and firearms form a dangerous mix. From the 1960s through the 1980s, violent gun crime was rampant in America. The wave of violence destroyed lives and devastated communities, particularly in America's cities. Between 1963 and 1968, annual murders with firearms rose by a staggering 87 percent, and annual aggravated assaults with firearms increased by more than 230 percent.

[*2337] Faced with an onslaught of violent gun crime and its debilitating effects, the American people demanded action. In 1968, Congress passed and President Lyndon Johnson signed the Gun Control Act. That law made it a separate federal crime to use or carry a firearm during a federal felony. Despite that and other efforts, violent crime with firearms continued at extraordinarily [**779] dangerous levels. In 1984 and again in 1986, in legislation signed by President Reagan, Congress reenacted [***39] that provision of the 1968 Act, with amendments. The law now prohibits, among other things, using or carrying a firearm during and in relation to a federal "crime of violence." 18 U. S. C. §924(c)(1)(A). The law mandates substantial prison time for violators.

Over the last 33 years, tens of thousands of §924(c) cases have been prosecuted in the federal courts. Meanwhile, violent crime with firearms has decreased significantly. Over the last 25 years, the annual rate of murders with firearms has dropped by about 50 percent, and the annual rate of nonfatal violent crimes (robberies, aggravated assaults, and sex crimes) with firearms has

decreased by about 75 percent. Violent crime in general (committed with or without a firearm) has also declined. During that same time period, both the annual rate of overall violent crime and the annual rate of murders have dropped by almost 50 percent.

Although the level of violent crime in America is still very high, especially in certain cities, Americans under the age of 40 probably cannot fully appreciate how much safer most American cities and towns are now than they were in the 1960s, 1970s, and 1980s. Many factors have contributed to the decline of violent crime in America. But [***40] one cannot dismiss the effects of state and federal laws that impose steep punishments on those who commit violent crimes with firearms.

Yet today, after 33 years and tens of thousands of federal prosecutions, the Court suddenly finds a key provision of §924(c) to be unconstitutional because it is supposedly too vague. That is a surprising conclusion for the Court to reach about a federal law that has been applied so often for so long with so little problem. The Court's decision today will make it harder to prosecute violent gun crimes in the future. The Court's decision also will likely mean that thousands of inmates who committed violent gun crimes will be released far earlier than Congress specified when enacting §924(c). The inmates who will be released early are not nonviolent offenders. They are not drug offenders. They are offenders who committed violent crimes with firearms, often brutally violent crimes.

A decision to strike down a 33-year-old, often-prosecuted federal criminal law because it is all of a sudden unconstitutionally vague is an extraordinary event in this Court. The Constitution's separation of powers authorizes this Court to declare Acts of Congress unconstitutional. That is [***41] an awesome power. We exercise that power of judicial review in justiciable cases to, among other things, ensure that Congress acts within constitutional limits and abides by the separation of powers. But when we overstep our role in the name of enforcing limits on Congress, we do not uphold the separation of powers, we transgress the separation of powers.

I fully understand how the Court has arrived at its conclusion given the Court's recent precedents in Johnson v. United States, 576 U. S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), and Sessions v. Dimaya, 584 U. S. ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018). But this case presents an entirely different question. Those cases [*2338] involved statutes that imposed [**780] additional penalties based on prior convictions. This case involves a statute that focuses on the defendant's current conduct during the charged crime. The statute here operates entirely in the present. Under our precedents, this statute therefore is not unconstitutionally vague. It is a serious mistake, in my respectful view, to follow Johnson and Dimaya off the constitutional cliff in this case. I respectfully dissent. 11

I

Section 924(c) prohibits using or carrying a firearm during and in relation to a federal "crime of violence," or possessing a firearm in furtherance of a federal "crime of violence." 12 Section 924(c) is a substantive criminal offense, not [***42] a sentence enhancement. The Government therefore charges a §924(c) offense in the indictment. Ordinarily, when charged under §924(c), a defendant will be charged with both an underlying federal crime and then also a §924(c) offense. For example, Davis was charged with both conspiracy to commit robbery and a §924(c) offense. Glover was likewise charged with both conspiracy to commit robbery and a §924(c) offense.

By any measure, Davis and Glover's conduct during the conspiracy was violent. Davis and Glover committed multiple armed robberies of convenience stores in the early morning hours. Those armed robberies followed a pattern: Davis and Glover (or Glover and a co-conspirator)—usually covering their faces—would arrive at a convenience store in the early morning hours in a car with no plates. One of them would point a short-barreled shotgun at a female employee and order her around. Sometimes, he would point the short-barreled shotgun in her face. Sometimes, he would put the short-barreled shotgun in her side. While one of them was aiming the short-barreled shotgun at the store employee, another would take cigarettes and demand money. Davis and Glover's crime spree ended with still more dangerous behavior: a high-speed [***43] car chase in wet and dangerous driving conditions that culminated in a crash.

Section 924(c)(3) lays out the definition [**781] of "crime of violence" for purposes of §924(c). That definition has two prongs, either of which can bring a defendant within [*2339] the scope of §924(c). 13

The first prong of §924(c)(3) is the elements prong. That prong, the Government concedes here, asks whether the underlying crime categorically fits within §924(c) because of the elements of the crime. The judge makes that determination. If the answer is yes, then the judge instructs the jury on the §924(c) offense to simply find whether the defendant used or carried a firearm during and in relation to that underlying crime, or possessed a firearm in furtherance of that underlying crime.

The Fifth Circuit concluded that Davis and Glover's conspiracy offenses did not fit within the elements prong of §924(c)(3). So the question was whether Davis and Glover were covered by the second prong.

The second prong of §924(c)(3) is the substantial-risk prong. That prong covers cases beyond those covered by the first prong, the elements prong. Congress sensibly wanted to cover defendants who committed crimes that are not necessarily violent by definition under the elements prong, but who committed crimes with [***44] firearms in a way that created a substantial risk that violent force would be used. To that end, the substantial-risk prong, properly

read, focuses not on the elements of the underlying crime, but rather on the defendant's conduct during that crime. If a defendant used or carried a firearm during and in relation to the crime, and the defendant's conduct during the crime created a substantial risk that physical force may be used, then the defendant may be guilty of a §924(c) offense. In that instance, the jury makes the finding: Did the defendant's conduct during the underlying crime create a substantial risk that violent force would be used?

In other words, as relevant here, a defendant can fall within the scope of §924(c) either (1) because of the elements of the underlying crime or (2) because of the defendant's conduct in committing the underlying crime. Either (1) the judge finds that an element of the underlying crime entails the use of physical force or (2) the jury finds that the defendant's actual conduct involved a substantial risk that physical force may be used. Put another way, the underlying crime itself may automatically bring the defendant within the scope of §924(c). Or if the underlying [***45] crime does not automatically qualify as a crime of violence, then the defendant's conduct during the crime may still bring the defendant within the scope of §924(c). Sensible enough.

The basic question in this case is whether the substantial-risk prong of §924(c)(3)'s definition of "crime of violence" is unconstitutionally vague. It is not.

As this Court has explained multiple times, criminal laws that apply a risk standard to a defendant's conduct [**782] are not too vague, but instead are perfectly constitutional. Writing for the Court in Johnson, for example, Justice Scalia stated that "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 583). The following year in Welch v. United States, Justice Kennedy confirmed that Johnson "cast no doubt on the many laws that 'require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion.'" [*2340] 578 U. S. ___, ___-___ 136 S. Ct. 1257, 194 L. Ed. 2d 387, 396-397 (2016) (quoting Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 583). Two years later in Dimaya, Justice Kagan wrote for the Court and echoed Justice Scalia and Justice Kennedy: "In Johnson's words, 'we do not doubt' the constitutionality of applying §16(b)'s 'substantial risk [standard] to real-world [***46] conduct.'" 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 561) (quoting Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569).

That kind of risk-based criminal statute is not only constitutional, it is very common. As the Court has recognized, "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" and almost all of those statutes "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion." Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 576. Indeed, the Government's

brief in Johnson collected more than 200 state and federal statutes that imposed criminal penalties for conduct that created a risk of injury to others. App. to Supp. Brief for United States in Johnson v. United States, O. T. 2014, No. 13-7120, pp. 1a-99a.

Take a few examples from federal law: It is a federal crime to create "a substantial risk of harm to human life" while illegally "manufacturing a controlled substance." 21 U. S. C. §858 (emphasis added). Under certain circumstances, it is a federal crime to create "a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to" do so. 18 U. S. C. §2332b(a)(1)(B) (emphasis added). And for purposes of the chapter [***47] of the federal criminal code dealing with sexual abuse crimes, "serious bodily injury" is defined as "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." §2246(4) (emphasis added).

The States' criminal codes are similar. Among the crimes that the States define by using qualitative risk standards are resisting arrest, 14 kidnaping, 15 [**783] assault, 16 battery, 17 criminal recklessness, 18 endangerment, [*2341] 19 unlawful restraint, 20 theft, 21 hazing, 22 abuse, 23 neglect, 24 arson, 25 homicide, 26 and weapons offenses. 27

Consider a few specific examples: In Pennsylvania, a person resists arrest "if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, [**784] the person creates a substantial risk of bodily injury to the public servant or anyone else." 18 Pa. Cons. Stat. §5104 (2015) (emphasis added). In Tennessee, kidnaping is defined as false imprisonment "under circumstances exposing the other person to substantial risk of bodily injury." Tenn. Code Ann. §39-13-303(a) (2018) (emphasis added). In New York, [***48] reckless endangerment occurs when a person "recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." N. Y. Penal Law Ann. §120.20 (emphasis added). And in Maryland, neglect of a [*2342] minor is defined as "the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor." Md. Crim. Law Code Ann. §3-602.1(a)(5)(i) (2012) (emphasis added).

The above examples demonstrate that substantial-risk standards like the one in §924(c)(3)(B) are a traditional and common feature of criminal statutes. As the Eleventh Circuit succinctly stated, there "is nothing remarkable about asking jurors to make that sort of risk determination—and, if necessary, requiring judges to instruct jurors on the meaning of terms like 'substantial' and 'physical force.'" Ovalles v. United States, 905 F. 3d 1231, 1250, n. 8 (2018) (en banc). That is

"exactly how similar questions have been resolved for centuries and are resolved every day in courts throughout the country." Ibid.

A statute is unconstitutionally vague only if "it fails to give ordinary people fair notice of the conduct it punishes," or is "so standardless that it invites arbitrary [***49] enforcement." Johnson, 576 U. S., at ___ , 135 S. Ct. 2551, 192 L. Ed. 2d 569, 575). Section 924(c)(3)(B) is not unconstitutionally vague. To reiterate, §924(c)(3)(B) defines "crime of violence" as "an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Section 924(c)(3)(B) affords people of ordinary intelligence ample notice that they may be punished if they carry or use a gun while engaging in criminal conduct that presents a risk that physical force may be used. There "is a whole range of conduct that anyone with at least a semblance of common sense would know" is covered by §924(c)(3)(B). Chicago v. Morales, 527 U. S. 41, 114, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (Thomas, J., dissenting) (internal quotation marks omitted). And prosecutors, defense attorneys, judges, and juries are well equipped to enforce and defend §924(c)(3)(B) prosecutions in a principled and predictable way—just as they have for decades with many other substantial-risk criminal statutes. As Judge Niemeyer wrote in his separate opinion in the Fourth Circuit, "the parties in [**785] those cases had little difficulty understanding, enforcing, or defending the §924(c)(1) charges at issue." United States v. Simms, 914 F. 3d 229, 264 (2019). 28

In short, §924(c)(3)(B) is a garden-variety, substantial-risk criminal law. Section 924(c)(3)(B) is not unconstitutionally vague.

II

This case therefore [***50] should be straightforward. But the Court complicates things by engaging in a two-step dance that ends with the Court concluding that §924(c)(3)(B) is unconstitutionally vague.

The Court's first step is to construe §924(c)(3)'s substantial-risk prong to require an ordinary-case categorical approach rather than a conduct-specific approach. In other words, the Court says that a defendant's guilt or innocence under §924(c)(3)'s substantial-risk prong hinges on a judge's assessment of how a hypothetical defendant would ordinarily commit the underlying crime. In the Court's view, a defendant's guilt or innocence under [*2343] §924(c)(3)'s substantial-risk prong does not depend on a jury's finding about how the actual defendant actually committed the underlying crime.

The Court's second step is based on the Court's decisions in Johnson and Dimaya. The Court says that the ordinary-case categorical approach makes §924(c)(3)(B) unconstitutionally vague.

For purposes of this case, the Court's error is its first step—that is, in construing the substantial-risk prong of §924(c)(3) to require an ordinary-case categorical approach. For three reasons, I disagree with the Court's analysis. First, the Court's justifications in Johnson and Dimaya for adopting the categorical [***51] approach do not apply in the context of §924(c). Second, the text of §924(c)(3)(B) is best read to focus on the actual defendant's actual conduct during the underlying crime, not on a hypothetical defendant's imagined conduct during an ordinary case of the underlying crime. Third, even if the text were ambiguous, the constitutional avoidance canon requires that we interpret the statute to focus on the actual defendant's actual conduct.

I will address those three points in Parts II-A, II-B, and II-C.

A

According to the Court, if §924(c)(3)(B) focused on the defendant's conduct during the underlying crime, then it would not be unconstitutionally vague. But §924(c)(3)(B), as the Court reads it, focuses on a hypothetical defendant's conduct during an ordinary case of the underlying crime. As a result, the Court says that §924(c)(3)(B) is unconstitutionally vague.

But it makes little sense, as I see it, to say that §924(c)(3)(B)'s substantial-risk inquiry focuses on whether a hypothetical defendant's imagined conduct during an ordinary case of the crime creates a substantial risk that physical force may be used, rather than on whether the actual defendant's actual conduct during the actual crime created a substantial [**786] risk that physical force may be used. Why would [***52] we interpret a federal law that criminalizes current-offense conduct to focus on a hypothetical defendant rather than on the actual defendant? As Judge Newsom cogently wrote for the Eleventh Circuit en banc majority, "If you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, 'Well, tell me how it went down—what happened?'" Ovalles, 905 F. 3d, at 1241. 29

Why does the Court read the substantial-risk prong in such an unnatural way? The Court explains that Johnson interpreted similar substantial-risk language to require the ordinary-case categorical approach. See 576 U. S., at ___-___ , 135 S. Ct. 2551, 192 L. Ed. 2d 569. A plurality of the Court did the same in Dimaya. See 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549). And the Court today casts this case as the third installment in a trilogy with a predictable ending, one that was supposedly foreordained by Johnson and Dimaya.

The gaping hole in the Court's analysis, in my view, is that Johnson and Dimaya addressed statutes that imposed penalties based on a defendant's prior criminal convictions.

In Johnson, the Court interpreted a definition of "violent felony" that was used in sentencing proceedings to classify prior convictions as predicates for stricter sentences. See §§924(e)(1),

(e)(2)(B). In Dimaya, [*2344] the Court interpreted [***53] a definition of "crime of violence" that was used in immigration proceedings to classify prior convictions as predicates for more severe immigration consequences. See §16 (defining "crime of violence"); 8 U. S. C. §1101(a)(43)(F) (incorporating 18 U. S. C. §16); 8 U. S. C. §1227(a)(2)(A)(iii) (deportation); §§1229b(a)(3), (b)(1)(C) (ineligibility for cancellation of removal and adjustment of status).

In interpreting those statutes, the Court employed the ordinary-case categorical approach to assess an individual's past convictions. And application of that categorical approach, the Court then said, rendered the statutes at issue in those cases unconstitutionally vague. See Dimaya, 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549; Johnson, 576 U. S., at ___-___, 135 S. Ct. 2551, 192 L. Ed. 2d 569). 30

Two important principles drove the Court's adoption of the categorical approach in the prior-conviction context in Johnson and Dimaya.

First, in the prior-conviction cases, the Court emphasized that the categorical approach avoids the difficulties and inequities of relitigating "past convictions in minitrials conducted long after the fact." Moncrieffe v. Holder, 569 U. S. 184, 200-201, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013). [**787] Without the categorical approach, courts would have to determine the underlying conduct from years-old or even decades-old documents with varying levels of factual detail. See Taylor v. United States, 495 U. S. 575, 601-602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). The factual statements that are contained in those documents are often "prone [***54] to error." Mathis v. United States, 579 U. S. ___, ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615 (2016). The categorical approach avoids the unfairness of allowing inaccuracies to "come back to haunt the defendant many years down the road." Id., at ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 615-616). The Court has echoed that reasoning time and again. See, e.g., Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (plurality opinion) ; Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569; Descamps v. United States, 570 U. S. 254, 270, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); Chambers v. United States, 555 U. S. 122, 125, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009).

Second, in the prior-conviction cases, the Court insisted on the categorical approach to avoid "Sixth Amendment concerns." Descamps, 570 U. S., at 269, 133 S. Ct. 2276, 186 L. Ed. 2d 438. The Sixth Amendment, as interpreted by this Court's precedents, does not allow a judge (rather than a jury) to make factual determinations that increase the maximum penalty. See Apprendi v. New Jersey, 530 U. S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court has read its Sixth Amendment precedents to require the categorical approach. Under the categorical approach, the judge looks only to the fact of conviction and the statutory definition of the prior offense. The Court has reiterated those Sixth Amendment concerns in countless categorical-approach cases. See, e.g., Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d

549 (plurality opinion) ; Mathis, 579 U. S., at ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604; Shepard v. United States, 544 U. S. 13, 24-25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (plurality opinion); Taylor, 495 U. S., at 601, 110 S. Ct. 2143, 109 L. Ed. 2d 607.

[*2345] In short, the Court in Johnson and Dimaya employed something akin to the constitutional avoidance doctrine to read the statutes at issue to avoid practical and Sixth Amendment problems. In the words of Justice Thomas, the "categorical approach was never really about the best reading of the text." Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 606 (dissenting opinion). As Judge Raggi has perceptively [***55] stated: "[C]onstitutional avoidance informed the original categorical-approach mandate." United States v. Barrett, 903 F. 3d 166, 179 (CA2 2018).

But neither of the two reasons identified in Johnson and Dimaya applies to 18 U. S. C. §924(c)(3)(B)—not even a little.

First, §924(c) does not require examination of old conduct underlying a prior conviction. Section 924(c) operates entirely in the present. In a §924(c) prosecution, there are ordinarily two charged crimes: the underlying crime and the §924(c) offense. Here, for example, the defendants were charged with conspiracy to commit robbery and with the §924(c) offense. The defendant's conduct during the underlying crime is part of the §924(c) offense. The conduct charged [**788] in the §924(c) offense is in front of the jury (if the case goes to trial) or accepted by the defendant in the plea agreement (if the defendant pleads guilty). The indictment must allege specific offense conduct, and that conduct must be proved with real-world facts in order to obtain a conviction. There is no need to worry about stale evidence or unavailable witnesses. Nor is there any need to worry about inaccuracies in years-old or decades-old documents coming back to haunt the defendant.

Second, §924(c) likewise raises no Sixth Amendment concerns. A jury will find the facts or, if the case ends in a guilty plea, the [***56] defendant will accept the facts in the plea agreement. For the §924(c) charge, as relevant here, a jury must find that the defendant's conduct "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The defendant has the opportunity to contest the relevant facts either at the trial or in plea negotiations. No Sixth Amendment issue arises in a §924(c) prosecution.

No practical or Sixth Amendment problems exist with §924(c)(3)(B). Indeed, the Court itself acknowledges that "a case-specific approach wouldn't yield the same practical and Sixth Amendment complications" that arose in Johnson and Dimaya. Ante, at ___, 204 L. Ed. 2d, at 767.

We should recognize that Johnson and Dimaya dealt with an entirely different context: prior convictions. There is no need to follow Johnson and Dimaya off the cliff here. We should read §924(c)(3)(B) like the dozens of other substantial-risk statutes in federal and state criminal law: to focus on the actual defendant's actual conduct during the actual underlying crime, not on a hypothetical defendant's imagined conduct during an ordinary case of that crime.

B

Now to the statutory text of §924(c)(3)(B). Even though the context here is current-offense conduct, not [***57] past convictions, the Court says that the statutory language nonetheless compels a focus on a hypothetical defendant's imagined conduct, not on the actual defendant's actual conduct. I disagree. Criminal defendants are usually punished based on what they actually did, not based on what a hypothetical defendant might have done.

To begin with, the text of §924(c)(3)(B) must be interpreted against the backdrop of traditional criminal-law practice. As described [*2346] above, substantial-risk statutes are commonplace in federal and state criminal law. Those statutes ordinarily call for examination of the actual defendant's actual conduct during the actual crime. The Court does not identify a single self-contained federal or state law that defines the actus reus of the crime based on the imagination of the judge about a hypothetical defendant, rather than on the evidence before the jury about the actual defendant.

This Court applied an exception in Johnson and Dimaya for substantial-risk statutes that impose sentencing and other penalties based on past convictions. But that is an exception for past convictions, not a rule for current-offense conduct. Section 924(c)(3)(B) must be read in line with [**789] the traditional, common practice [***58] of focusing on the actual defendant's actual conduct during the underlying crime.

With that background, I turn to the precise text of §924(c)(3). To repeat, the text of §924(c)(3) provides: A defendant may not use or carry a firearm during and in relation to, or possess a firearm in furtherance of, "an offense that is a felony and" that either (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (B) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

I will focus on four particular aspects of the statutory text of §924(c)(3)(B).

First, start with the term "offense." Section 924(c)(3) has two prongs under which a defendant might qualify for a §924(c) conviction: first, if the underlying crime automatically qualifies as a crime of violence based on its elements; and, second, if the defendant's conduct during the

underlying crime created a substantial risk that physical force may be used, even if the underlying crime by its elements does not constitute a crime of violence.

The term "offense" applies to both prongs. In the elements prong, the term refers to the elements [***59] of the underlying crime. In the substantial-risk prong, the term refers to the defendant's conduct during the underlying crime. That is entirely commonplace and sensible.

Reading "offense" in that commonsense way follows from the Court's precedents interpreting the term "offense." As the Court has explained many times, the term "offense" may "sometimes refer to a generic crime" and may "sometimes refer to the specific acts in which an offender engaged on a specific occasion." Nijhawan v. Holder, 557 U. S. 29, 33-34, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009). 31 Indeed, the single term "offense" can refer to both in the same statutory scheme. See, e.g., id., at 40, 129 S. Ct. 2294, 174 L. Ed. 2d 22; id., at 38, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (listing other examples); United States v. Hayes, 555 U. S. 415, 421-422, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009).

In United States v. Hayes, for example, the Court interpreted the term "misdemeanor crime of domestic violence." That term was defined as "an offense" that (1) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," and (2) was "committed by" a person who has a particular relationship with the victim. §921(a)(33)(A). The Court interpreted the "offense that . . . has, as an element" language in that provision to focus on the [*2347] legal prohibition, and interpreted the "offense . . . committed by" language to focus on the defendant's conduct. See Hayes, 555 U. S., at 421-422, 129 S. Ct. 1079, 172 L. Ed. 2d 816. In other [***60] words, the term "offense" was used once but had two different meanings as applied to the two different parts of the statutory provision.

Another example is the Immigration [**790] and Nationality Act. That statute defines "aggravated felony" in part as "an offense" (1) that "involves fraud or deceit" and (2) "in which the loss to the victim or victims exceeds $10,000." 8 U. S. C. §1101(a)(43)(M)(i). The Court interpreted the "offense that . . . involves fraud or deceit" language to focus on the legal prohibition. See Kawashima v. Holder, 565 U. S. 478, 483, 132 S. Ct. 1166, 182 L. Ed. 2d 1 (2012). And the Court interpreted the "offense . . . in which the loss" language to focus on the individual's conduct. See Nijhawan, 557 U. S., at 40, 129 S. Ct. 2294, 174 L. Ed. 2d 22. Again, the term "offense" was used once, but had two different meanings as applied to the two different parts of the statutory provision.

Section 924(c)(3) is the same kind of statutory provision. It likewise encompasses both the legal prohibition (in subpart (A)) and the defendant's actual conduct (in subpart (B)). The term "offense" was read in Hayes, Kawashima, and Nijhawan to encompass both the legal prohibition and the defendant's conduct. The term should be read that same way here.

Moreover, if the substantial-risk prong of §924(c)(3) requires assessing a hypothetical defendant's conduct rather than the actual defendant's [***61] conduct, then there would be little daylight between the elements prong and the substantial-risk prong. After all, a crime is defined by its elements. The elements tell you what happens in an ordinary case of a crime. To imagine how a hypothetical defendant would have committed an ordinary case of the crime, you would presumably look back to the elements of the crime. But doing that under the substantial-risk prong—as the Court would do—would just duplicate the inquiry that already occurs under the elements prong. That would defeat Congress' purpose in adding the substantial-risk prong to §924(c)(3)—namely, covering defendants who committed crimes that are not violent by definition but that are committed by particular defendants in ways that create a risk of violence. There is no reason to think that Congress meant to duplicate the elements prong in the substantial-risk prong. 32

The Court usually tries to avoid an interpretation of a statutory provision that would make the provision redundant and accomplish virtually nothing. See, e.g., Republic of Sudan v. Harrison, 587 U. S. ___, ___, 139 S. Ct. 1048, 203 L. Ed. 2d 433 (2019); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U. S. 23, 35, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003); Mackey v. Lanier Collection Agency & Service, Inc., 486 U. S. 825, 837, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174-179 (2012); W. Eskridge, Interpreting Law: A Primer on How to Read Statutes and [***62] the Constitution 112-114 (2016). We should heed that principle here, and recognize that the term "offense" in the substantial-risk prong refers to the actual defendant's conduct during the underlying crime.

In short, the term "offense" in §924(c)(3), as applied to the substantial-risk [*2348] prong, focuses on the [**791] actual defendant's actual conduct, not on a hypothetical defendant's imagined conduct.

Second, §924(c)(3)(B) asks whether the defendant's offense "by its nature" involves a risk that physical force may be used. In a vacuum, the "nature" of an offense could be either "the metaphysical 'nature' of the offense" or "the underlying facts of the offense." Dimaya, 584 U. S., at ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 604 (Thomas, J., dissenting). But that is because the term "offense" could refer to a legal prohibition or to the defendant's actual conduct. As explained above, however, the term "offense" as applied to the substantial-risk prong refers to the actual defendant's conduct during the underlying crime. It follows that "by its nature" focuses on the nature of the actual defendant's conduct during the crime. The phrase "by its nature" is linked to the term "offense." If the term "offense" refers to the defendant's actual conduct, then "by its nature" also focuses [***63] on the defendant's actual conduct.

Under the conduct-specific approach to the substantial-risk prong, the "by its nature" language simply means that the Government has to show more than a defendant's proclivity for crime and more than the mere fact that the defendant was carrying a gun. The Government has to show that the defendant's conduct by its nature during the crime created a substantial risk that physical force may be used.

In short, as Justice Thomas has pointed out, it "is entirely natural to use words like 'nature' and 'offense' to refer to an offender's actual underlying conduct." Ibid. So it is here.

Third, §924(c)(3)(B) asks whether the defendant's conduct "involves" a substantial risk that physical force may be used. In Taylor v. United States, a case involving a prior-conviction statutory provision, the Court pointed to the absence of the word "involved" in adopting a categorical approach. 495 U. S., at 600, 110 S. Ct. 2143, 109 L. Ed. 2d 607. And in Nijhawan v. Holder, another case involving a prior-conviction statutory provision, the Court explained that the word "involves" did not support a categorical approach. 557 U. S., at 36, 129 S. Ct. 2294, 174 L. Ed. 2d 22. Here, unlike in Taylor, the statute does use the word "involves." Under Taylor's reasoning, the inclusion of the word "involves" [***64] in §924(c)(3)(B) supports the conclusion that §924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

Fourth, §924(c)(3)(B)'s use of the phrase "in the course of committing the offense" indicates that the proper focus is on the actual defendant's actual conduct, not on a hypothetical defendant's imagined conduct. After all, the underlying offense was committed by the actual defendant, not by a hypothetical defendant. It strains common sense to think that the "in the course of committing the offense" language in §924(c)(3)(B) contemplates an inquiry into a hypothetical defendant's conduct during an ordinary case of the crime.

Importantly, the law at issue in Johnson did not have the "in the course of committing the offense" language. §924(e)(2)(B)(ii). That is a major textual difference between the law in Johnson on the one hand and §924(c)(3)(B) on the other hand. And that textual distinction further shows [**792] that §924(c)(3)(B) focuses on the actual defendant's actual conduct.

In short, those four textual indicators, while not all entirely one-sided, together strongly suggest that §924(c)(3)(B) focuses on the actual defendant's actual conduct during the actual crime, not on a hypothetical defendant's imagined conduct during an ordinary case of the crime.

On top of [***65] all the language in the statute, §924(c)(3)(B) does not contain the critical [*2349] term that ordinarily marks a categorical approach.

Section 924(c)(3)(B) does not use the term "conviction." This Court has historically recognized the term "conviction" as a key textual driver of the categorical approach. In cases such as Taylor and Johnson, the Court zeroed in on the word "convictions." See Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569; Taylor, 495 U. S., at 600, 110 S. Ct. 2143, 109 L. Ed. 2d 607; see also Mathis, 579 U. S., at ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604; Moncrieffe, 569 U. S., at 191, 133 S. Ct. 1678, 185 L. Ed. 2d 727; Ovalles, 905 F. 3d, at 1245. So too, the Court in Leocal v. Ashcroft emphasized that the text of the INA that incorporated §16(b) used the term "convicted." 543 U. S. 1, 4, 7, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). 33

The term "conviction" is nowhere to be found in the text of §924(c)(3)(B). That should not come as a surprise, given that §924(c)(3)(B) is a substantive criminal offense concerned with the defendant's current-offense conduct. The absence of the term "conviction" in §924(c)(3)(B) strongly supports a conduct-specific approach.

Put simply, the textual clues—both the words that are used and the words that are not used—point strongly to the conclusion that §924(c)(3)(B) requires a jury to assess the actual defendant's actual conduct during the underlying crime. The conclusion becomes overwhelming when considered against the general background of substantial-risk statutes. To be sure, a statute can always be written more clearly. But here, the textual [***66] toolkit leads decisively to that conclusion.

C

But after all of that, suppose that you are not convinced. Suppose that you think that this case is still a close call on the text, even with the background of substantial-risk statutes and the Court's precedents. Indeed, suppose you ultimately disagree with the above analysis of the text. Even so, the Government still wins—unless it can be said that §924(c)(3)(B) unambiguously requires a categorical approach. Under the constitutional avoidance canon, the precise question before us is not whether §924(c)(3)(B) is best read to require a conduct-specific approach, but rather (as the Court's cases say) whether §924(c)(3)(B) can reasonably, plausibly, or fairly possibly be interpreted to require a conduct-specific approach. [**793] The answer to that question is easy. Yes. See Hooper v. California, 155 U. S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895) ("reasonable"); Clark v. Martinez, 543 U. S. 371, 380, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("plausible"); Skilling v. United States, 561 U. S. 358, 406, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010) ("fairly possible" (internal quotation marks omitted)).

The Court says that if §924(c)(3)(B) requires the categorical approach, then it is unconstitutionally vague. But the Court also says that if §924(c)(3)(B) focuses on the defendant's actual conduct, then it is constitutionally permissible. As the Court puts it, "a case-specific approach would avoid the vagueness problems that doomed the statutes in Johnson [***67] and Dimaya." Ante, at ___, 204 L. Ed. 2d, at 767. So the entire ball game is [*2350] whether it is

fairly possible to interpret §924(c)(3)(B) to require a conduct-specific approach. It surely is at least fairly possible.

It is an elementary principle of statutory interpretation that an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality. See generally Scalia, Reading Law: The Interpretation of Legal Texts, at 247-251; Eskridge, Interpreting Law: A Primer on How to Read Statutes and the Constitution, at 317-322. That uncontroversial principle of statutory interpretation dates back to the Founding era. See Mossman v. Higginson, 4 U.S. 12, 4 Dall. 12, 1 L. Ed. 720 (1800). As Justice Thomas has explained, the traditional doctrine of constitutional avoidance commands "courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading." Clark, 543 U. S., at 395 125 S. Ct. 716, 160 L. Ed. 2d 734 (dissenting opinion). This Court's duty is "not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." Civil Service Comm'n v. Letter Carriers, 413 U. S. 548, 571, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). In discharging that duty, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Hooper, 155 U. S., at 657, 15 S. Ct. 207, 39 L. Ed. 297.

This Court's longstanding practice of saving ambiguous statutes from unconstitutionality where fairly possible affords proper respect for the representative [***68] branches of our Government. The Court has explained that "a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous." United States v. Coombs, 37 U.S. 72, 12 Pet. 72, 76, 9 L. Ed. 1004 (1838).

In countless cases for more than 200 years, this Court has recognized the principle that courts should construe ambiguous laws to be consistent with the Constitution. See, e.g., McDonnell v. United States, 579 U. S. ___, ___-___, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016); Skilling, 561 U. S., at 405-409, 130 S. Ct. 2896, 177 L. Ed. 2d 619; Clark, 543 U. S., at 380-382 125 S. Ct. 716, 160 L. Ed. 2d 734; Edmond v. United States, 520 U. S. 651, 658, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997); Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U. S. 602, 628-630, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993); [**794] New York v. United States, 505 U. S. 144, 170, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992); Rust v. Sullivan, 500 U. S. 173, 190-191, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); Public Citizen v. Department of Justice, 491 U. S. 440, 465-467, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989); Communications Workers v. Beck, 487 U. S. 735, 762, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U. S. 568, 575-578, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U. S. 772, 780-781, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981); Letter Carriers, 413 U. S., at 571; Machinists v. Street, 367 U. S. 740,

749-750, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961); Ashwander v. TVA, 297 U. S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring); ICC v. Oregon-Washington R. & Nav. Co., 288 U. S. 14, 40-42, 53 S. Ct. 266, 77 L. Ed. 588 (1933); Crowell v. Benson, 285 U. S. 22, 62-63, 52 S. Ct. 285, 76 L. Ed. 598 (1932); Lucas v. Alexander, 279 U. S. 573, 577-578, 49 S. Ct. 426, 73 L. Ed. 851, 1929-2 C.B. 273 (1929); Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 345-346, 48 S. Ct. 194, 72 L. Ed. 303, 65 Ct. Cl. 761, 1928 Dec. Comm'r Pat. 246 (1928); [*2351] Blodgett v. Holden, 275 U. S. 142, 148-149, 48 S. Ct. 105, 72 L. Ed. 206, 1928-1 C.B. 324 (1927) (opinion of Holmes, J.); Missouri Pacific R. Co. v. Boone, 270 U. S. 466, 471-472, 46 S. Ct. 341, 70 L. Ed. 688 (1926); Linder v. United States, 268 U. S. 5, 17-18, 45 S. Ct. 446, 69 L. Ed. 819 (1925); Panama R. Co. v. Johnson, 264 U. S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748 (1924); Texas v. Eastern Texas R. Co., 258 U. S. 204, 217, 42 S. Ct. 281, 66 L. Ed. 566 (1922); Baender v. Barnett, 255 U. S. 224, 225-226, 41 S. Ct. 271, 65 L. Ed. 597 (1921); United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 S. Ct. 658, 60 L. Ed. 1061, T.D. 2340 (1916); United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 407-408, 29 S. Ct. 527, 53 L. Ed. 836 (1909); Hooper, 155 U. S., at 657, 15 S. Ct. 207, 39 L. Ed. 297; Grenada County Supervisors v. Brogden, 112 U. S. 261, 268-269, 5 S. Ct. 125, 28 L. Ed. 704 (1884); Coombs, 37 U.S., at 76, 12 Pet. 72, 76, 9 L. Ed. 1004; Parsons v. Bedford, 28 U.S. 433, 3 Pet. 433, 448-449, 7 L. Ed. 732 (1830); Mossman, 4 U.S., at 14, 4 Dall. 12, 1 L. Ed. 720.

To be clear, the case before us is not a case of avoiding possible unconstitutionality. This is a case of avoiding actual unconstitutionality. There is a debate about the former practice. There is no real debate about the latter rule. And it is the latter rule of statutory interpretation at issue here.

Section 924(c)(3)(B) is best read to focus on the defendant's actual conduct. But at a minimum—given the text, the background of substantial-risk laws, and the relevant precedents—it is fairly possible to interpret §924(c)(3)(B) to focus on the defendant's actual conduct. Because that reasonable interpretation would save §924(c)(3)(B) from unconstitutionality, this case [***69] should be very straightforward, as Judge Newsom explained in his thorough majority opinion in the Eleventh Circuit and as Judge Niemeyer and Judge Richardson explained in their persuasive separate opinions in the Fourth Circuit. Ovalles, 905 F. 3d, at 1251; Simms, 914 F. 3d, at 272 (opinion of Niemeyer, J.); id., at 272-277 (opinion of Richardson, J.). We should prefer the constitutional reading over the unconstitutional reading.

The Court did not apply constitutional [**795] avoidance in Johnson and Dimaya. Why not? In those two cases, the Court explained, the canon of constitutional avoidance was essentially rendered a nullity. That is because, as the Court described the situation, the Court was between a rock and a hard place. The categorical approach would have led to Fifth Amendment vagueness concerns, whereas applying the conduct-specific approach would have led to Sixth Amendment

jury-trial concerns. See Dimaya, 584 U. S., at ___-___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (plurality opinion) .

Here, by contrast, the Court is not between a rock and a hard place. Applying the categorical approach to §924(c)(3)(B) would lead to vagueness concerns, whereas applying the conduct-specific approach would lead to no constitutional concerns.

Faced with a choice between a rock and constitutionality, the Court chooses the rock. I do not understand that choice.

The Court [***70] offers two related reasons for its choice to run the statute into a rock. Neither reason holds up.

First, the Court concludes that the constitutional avoidance canon must yield to the rule of lenity. That argument disregards the Court's oft-repeated statements that the rule of lenity is a tool of last resort that applies "only when, after consulting traditional canons of statutory construction," grievous ambiguity remains. Hayes, 555 U. S., at 429, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (internal quotation marks omitted); see also, e.g., [*2352] Ocasio v. United States, 578 U. S. ___, ___, n. 8, 136 S. Ct. 1423, 194 L. Ed. 2d 520, 531 (2016) ("after seizing everything from which aid can be derived" (internal quotation marks omitted)); Muscarello v. United States, 524 U. S. 125, 138, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998) (same); United States v. Wells, 519 U. S. 482, 499, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997) (same); Reno v. Koray, 515 U. S. 50, 65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (same); United States v. Shabani, 513 U. S. 10, 17, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994) ("after consulting traditional canons of statutory construction"); Smith v. United States, 508 U. S. 223, 239, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993) ("after seizing every thing from which aid can be derived" (internal quotation marks and alterations omitted)); Moskal v. United States, 498 U. S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) ("after resort to the language and structure, legislative history, and motivating policies of the statute" (internal quotation marks omitted)); Callanan v. United States, 364 U. S. 587, 596, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1961) ("at the end of the process of construing what Congress has expressed").

The constitutional avoidance canon is a traditional canon of statutory interpretation. The constitutional avoidance canon is employed to reach a reasonable interpretation of an ambiguous statute. Where, [***71] as here, that canon applies and yields such a reasonable interpretation, no grievous ambiguity remains. The rule of lenity has no role to play. Contrary to the Court's assertion, the canon of constitutional avoidance is not "at war" with the rule of lenity. Ante, at ___, 204 L. Ed. 2d, at 775. The canon of constitutional avoidance precedes the rule of lenity because the rule of lenity comes into play (this Court has said countless times) only "after consulting [**796] traditional canons of statutory construction." Hayes, 555 U. S., at 429, 129

S. Ct. 1079, 172 L. Ed. 2d 816 (emphasis added; internal quotation marks omitted). The rule of lenity "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Callanan, 364 U. S., at 596, 81 S. Ct. 321, 5 L. Ed. 2d 312.

In addition, the rule of lenity is triggered only in the face of "grievous ambiguity." Muscarello, 524 U. S., at 139, 138, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (internal quotation marks omitted). To reiterate, §924(c)(3)(B) is best read to focus on the actual defendant's actual conduct. But to the extent that there is any ambiguity in §924(c)(3)(B), that ambiguity is far from grievous.

Second, and relatedly, the Court claims that the canon of constitutional avoidance, as a general matter, cannot be relied upon to broaden the scope of a criminal statute, as [***72] opposed to narrowing the scope of a criminal statute. And the Court says that the canon cannot be used here because, in the Court's view, relying on the constitutional avoidance canon in this case would expand the scope of §924(c)(3)(B). I disagree for two independent reasons.

To begin with, that theory seems to come out of nowhere. The Court's novel cabining of the constitutional avoidance canon is not reflected in this Court's precedents. On the contrary, it contradicts several precedents. This Court has applied the constitutional avoidance canon even when avoiding the constitutional problems would have broadened the statute's scope. For example, in United States v. Culbert, this Court rejected a narrowing construction of the Hobbs Act because that construction would have raised vagueness concerns. 435 U. S. 371, 374, 98 S. Ct. 1112, 55 L. Ed. 2d 349 (1978); see also United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 82, 53 S. Ct. 42, 77 L. Ed. 175 (1932); cf. United States v. Grace, 461 U. S. 171, 176, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

[*2353] Moreover, the premise of this novel broadening/ narrowing theory is flawed. A categorical approach to §924(c)(3)(B) would not be inherently narrower than a conduct-specific approach. Each approach would sweep in some crimes that the other would not. On the one hand, some crimes that might be deemed categorically violent sometimes may be committed in nonviolent ways. Those crimes would be covered [***73] by the categorical approach but not by a conduct-specific approach. On the other hand, some categorically nonviolent crimes are committed in violent ways. Those crimes would not be covered by the categorical approach but would be covered by a conduct-specific approach. See Johnson, 576 U. S., at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (Alito, J., dissenting).

In sum, the constitutional avoidance canon makes this an especially straightforward case. It is at least fairly possible to read §924(c)(3)(B) to focus on the actual defendant's actual conduct during the actual crime. End of case.

[**797] III

The consequences of the Court's decision today will be severe. By invalidating the substantial-risk prong of §924(c)(3), the Court's decision will thwart Congress' law enforcement policies, destabilize the criminal justice system, and undermine safety in American communities. If the law required those results, we would have to swallow the consequences. But the law, in my respectful view, does no such thing.

The Court's decision means that people who in the future commit violent crimes with firearms may be able to escape conviction under §924(c). In enacting §924(c), Congress sought to keep firearms away from violent criminal situations. Today, the Court invalidates a critical provision designed [***74] to achieve that goal. To be sure, many violent crimes still might fall within §924(c)(3)'s elements clause. But many others might not. When defendants use firearms during conspiracies to commit robbery, arsons, attempted carjackings, and kidnapings, to name just a few, they might no longer be subject to prosecution under §924(c). See, e.g., Simms, 914 F. 3d, at 233-234 (conspiracy to commit robbery); United States v. Salas, 889 F. 3d 681, 683-684 (CA10 2018) (arson); United States v. Jenkins, 849 F. 3d 390, 393 (CA7 2017) (kidnaping).

To get a flavor of the offenders who will now potentially avoid conviction under §924(c), consider a sample of those offenders who have been convicted under §924(c)(3)'s substantial-risk prong:

• One defendant committed assault with intent to commit murder. The defendant shot his wife multiple times while the couple was camping in Buffalo River National Park. See United States v. Prickett, 839 F. 3d 697, 698 (CA8 2016).

• One defendant committed arson. The defendant used a molotov cocktail to firebomb the Irish Ink Tattoo Shop. See Salas, 889 F. 3d, at 683; United States v. Salazar, 2014 WL 12788997, *1 (NM, Aug. 14, 2014).

• One defendant and others kidnaped a man who they believed had stolen money and an Xbox from the defendant. They beat the man severely and threatened to kill him. See Pet. for Cert. in United States v. Jenkins, O. T. 2017, No. 17-97, p. 2.

• One defendant committed conspiracy to commit robbery. The defendant and his co-conspirators planned to steal Percocet [***75] and cash from a man they thought was a drug dealer. Armed with a pistol and a crowbar, they broke into the man's home by shattering a sliding glass door and found three men there. One of the [*2354] defendant's co-conspirators attacked all three men with the crowbar, and the defendant threatened the men with a pistol multiple times. See United States v. Douglas, 907 F. 3d 1, 4-5 (CA1 2018).

• One defendant committed attempted carjacking. Armed with guns and baseball bats, the defendant and her co-conspirators robbed a grocery store and carjacked two vehicles, pistol whipping the owner of one of the vehicles in the process. They then attempted to carjack a third vehicle. They approached a family getting out of a minivan and demanded the keys. One of the defendant's co-conspirators [**798] hit a 13-year-old girl in the mouth with a baseball bat. Another shot an AK-47 at the girl's family. See Ovalles, 905 F. 3d, at 1235.

• One defendant operated multiple houses of prostitution in Annapolis. The defendant threatened perceived competitors with violence. He also beat and threatened women, sometimes to compel them to engage in prostitution. See United States v. Fuertes, 805 F. 3d 485, 490-492 (CA4 2015).

• One defendant committed conspiracy to commit robbery. In the middle of the night, the defendant and a co-conspirator crawled into a McDonald's [***76] through the drive-through window. The defendant pointed a gun at the restaurant's manager and attempted to hit another employee. The defendant demanded money, and the manager complied. The defendant then removed the money from the cash drawer, pistol whipped the manager, threw the cash drawer at the other employee, and fled the scene along with his co-conspirators and $1,100. See Simms, 914 F. 3d, at 232.

• One defendant committed conspiracy to commit robbery. The defendant and his co-conspirators committed a string of armed robberies of small businesses. During the robberies, they wore masks and gloves. They were armed with guns, knives, and baseball bats. They injured several people during the course of their robberies, breaking bones, drawing blood, and knocking people out. They also shot and killed one of their victims point blank. See Barrett, 903 F. 3d, at 170, 184.

Those real-life stories highlight a second unfortunate consequence of the Court's decision. Many offenders who have already committed violent crimes with firearms—and who have already been convicted under §924(c)—may be released early from prison. The Court's decision will apply to all defendants whose convictions are not yet final on direct review and who preserved the argument. [***77] With the benefit of this Court's decision, many dangerous offenders who received lengthy prison sentences as a result of their violent conduct might walk out of prison early. And who knows whether the ruling will be retroactive? Courts will be inundated with collateral-review petitions from some of the most dangerous federal offenders in America. As Judge Niemeyer wrote in his separate opinion in the Fourth Circuit, "thousands of §924(c)(1) convictions will unnecessarily be challenged as premised on what the majority today concludes is an unconstitutionally vague provision, even though the parties in those cases had little difficulty understanding, enforcing, or defending the §924(c)(1) charges at issue." Simms, 914 F. 3d, at 264.

Moreover, defendants who successfully challenge their §924(c) convictions will not merely be resentenced. Rather, their §924(c) convictions will be thrown out altogether. [*2355] That is because, to restate an obvious point, §924(c) defines a substantive criminal offense. To be sure, the §924(c) defendants may also be serving other sentences for other convictions (for instance, if they were convicted of and [**799] sentenced for the underlying crime of violence). But with the benefit of the Court's decision, they may be able to get their §924(c) convictions [***78] tossed and lop off years—potentially decades—from their total prison time.

All because the Court thinks that §924(c)(3)(B) unambiguously compels a focus on the imagined conduct of a hypothetical defendant rather than on the actual conduct of the actual defendant. That analysis is not persuasive, especially in light of the constitutional avoidance doctrine. It is true that the Government once advocated for a categorical approach. But in the early years after Congress added a "crime of violence" definition to §924(c), before courts settled on a categorical approach, the Government correctly argued for a conduct-specific approach to the substantial-risk prong. See, e.g., United States v. Cruz, 805 F. 2d 1464, 1469 (CA11 1986). The Government later changed its tune only after the courts settled on a categorical approach—at a time when it did not matter for constitutional vagueness purposes, before Johnson and Dimaya. In any event, the question is what to do now after Johnson and Dimaya. The answer should not be hard. To quote Judge William Pryor, writing for five judges in the Eleventh Circuit, how "did we ever reach the point where" we "must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort [***79] fired an AK-47 at her family is a crime of violence? It's nuts." Ovalles, 905 F. 3d, at 1253 (concurring opinion).

To be sure, the consequences cannot change our understanding of the law. But when the consequences are this bad, it is useful to double-check the work. And double-checking here, in my view, reveals several problems: relying on cases from the prior-conviction context whose rationales do not apply in this current-offense context; not fully accounting for the long tradition of substantial-risk criminal statutes; not reading the words of the statute in context and consistent with precedents such as Hayes; and then, perhaps most problematically, misapplying the longstanding constitutional avoidance canon. After double-checking, it should be evident that the law does not compel those serious consequences. I am not persuaded that the Court can blame this decision on Congress. The Court has a way out, if it wants a way out.

***

The Court usually reads statutes with a presumption of rationality and a presumption of constitutionality. Instead of reading §924(c)(3)(B) to ensure that it is constitutional, the Court reads §924(c)(3)(B) in a way that makes it unconstitutional. The bedrock principle that the Court interprets ambiguous statutes [***80] to avoid unconstitutionality is seemingly transformed into a principle of interpreting ambiguous statutes to lead to unconstitutionality.

I respect and entirely understand how the Court got here. Johnson and Dimaya were earth-rattling decisions. But we should not follow Johnson and Dimaya off the constitutional cliff in this different §924(c) context. Unlike [**800] the statutes at issue in Johnson and Dimaya, this statute is not a prior-conviction statute. This statute operates entirely in the present and is not remotely vague. I respectfully dissent.

ROSALES-MIRELES V. UNITED STATES
Supreme Court of the United States, February 21, 2018, Argued; June 18, 2018, Decided, No. 16-9493. Reporter, 138 S. Ct. 1897 * | 201 L. Ed. 2d 376 ** | 2018 U.S. LEXIS 3690 *** | 86 U.S.L.W. 4434 | 27 Fla. L. Weekly Fed. S 357 | 2018 WL 3013806

FLORENCIO ROSALES-MIRELES, Petitioner v. UNITED STATES

Subsequent History: Decision reached on appeal by, Remanded by United States v. Rosales-Mireles, 898 F.3d 1265, 2018 U.S. App. LEXIS 22254 (5th Cir. Tex., Aug. 10, 2018)

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
United States v. Rosales-Mireles, 850 F.3d 246, 2017 U.S. App. LEXIS 3968 (5th Cir. Tex., Mar. 6, 2017)

Disposition: Reversed and remanded.

Case Summary

Overview
HOLDINGS: [1]-Application of an unduly burdensome articulation of Olano's fourth prong and declining to remand a case for resentencing under Fed. R. Crim. P. 52(b) was an abuse of discretion because in the ordinary case a failure to correct plain USSG error that affected a defendant's substantial rights would seriously affect the fairness, integrity, and public reputation of judicial proceedings; [2]-Accordingly, defendant, who pleaded guilty to illegal reentry, and who was erroneously sentenced due to a presentence report which mistakenly counted a state misdemeanor conviction twice, resulting in a USSG range of 77 to 96 months when the correctly calculated range was 70 to 87 months, was entitled to resentencing under Fed. R. Crim. P. 52(b) because the appellate court applied an unduly burdensome articulation of Olano's fourth prong in requiring that the error "shock the conscience."

Outcome
Decision reversed and case remanded. 7-2 Decision; 1 Dissent.

Decision

[**376] Lower court erred in not remanding for resentencing due to miscalculation of Federal Sentencing Guidelines range as error was plain and affected substantial rights of defendant.

Overview: HOLDINGS: [1]-Application of an unduly burdensome articulation of Olano's fourth prong and declining to remand a case for resentencing under Fed. R. Crim. P. 52(b) was an abuse of discretion because in the ordinary case a failure to correct plain USSG error that affected a defendant's substantial rights would seriously affect the fairness, integrity, and public reputation of judicial proceedings; [2]-Accordingly, defendant, who pleaded guilty to illegal reentry, and who was erroneously sentenced due to a presentence report which mistakenly counted a state misdemeanor conviction twice, resulting in a USSG range of 77 to 96 months when the correctly calculated range was 70 to 87 months, was entitled to resentencing under Fed. R. Crim. P. 52(b) because the appellate court applied an unduly burdensome articulation of Olano's fourth prong in requiring that the error "shock the conscience."

Outcome: Decision reversed and case remanded. 7-2 Decision; 1 Dissent.

Syllabus

[*1900] [**379] Each year, district courts sentence thousands of individuals to imprisonment for violations of federal law. To help ensure certainty and fairness in those sentences, federal district courts are required to consider the advisory United States Sentencing Guidelines. Prior to sentencing, the United States Probation Office prepares a presentence investigation report to help the court determine the applicable Guidelines range. Ultimately, the district court is responsible for ensuring the Guidelines range it considers is correct. [*1901] At times, however, an error in the calculation of the Guidelines range goes unnoticed by the court and the parties. On appeal, such errors not raised in the district court may be remedied under Federal Rule of Criminal Procedure 52(b), provided that, as established in United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508: (1) the error was not "intentionally relinquished or abandoned," (2) the error is plain, and (3) the error "affected the defendant's substantial rights," Molina-Martinez v. United States, 578 U.S. ___, ___,136 S. Ct. 1338, 194 L. Ed. 2d 444. If those conditions are met, "the court of appeals should exercise its discretion to correct the forfeited error if the error ' "seriously affects the fairness, integrity or public [***2] reputation of judicial proceedings." ' " Id., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444. This last consideration is often called Olano's fourth prong. The issue here is when a Guidelines error [**380] that satisfies Olano's first three conditions warrants relief under the fourth prong.

Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry into the United States. In calculating the Guidelines range, the Probation Office's presentence report mistakenly counted a state misdemeanor conviction twice. As a result, the report yielded a Guidelines range of 77 to 96 months, when the correctly calculated range would have been 70 to 87 months.

Rosales-Mireles did not object to the error in the District Court, which relied on the miscalculated Guidelines range and sentenced him to 78 months of imprisonment. On appeal, Rosales-Mireles challenged the incorrect Guidelines range for the first time. The Fifth Circuit found that the Guidelines error was plain and that it affected Rosales-Mireles' substantial rights because there was a "reasonable probability that he would have been subject to a different sentence but for the error." The Fifth Circuit nevertheless declined to remand the case for resentencing, concluding that Rosales-Mireles [***3] had not established that the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings because neither the error nor the resulting sentence "would shock the conscience."

Held:

A miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case. Pp. ___ - ___, 201 L. Ed. 2d, at 385-390.

(a) Although "Rule 52(b) is permissive, not mandatory," Olano, 507 U.S., at 735, 113 S. Ct. 1770, 123 L. Ed. 2d 508, it is well established that courts "should" correct a forfeited plain error affecting substantial rights "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,' " id., at 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508. Like the narrow rule rejected in Olano, which would have called for relief only for a miscarriage of justice, the Fifth Circuit's shock-the-conscience standard too narrowly confines the extent of the court of appeals' discretion. It is not reflected in Rule 52(b), nor in how the plain-error doctrine has been applied by this Court, which has reversed judgments for plain error based on inadvertent or unintentional errors by the court or the parties below and has remanded [***4] cases involving such errors, including sentencing errors, for consideration of Olano's fourth prong. The errors are not required to amount to a "powerful indictment" of the system. The Fifth Circuit's emphasis on the district judge's "competence or integrity" also unnecessarily narrows Olano's instruction to correct an error if it seriously affects "judicial proceedings." Pp. ___ - ___, 201 L. Ed. 2d, at 385-386.

(b) The effect of the Fifth Circuit's heightened standard is especially pronounced in cases like this one. An error [*1902] resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence greater than "necessary" to fulfill the purposes of incarceration, 18 U.S.C. §3553(a). See Molina-Martinez, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444. That risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings [**381] in the context of a plain Guidelines error because Guidelines miscalculations ultimately result from judicial error, as the district court is charged in the first instance with ensuring the

Guidelines range it considers is correct. Moreover, remands for resentencing are relatively inexpensive proceedings compared to remands for retrial. [***5] Ensuring the accuracy of Guidelines determinations also furthers the Sentencing Commission's goal of achieving uniformity and proportionality in sentencing more broadly, since including uncorrected sentences based on incorrect Guidelines ranges in the data the Commission collects could undermine the Commission's ability to make appropriate revisions to the Guidelines. Because any exercise of discretion at the fourth prong of Olano inherently requires "a case-specific and fact-intensive" inquiry, Puckett v. United States, 556 U.S. 129, 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266, countervailing factors may satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction. But there are no such factors in this case. Pp. ___ - ___, 201 L. Ed. 2d, at 386-388.

(c) The Government and dissent maintain that even though the Fifth Circuit's standard was inaccurate, Rosales-Mireles is still not entitled to relief. But their arguments are unpersuasive. They caution that granting this type of relief would be inconsistent with the Court's statements that discretion under Rule 52(b) should be exercised "sparingly," Jones v. United States, 527 U.S. 373, 389, 119 S. Ct. 2090, 144 L. Ed. 2d 370, and reserved for "exceptional circumstances," Meyer v. Kenmore Granville Hotel Co., 297 U.S. 160, 56 S. Ct. 405, 80 L. Ed. 557. In contrast to the Jones remand, however, no additional jury proceedings would be required [***6] in a remand for resentencing based on a Guidelines miscalculation. Plus, the circumstances of Rosales-Mireles' case are exceptional under this Court's precedent, as they are reasonably likely to have resulted in a longer prison sentence than necessary and there are no countervailing factors that otherwise further the fairness, integrity, or public reputation of judicial proceedings. The Government and dissent also assert that Rosales-Mireles' sentence is presumptively reasonable because it falls within the corrected Guidelines range. But a court of appeals can consider a sentence's substantive reasonableness only after it ensures "that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445. If a district court cannot properly determine whether, considering all sentencing factors, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary," 18 U. S. C. §3553(a), the resulting sentence would not bear the reliability that would support a "presumption of reasonableness" on review. See 552 U.S., at 51, 128 S. Ct. 586, 169 L. Ed. 2d 445. And regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust [***7] procedures may well undermine public perception of the proceedings. Finally, the Government and dissent maintain that the Court's decision will create an opportunity for "sandbagging" [*1903] that Rule 52(b) is supposed to prevent. But that concern fails to account [**382] for the realities at play in sentencing proceedings, where it is highly speculative that a defendant would benefit from a strategy of deliberately forgoing an objection in the district court, with hopes of arguing for reversal under plain-error review later. Pp. ___ - ___, 201 L. Ed. 2d, at 388-390.

850 F.3d 246, reversed and remanded.

Counsel: Kristin L. Davidson argued the cause for petitioner.

Noel J. Francisco argued the cause for respondent.

Judges: Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Kagan, and Gorsuch, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined.

Opinion by: SOTOMAYOR

Opinion
Justice Sotomayor delivered the opinion of the Court.

[1] Federal Rule of Criminal Procedure 52(b) provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns the bounds of that discretion, and whether a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights, calls for a court [***8] of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence. The Court holds that such an error will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.

I

A
Each year, thousands of individuals are sentenced to terms of imprisonment for violations of federal law. District courts must determine in each case what constitutes a sentence that is "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), to achieve the overarching sentencing purposes of "retribution, deterrence, incapacitation, and rehabilitation." Tapia v. United States, 564 U.S. 319, 325, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (2011); 18 U.S.C. §§3551(a), 3553(a)(2). Those decisions call for the district court to exercise discretion. Yet, to ensure "'certainty and fairness'" in sentencing, district courts must operate within the framework established by Congress. United States v. Booker, 543 U.S. 220, 264, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (quoting 28 U.S.C. §991(b)(1)(B)).

The Sentencing Guidelines serve an important role in that framework. [*1904] "'[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout

the sentencing process.'" Peugh v. United States, 569 U.S. 530, 541, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013) (quoting Gall v. United States, 552 U.S. 38, 50, n. 6, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); emphasis in original). Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as "a meaningful benchmark" in the [***9] initial determination of a sentence and "through the process of appellate review." 569 U.S., at 541, 133 S. Ct. 2072, 186 L. Ed. 2d 84.

Of course, to consult the applicable Guidelines range, a district court must first determine what that range is. This can be a "complex" undertaking. [**383] Molina-Martinez v. United States, 578 U.S. ___, ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, 451 (2016). The United States Probation Office, operating as an arm of the district court, first creates a presentence investigation report, "which includes a calculation of the advisory Guidelines range it considers to be applicable." Id., at ___, 136 S. Ct. 1338, 194 L. Ed .2d 444, at 451; see Fed. Rules Crim. Proc. 32(c)(1)(A), (d)(1); United States Sentencing Commission, Guidelines Manual §1B1.1(a) (Nov. 2016) (USSG). That calculation derives from an assessment of the "offense characteristics, offender characteristics, and other matters that might be relevant to the sentence." Rita v. United States, 551 U.S. 338, 342, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) (internal quotation marks omitted). Specifically, an offense level is calculated by identifying a base level for the offense of conviction and adjusting that level to account for circumstances specific to the defendant's case, such as how the crime was committed and whether the defendant accepted responsibility. See USSG §§1B1.1(a)(1)-(5). A numerical value is then attributed to any prior offenses committed by the defendant, which are added together to generate a criminal history score that places the defendant within a particular [***10] criminal history category. §§1B1.1(a)(6), 4A1.1. Together, the offense level and the criminal history category identify the applicable Guidelines range. §1B1.1(a)(7).

B

[2] The district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct, and the "[f]ailure to calculate the correct Guidelines range constitutes procedural error." Peugh, 569 U.S., at 537, 133 S. Ct. 2072, 186 L. Ed. 2d 84. Given the complexity of the calculation, however, district courts sometimes make mistakes. It is unsurprising, then, that "there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed" by the parties as well, which may result in a defendant raising the error for the first time on appeal. Molina-Martinez, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 451. Those defendants are not entirely without recourse.

[3] Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." In United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), the Court established three conditions that must be met before a court may consider exercising its discretion to correct the error. "First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear [***11] or obvious. Third, the error must have affected the defendant's substantial rights." Molina-Martinez, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452 (citations omitted). To satisfy this third condition, the defendant ordinarily must "'show a [*1905] reasonable probability that, but for the error,' the outcome of the proceeding would have been different." Ibid. (quoting United States v. Dominguez Benitez, 542 U.S. 74, 76, 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)). Once those three conditions have been met, "the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the [**384] fairness, integrity or public reputation of judicial proceedings." Molina-Martinez, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452 (internal quotation marks omitted). It is this last consideration, often called Olano's fourth prong, that we are asked to clarify and apply in this case.

C

Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry in violation of 8 U.S.C. §§1326(a), (b)(2). The Probation Office in its presentence investigation report mistakenly counted a 2009 state conviction of misdemeanor assault twice. This double counting resulted in a criminal history score of 13, which placed Rosales-Mireles in criminal history category VI. Combined with his offense level of 21, that yielded a Guidelines range of 77 to 96 months. Had the criminal history score been calculated correctly, Rosales-Mireles [***12] would have been in criminal history category V, and the resulting Guidelines range would have been 70 to 87 months. See USSG ch. 5, pt. A (sentencing table).

Rosales-Mireles did not object to the double-counting error before the District Court. Relying on the erroneous presentence investigation report, and after denying Rosales-Mireles' request for a downward departure, the District Court sentenced Rosales-Mireles to 78 months of imprisonment, one month above the lower end of the Guidelines range that everyone thought applied.

On appeal, Rosales-Mireles argued for the first time that his criminal history score and the resulting Guidelines range were incorrect because of the double counting of his 2009 conviction. Because he had not objected in the District Court, the Court of Appeals for the Fifth Circuit reviewed for plain error. 850 F.3d 246, 248 (2017).

Applying the Olano framework, the Fifth Circuit concluded that Rosales-Mireles had established that the Guidelines miscalculation constituted an error that was plain, satisfying Olano's first two

conditions. It also held that the error affected Rosales-Mireles' substantial rights, thus satisfying the third condition, because there was "a reasonable probability that he would [***13] have been subject to a different sentence but for the error." 850 F.3d, at 249. In reaching that conclusion, the Fifth Circuit rejected the Government's argument that Rosales-Mireles would have received the same sentence regardless of the Guidelines error, because the District Court had denied a downward departure "based, in part, on Rosales-Mireles' criminal history," which "erroneously included an extra conviction." Ibid.

The Fifth Circuit nevertheless declined to exercise its discretion to vacate and remand the case for resentencing because it concluded that Rosales-Mireles failed to establish that the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. In its view, "the types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Id., at 250 (internal quotation marks and alterations omitted). Because Rosales-Mireles' sentence of 78 months fell within the correct range [**385] of 70 to 87 [*1906] months, the Fifth Circuit held that neither the error nor the resulting sentence "would shock the conscience." [***14] Ibid.

The Fifth Circuit's articulation of Olano's fourth prong is out of step with the practice of other Circuits. 1 We granted certiorari to resolve that conflict, 582 U.S. ___, 137 S. Ct. 2000, 198 L. Ed. 2d 718 (2017), and now reverse.

II

A

[4] Although "Rule 52(b) is permissive, not mandatory," Olano, 507 U.S., at 735, 113 S. Ct. 1770, 123 L. Ed. 2d 508, it is well established that courts "should" correct a forfeited plain error that affects substantial rights "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" Id., at 736, 113 S. Ct. 1770, 123 L. Ed .2d 508 (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555 (1936); alteration omitted); see also Molina-Martinez, 578 U.S., at ___-___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452. The Court in Olano rejected a narrower rule that would have called for relief only "'in those circumstances in which a miscarriage of justice would otherwise result,'" that is to say, where a defendant is actually innocent. 507 U.S., at 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (quoting United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). By focusing instead on principles of fairness, integrity, and public reputation, the Court recognized a broader category of errors that warrant correction on plain-error review. See 507 U.S., at 736-737, 113 S. Ct. 1770, 123 L. Ed .2d 508.

Like the miscarriage-of-justice rule that the Court rejected in Olano, the Fifth Circuit's standard is unduly restrictive. To be sure, a conclusion that an error "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into [***15] question the competence or integrity of the district judge," 850 F.3d, at 250 (internal quotation marks omitted), would demand an exercise of discretion to correct the error. Limiting relief only to those circumstances, however, too narrowly confines the extent of a court of appeals' discretion.

[5] The "shock the conscience" standard typically is employed when determining whether governmental action violates due process rights under the Fifth and Fourteenth Amendments. See County of Sacramento v. Lewis, 523 U.S. 833, 847, n. 8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience"). This Court has said that the "shock the conscience" standard is satisfied where the conduct was "intended to injure in some way unjustifiable by any government interest," or in some circumstances if it resulted from deliberate [**386] indifference. Id., at 849-850, 118 S. Ct. 1708, 140 L. Ed. 2d 1043.

[6] That standard is not reflected in Rule 52(b) itself, nor in how this Court has applied the plain-error doctrine. The Court repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below. See, e.g., [*1907] Silber v. United States, 370 U.S. 717, 717-718, 82 S. Ct. 1287, 8 L. Ed. 2d 798 (1962) (per curiam) (reversing judgment for [***16] plain error as a result of insufficient indictment); Brasfield v. United States, 272 U.S. 448, 449-450, 47 S. Ct. 135, 71 L. Ed. 345 (1926) (reversing judgment for plain error where the trial judge improperly inquired of a jury's numerical division); Clyatt v. United States, 197 U.S. 207, 222, 25 S. Ct. 429, 49 L. Ed. 726 (1905) (reversing judgment for plain error where the Government presented insufficient evidence to sustain conviction). The Court also "routinely remands" cases involving inadvertent or unintentional errors, including sentencing errors, for consideration of Olano's fourth prong with the understanding that such errors may qualify for relief. Hicks v. United States, 582 U.S. ___, ___, 137 S. Ct. 2000, 198 L. Ed. 2d 718 (2017) (Gorsuch, J., concurring) (137 S. Ct. 2000, 198 L. Ed. 2d 718).

The Fifth Circuit's additional focus on errors that "serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge," 850 F.3d, at 250 (internal quotation marks omitted), similarly alters the Rule 52(b) standard. [7] The Court has never said that errors must amount to a "powerful indictment" of the system, a phrase which implies by its terms that the only errors worthy of correction are those that rise to the level of grossly serious misconduct. Similarly, the Fifth Circuit's emphasis on the "competence or integrity of the district judge" narrows Olano's instruction that an error should

be corrected if it seriously [***17] affects "judicial proceedings." In articulating such a high standard, the Fifth Circuit substantially changed Olano's fourth prong.

B

The effect of the Fifth Circuit's heightened standard is especially pronounced in a case like this one. A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b).

In Molina-Martinez, [8] the Court recognized that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 454. In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than "necessary" to fulfill the purposes of incarceration. 18 U.S.C. §3553(a); Tapia, 564 U.S., at 325, 131 S. Ct. 2382, 180 L. Ed. 2d 357. "To a prisoner," this prospect of additional "time behind bars is not some theoretical or mathematical concept." Barber v. Thomas, 560 U.S. 474, 504, 130 S. Ct. 2499, 177 L. Ed. 2d 1 (2010) (Kennedy, J., dissenting). "[A]ny amount of actual jail time" is significant, Glover v. United States, 531 U.S. 198, 203, [**387] 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001), and "ha[s] exceptionally severe consequences for the [***18] incarcerated individual [and] for society which bears the direct and indirect costs of incarceration," United States v. Jenkins, 854 F.3d 181, 192 (CA2 2017). The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b). It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners "as people." T. Tyler, Why People Obey the Law 164 (2006).

[*1908] The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error. Unlike "case[s] where trial strategies, in retrospect, might be criticized for leading to a harsher sentence," Guidelines miscalculations ultimately result from judicial error. Glover, 531 U.S., at 204, 121 S. Ct. 696, 148 L. Ed. 2d 604; see also Peugh, 569 U.S., at 537, 133 S. Ct. 2072, 186 L. Ed. 2d 84. That was especially so here where the District Court's error in imposing Rosales-Mireles' sentence was based on a mistake made in the presentence investigation report by the Probation Office, which works on behalf of the District Court. Moreover, [***19] "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." Molina-Martinez, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 458 (internal quotation marks omitted). "A resentencing is a brief event,

normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." United States v. Williams, 399 F.3d 450, 456 (CA2 2005).

Ensuring the accuracy of Guidelines determinations also serves the purpose of "providing certainty and fairness in sentencing" on a greater scale. 28 U.S.C. §994(f); see also §991(b)(1)(B); Booker, 543 U.S., at 264, 125 S. Ct. 738, 160 L. Ed. 2d 621. The Guidelines assist federal courts across the country in achieving uniformity and proportionality in sentencing. See Rita, 551 U.S., at 349, 127 S. Ct. 2456, 168 L. Ed. 2d 203. To realize those goals, it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. See id., at 350, 127 S. Ct. 2456, 168 L. Ed. 2d 203. When sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined. 2

In broad strokes, the public legitimacy of our justice system relies on [**388] procedures that [***20] are "neutral, accurate, consistent, trustworthy, and fair," and that "provide opportunities for error correction." Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215-216 (2012). In considering claims like Rosales-Mireles', then, "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" United States v. Sabillon-Umana, 772 F.3d 1328, 1333-1334 (CA10 2014) (Gorsuch, J.). In the context of a plain Guidelines error that affects substantial rights, that diminished view of the proceedings ordinarily will satisfy Olano's fourth prong, as it does in this case. 3 As the Fifth Circuit [*1909] itself concluded, there is a reasonable probability that, without correction of the Guidelines error, Rosales-Mireles will spend more time in prison than the District Court otherwise would have considered necessary. 850 F.3d, at 249. That error was based on a mistake by the Probation Office, a mistake that can be remedied through a relatively inexpensive resentencing proceeding.

Of course, [10] any exercise of discretion [***21] at the fourth prong of Olano inherently requires "a case-specific and fact-intensive" inquiry. Puckett v. United States, 556 U.S. 129, 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); see also Young, 470 U.S., at 16-17, n. 14, 105 S. Ct. 1038, 84 L. Ed. 2d 1. There may be instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction. But on the facts of this case, there are no such factors. 4

III

The United States and the dissent agree with Rosales-Mireles that the Fifth Circuit's formulation of the standard for the exercise of discretion under Rule 52(b) "is an inaccurate description" of Olano's fourth prong. Brief for United States 34; post, at 1, n. 1, 201 L. Ed. 2d, at 391 (opinion of Thomas, J.) ("[T]he Fifth Circuit's standard is higher than the one articulated in this Court's precedents"). They nevertheless maintain that Rosales-Mireles is not entitled to relief. We are unpersuaded, though a few points merit brief discussion.

[**389] First, the United States and the dissent caution that a grant of relief in Rosales-Mireles' case and in others like his would be inconsistent with the Court's statements that discretion under Rule 52(b) should be exercised "sparingly," Jones v. United States, 527 U.S. 373, 389, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999), and reserved for "exceptional circumstances," Atkinson, 297 U.S., at 160, 56 S. Ct. 391, 80 L. Ed. 555. As an initial matter, Jones and the cases it relies [***22] on for the point that discretion should be exercised "sparingly" would have required additional jury proceedings on remand, either at resentencing or retrial. See 527 U.S., at 384, 389, 119 S. Ct. 2090, 144 L. Ed. 2d 370; see also Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1; United States v. Frady, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Henderson v. Kibbe, 431 U.S. 145, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). As we have explained, a decision remanding a case to the district court for resentencing on the basis of a Guidelines miscalculation is far less burdensome than a retrial, or other jury proceedings, and thus does not demand such a high degree of caution.

[*1910] In any event, the circumstances surrounding Rosales-Mireles' case are exceptional within the meaning of the Court's precedent on plain-error review, as they are reasonably likely to have resulted in a longer prison sentence than necessary and there are no countervailing factors that otherwise further the fairness, integrity, or public reputation of judicial proceedings. The fact that, as a result of the Court's holding, most defendants in Rosales-Mireles' situation will be eligible for relief under Rule 52(b) does not justify a decision that ignores the harmful effects of allowing the error to persist.

Second, the United States and the dissent assert that, because Rosales-Mireles' sentence falls within the corrected Guidelines range, the sentence is presumptively reasonable [***23] and "less likely to indicate a serious injury to the fairness, integrity, or public reputation of judicial proceedings." Brief for United States 20-21; see also post, at 10, 201 L. Ed. 2d, at 396. [11] A substantive reasonableness determination, however, is an entirely separate inquiry from whether an error warrants correction under plain-error review.

Before a court of appeals can consider the substantive reasonableness of a sentence, "[i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." Gall, 552 U.S., at 51, 128 S. Ct. 586, 169 L. Ed. 2d 445. This makes eminent sense, for the district court is charged in the first instance

with determining whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary." 18 U. S. C. §3553(a). If the district court is unable properly to undertake that inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability that would support a "presumption of reasonableness" on review. See Gall, 552 U.S., at 51, 128 S. Ct. 586, 169 L. Ed. 2d 445. Likewise, regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may [***24] well undermine public perception of [**390] the proceedings. See Hollander-Blumoff, The Psychology of Procedural Justice in the Federal Courts, 63 Hastings L. J. 127, 132-134 (2011) (compilation of psychology research showing that the fairness of procedures influences perceptions of outcomes). The mere fact that Rosales-Mireles' sentence falls within the corrected Guidelines range does not preserve the fairness, integrity, or public reputation of the proceedings. 5

Third, the United States and the dissent contend that our decision "creates the very opportunity for 'sandbagging' that Rule 52(b) is supposed to prevent." Post, at 5, 201 L. Ed. 2d, at 393; Brief for United States 17-18, 27. But that concern fails to account for the realities at play in sentencing proceedings. As this Court repeatedly has explained, "the Guidelines are 'the starting point for every sentencing calculation in the federal system,'" Hughes v. United States, 584 U.S. ___, ___, 138 S. Ct. 1765, 201 L. Ed. 2d 72, 77 (2018) (quoting Peugh, 569 U.S., at 542, 133 S. Ct. 2072, 186 L. Ed. 2d 84). It is hard to imagine that defense counsel would "deliberately forgo objection now" to a plain Guidelines error that would subject her client to a [*1911] higher Guidelines range, "because [counsel] perceives some slightly expanded chance to argue for 'plain error' later." Henderson v. United States, 568 U.S. 266, 276, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013) (emphasis in original). Even setting aside the conflict such a strategy would create [***25] with defense counsel's ethical obligations to represent her client vigorously and her duty of candor toward the court, any benefit from such a strategy is highly speculative. There is no guarantee that a court of appeals would agree to a remand, and no basis to believe that a district court would impose a lower sentence upon resentencing than the court would have imposed at the original sentencing proceedings had it been aware of the plain Guidelines error.

IV

For the foregoing reasons, we conclude that the Fifth Circuit abused its discretion in applying an unduly burdensome articulation of Olano's fourth prong and declining to remand Rosales-Mireles' case for resentencing. In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: THOMAS

Dissent
Justice Thomas, with whom Justice Alito joins, dissenting.

The Court holds that, "in the ordinary case," a miscalculation of the [**391] advisory Sentencing [***26] Guidelines range will "seriously affect the fairness, integrity, or public reputation of judicial proceedings." Ante, at 1, 201 L. Ed. 2d, at 382. In other words, a defendant who does not alert the district court to a plain miscalculation of his Guidelines range—and is not happy with the sentence he receives—can raise the Guidelines error for the first time on appeal and ordinarily get another shot at a more favorable sentence. The Court's decision goes far beyond what was necessary to answer the question presented. 1 And it contravenes long-established principles of plain-error review. I respectfully dissent.

I
Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." (Emphasis added.) The "point of the plain-error rule" is to "requir[e] defense counsel to be on his toes." United States v. Vonn, 535 U.S. 55, 73, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002). Its demanding standard is meant to "encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." United States v. Dominguez Benitez, 542 U.S. 74, 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). If the standard were not stringent, there would be nothing "prevent[ing] a litigant from ' "sandbagging" ' the court—remaining silent about his objection and belatedly raising the error only if [***27] the case does not conclude in his favor." [*1912] Puckett v. United States, 556 U.S. 129, 134, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). Satisfying the plain-error standard "is difficult, 'as it should be.'" Id., at 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266.

This Court has held that Rule 52(b) is satisfied only when four requirements are met: "(1) there is 'an error,' (2) the error is 'plain,'" "(3) the error 'affect[s] substantial rights,'" and "(4) . . . 'the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." '" Henderson v. United States, 568 U.S. 266, 272, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013). The fourth requirement—the one at issue here—is discretionary. Ibid. It should "be applied on a case-specific and fact-intensive basis." Puckett, supra, at 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266. And it cannot be satisfied by "a plain error affecting substantial rights . . ., without more, . . . for otherwise the discretion afforded by Rule 52(b) would be illusory." United States v. Olano, 507 U.S. 725, 737, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Instead, "only 'particularly egregious errors'" will meet the fourth prong's rigorous standard. United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (quoting United States v. Frady, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)); see also United [**392] States v. Atkinson, 297

U.S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555 (1936) (explaining that courts should provide relief under plain-error review only in "exceptional circumstances").

II

The Court holds that Guidelines errors will "ordinar[ily]" satisfy the fourth prong of plain-error review. Ante, at 15, 201 L. Ed. 2d, at 390. This result contravenes several established principles from our precedents.

To begin, the Court's decision is at odds with the principle [***28] that the fourth prong of plain-error review "be applied on a case-specific and fact-intensive basis." Puckett, supra, at 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266. By holding that a Guidelines error "ordinarily will satisfy [the] fourth prong" absent "countervailing factors," ante, at 11, 201 L. Ed. 2d, at 388, the Court creates what is essentially a rebuttable presumption that plain Guidelines errors satisfy Rule 52(b). And, based on the Court's application of it today, this presumption certainly must be difficult to rebut. The Court matter-of-factly asserts, in a single sentence with no analysis, that "there are no [countervailing] factors" in this case that counsel in favor of affirmance. Ante, at 11, 201 L. Ed. 2d, at 388. It does so without even discussing the particular details of the defendant's crime, what happened at his sentencing, the reasoning that the District Court employed, the difference between the defendant's calculated Guidelines range and the correct one, or where his sentence fell relative to the correct Guidelines range. This approach is neither "case-specific" nor "fact-intensive." Puckett, supra, at 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266. The Court candidly admits as much. See ante, at 11, 201 L. Ed. 2d, at 388, n. 4. But this is exactly the kind of "'per se approach to plain-error review'" that we have consistently rejected. Puckett, supra, at 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266.

The Court's rebuttable [***29] presumption also renders the fourth prong of plain-error review "illusory" in most Guidelines cases. Olano, supra, at 737, 113 S. Ct. 1770, 123 L. Ed. 2d 508. The Court expressly states that Guidelines errors will satisfy the fourth prong in "the ordinary case." Ante, at 15, 201 L. Ed. 2d, at 390. But this Court has repeatedly held that the fourth prong limits courts' discretion to "correct[ing] only 'particularly egregious errors.'" Young, supra, at 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1. Because Rule 52(b) "'is not a run-of-the-mill remedy,'" Frady, supra, at 163, n. 14, 102 S. Ct. 1584, 71 L. Ed. 2d 816, relief should be granted "sparingly" in "'the rare case,'" [*1913] Jones v. United States, 527 U.S. 373, 389, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999), and only in "exceptional circumstances," Atkinson, supra, at 160, 56 S. Ct. 391, 80 L. Ed. 555. Today's decision turns that principle on its head by making relief available "in the ordinary case." Ante, at 1, 201 L. Ed. 2d, at 382.

The Court asserts that relief under plain-error review need not be exceptional or rare when a remand would not require "additional jury proceedings." Ante, at 12, 201 L. Ed. 2d, at 389. But that distinction has no basis in the text of Rule 52(b) or this Court's precedents. The only Rule

52(b) precedent that the Court cites for this assertion is Molina-Martinez v. United States, 578 U.S. ___, ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, 458 [**393] (2016). See ante, at 9, 201 L. Ed. 2d, at 387. That decision rejected the Fifth Circuit's categorical rule requiring defendants to present "additional evidence" (beyond the Guidelines error itself) to prove prejudice under the third prong of plain-error review. See 578 U.S., at ___-___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 449). In dicta it suggested that, "in [***30] the ordinary case," the Guidelines error would be enough to satisfy the third prong's requirement that the error affect substantial rights. Id., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 458. And it rebuffed the Government's pragmatic "concern over the judicial resources needed" if Guidelines errors usually satisfy the third prong of plain-error review. Id., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 458. But Molina-Martinez did not discuss the fourth prong of plain-error review, which is at issue here and is an independent requirement, see Olano, supra, at 737, 113 S. Ct. 1770, 123 L. Ed. 2d 508. Nor did it relax the plain-error standard whenever reversal would not require "additional jury proceedings." Ante, at 12, 201 L. Ed. 2d, at 389. Thus, Molina-Martinez gives no support to the Court's innovation.

Additionally, the Court's encouragement of remands based on ordinary Guidelines errors undermines "the policies that underpin Rule 52(b)." Dominguez Benitez, 542 U.S., at 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157. As explained, the plain-error standard encourages defendants to make timely objections in order to avoid sandbagging and to prevent wasteful reversals and remands. After today, however, most defendants who fail to object to a Guidelines error will be in virtually the same position as those who do. Today's decision, especially when combined with Molina-Martinez, means that plain Guidelines errors will satisfy Rule 52(b) in all but the unusual [***31] case. That creates the very opportunity for "sandbagging" that Rule 52(b) is supposed to prevent, Puckett, 556 U.S., at 134, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (internal quotation marks omitted), by allowing a defendant who is aware of a mistake in the presentence report to "simply relax and wait to see if the sentence later str[ikes] him as satisfactory," Vonn, 535 U.S., at 73, 122 S. Ct. 1043, 152 L. Ed. 2d 90. Oddly, defendants who do not object to a Guidelines error could be in a better position than ones who do. An objection would give the district court a chance to explain why it would "arrive at the same sentencing conclusion" even if the defendant was correct about an alleged Guidelines error, which would "mak[e] clear" that the Guidelines error did not "adversely affect the defendant's ultimate sentence." United States v. Sabillon-Umana, 772 F.3d 1328, 1334 (CA10 2014). Today's decision thus inverts Rule 52(b) by giving defendants an incentive to withhold timely objections and "'game' the system." Puckett, supra, at 140, 129 S. Ct. 1423, 173 L. Ed. 2d 266.

III

Even if it were appropriate to create rebuttable presumptions under the fourth prong of plain-error review, the Court is wrong to conclude that the "ordinary" Guidelines error will "seriously affect the fairness, integrity, or public reputation of judicial proceedings." Ante, at 1,

201 L. Ed. 2d, at 382. Whether a district court's failure to correctly [*1914] calculate the advisory Guidelines range satisfies [***32] the fourth prong of plain-error review will [**394] depend on the circumstances of each case. And the circumstances of this case prove the folly of the Court's presumption.

A

The Court asserts that plain Guidelines errors must ordinarily be corrected to ensure that defendants do not "linger longer in federal prison than the law demands." Ante, at 10, 201 L. Ed. 2d, at 388 (internal quotation marks omitted). But the Guidelines are not "law." They neither "define criminal offenses" nor "fix the permissible sentences for criminal offenses." Beckles v. United States, 580 U.S. ___, ___, 137 S. Ct. 886, 197 L. Ed. 2d 145, 152 (2017) (emphasis deleted). Instead, they are purely "advisory" and "merely guide the district courts' discretion." Id., at ___, 137 S. Ct. 886, 197 L. Ed. 2d 145, at 148. They provide advice about what sentencing range the Sentencing Commission believes is appropriate, "but they 'do not constrain'" district courts. Ibid. Accordingly, district courts are free to disagree with the Guidelines range, for reasons as simple as a policy disagreement with the Sentencing Commission. See Pepper v. United States, 562 U.S. 476, 501, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011); 18 U.S.C. §3661. In fact, district courts commit reversible error if they "trea[t] the Guidelines as mandatory." Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). Although the Guidelines range is one of the factors that courts must consider at sentencing, 18 U. S. C. §3553(a), judges need not give the Guidelines range any particular weight. The [***33] only thing that "the law demands" is that a defendant's sentence be substantively reasonable and within the applicable statutory range. See Jones v. United States, 577 U.S. ___, ___-___ (2015) (Scalia, J., dissenting from denial of certiorari); Kimbrough v. United States, 552 U.S. 85, 113-114, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007) (Scalia, J., concurring).

The Court also justifies its presumption by repeatedly stressing the importance of procedural rules to the public's perception of judicial proceedings. See ante, at 10, 201 L. Ed. 2d, at 387 ("[T]he public legitimacy of our justice system relies on procedures"); ante, at 13, 201 L. Ed. 2d, at 389 ("[U]njust procedures may well undermine public perception of [sentencing] proceedings"). It even cites a hodgepodge of psychological studies on procedural justice. Ante, at 13, 201 L. Ed. 2d, at 389 (citing Hollander-Blumoff, The Psychology of Procedural Justice in the Federal Courts, 63 Hastings L. J. 127, 132-134 (2011) (Hollander-Blumoff)).

Putting aside the obvious problems with this research, 2 the Court contradicts our [*1915] precedents by suggesting that adhering to procedure has prime [**395] importance for purposes of the fourth prong. This Court has repeatedly concluded that purely procedural errors—ones that likely did not affect the substantive outcome—do not satisfy the fourth prong of plain-error review. In Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), for example, the District Court failed to submit a materiality element [***34] to the jury, but this

Court found that the fourth prong of plain-error review was not satisfied because "the evidence supporting materiality was 'overwhelming.'" Id., at 470, 117 S. Ct. 1544, 137 L. Ed. 2d 718. Reversal based on errors that have no actual "'effect on the judgment,'" this Court explained, "'encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" Ibid. (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)). Similarly, in United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002), the indictment failed to allege a fact that increased the statutory maximum, but the evidence of that fact "was 'overwhelming' and 'essentially uncontroverted.'" Id., at 633, 122 S. Ct. 1781, 152 L. Ed. 2d 860. This Court held that reversing a defendant's sentence based on such a technicality would be "[t]he real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings.'" Id., at 634, 122 S. Ct. 1781, 152 L. Ed. 2d 860. And in United States v. Marcus, 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010), the Second Circuit had held that an ex post facto error automatically satisfies the plain-error standard, "'no matter how unlikely'" it was that the jury actually convicted the defendant based on conduct that predated the statute of conviction. Id., at 261, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (emphasis deleted). In reversing that decision, this Court emphasized that, "in most circumstances, an error that does not affect the jury's verdict [***35] does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process." Id., at 265-266, 130 S. Ct. 2159, 176 L. Ed. 2d 1012. Thus, the Court is mistaken when it asserts that, because Guidelines errors are procedural mistakes, they are particularly likely to implicate the fourth prong of plain error.

B

While the Court holds that the ordinary Guidelines error will satisfy the fourth prong of plain-error review, it admits that there can be "instances where countervailing factors" preclude defendants from satisfying the fourth prong. Ante, at 11, 201 L. Ed. 2d, at 388. Because the Court does not question our existing plain-error precedents, see ante, at 12, 201 L. Ed. 2d, at 389, the burden presumably remains on defendants to establish that there are no such countervailing factors, and to persuade the appellate court that any countervailing factor identified by the Government is insufficient. See Vonn, 535 U.S., at 63, 122 S. Ct. 1043, 152 L. Ed. 2d 90 ("[A] defendant has the further burden to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" (internal quotation [**396] marks omitted)); Dominguez Benitez, 542 U. S., at 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 ("[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it"). But the Court does not explain what the defendant [***36] in this case has done to satisfy his burden.

If this case is an ordinary one, it highlights the folly of the Court's new rebuttable presumption. Petitioner Florencio Rosales-Mireles has a penchant for entering this country illegally and

committing violent crimes—especially against women. A Mexican citizen, Rosales-Mireles entered the United States illegally in 1997. In 2002, he was convicted of assault for throwing his girlfriend to the floor of their apartment and dragging her outside by her hair. In 2009, he was convicted of [*1916] aggravated assault with serious bodily injury and assault causing bodily injury to a family member. 3 His convictions stemmed from an altercation in which he attempted to stab one man and did stab another—once in the shoulder and twice in the chest. In January 2010, Rosales-Morales was removed to Mexico. But that same month he reentered the United States illegally. In 2015, he was convicted in Texas state court of assaulting his wife and 14-year-old son. During the altercation, Rosales-Mireles grabbed his wife by the hair and punched her in the face repeatedly.

Most recently, Rosales-Mireles pleaded guilty to illegal reentry. See 8 U.S.C. §§1326(a), (b)(2). The District Court sentenced [***37] him to 78 months in prison, which was within the Guidelines range he argued for on appeal. See ante, at 4, 201 L. Ed. 2d, at 380. In choosing that sentence, the District Court emphasized that it was "the second time he's come to the courts for being here illegally"; that he had "attempted to hide in the United States with multiple aliases, birth dates, [and] Social Security numbers"; and that his "assaultive behavior" spanned from "at least . . . 2001 to 2015." App. 20.

The sentence that Rosales-Mireles received was not only within both the improperly and properly calculated Guidelines ranges but also in the bottom half of both possible ranges. See ante, at 4, 201 L. Ed. 2d, at 380. If the District Court had used the proper Guidelines range at his initial sentencing, then the sentence that it ultimately gave Rosales-Mireles would have been presumptively reasonable on appeal. See 850 F.3d 246, 250 (CA5 2017); Rita v. United States, 551 U.S. 338, 347, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007). And the Fifth Circuit determined that his sentence was in fact reasonable. See 850 F.3d, at 250-251. Leaving that reasonable sentence in place would not "'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" Young, 470 U.S., at 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1. A sentence that is substantively reasonable is hardly the kind of "particularly egregious erro[r]" that warrants plain-error [***38] relief. Frady, 456 U.S., at 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816.

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Rule 52(b) strikes a "careful balance . . . between judicial efficiency [**397] and the redress of injustice." Puckett, 556 U. S., at 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266. Because today's decision upsets that balance for scores of cases involving Guidelines errors, I respectfully dissent.