Appellate Court Decisions - Week of 6/19/17

Note: This is not a comprehensive list of every case released this week.

First Appellate District of Ohio

***State v. Thomas*, 2017-Ohio-4403**

New Trial: Crim.R. 33(B)

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-4375.pdf

Summary from the First District:

"An appeal purportedly taken from an entry that is not reflected in the record on appeal is subject to dismissal.

"In defendant's appeal from the overruling of his Crim.R. 33(B) motion for leave to move for a new trial, the court of appeals has no jurisdiction to address assignments of error challenging his convictions.

"The common pleas court did not abuse its discretion in overruling, without a hearing, defendant's Crim.R. 33(B) motion for leave to file a Crim.R. 33(A)(6) motion for a new trial upon a claim of actual innocence based on newly discovered evidence: defendant demonstrated that he did not know of, and could not have learned of, the proposed ground for a new trial within the prescribed period; but he delayed more than six years in moving for leave after discovering the evidence supporting that claim, and that delay was not adequately explained or reasonable under the circumstances."

***State v. Black*, 2017-Ohio-????** **(Not posted on Friday, 6/23/17)**

Felonious Assault: Aggravated Riot: Jury Instructions: Serious Provocation: Prosecutorial Misconduct: Sentencing

Full Decision:
http://www.hamiltoncountyohio.gov/UserFiles/Servers/Server_3788196/File/releases/C-160321_06232017.pdf

Summary from the First District:

"The trial court's decision overruling defendant's *Batson* challenge was not clearly erroneous where the state offered the race-neutral explanations that the prospective juror had denied that she lived in a high-crime neighborhood, she had no interests or activities, she did not watch the news or 'pay attention to anything,' and she seemed reluctant to answer questions or to give explanations for her answers.

"The trial court properly denied defendant's motion for a mistrial based on the fact that a juror had seen him being led from the courtroom in custody where the juror informed the court that the incident would not impact her ability to perform her function as a juror.

"The trial court properly supported its decision to sentence defendant to maximum, consecutive sentences by making findings that were supported by the record.

"Defendant failed to demonstrate prosecutorial misconduct during the course of the trial where many of the instances cited were not objected to and did not rise to the level of plain error, and the remaining instances resulted in sustained objections with instructions—which the jury is presumed to have followed—that the questions and answers should not be considered.

"Defendant's convictions for felonious assault and aggravated riot were based upon sufficient evidence and were not against the weight of the evidence where witnesses testified that defendant beat the victim and encouraged others to do so, and video evidence supported that testimony.

"Defendant was not entitled to an instruction on aggravated assault, because being shoved and having the victim tell him to "[m]ove the fuck out of the way, nigger" were not reasonably sufficient provocation to arouse defendant to use deadly force."

Second Appellate District of Ohio

Nothing to report.

Third Appellate District of Ohio

Nothing to report.

Fourth Appellate District of Ohio

***State v. Lambert*, 2017-Ohio-4310**

Indictment

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-4310.pdf

Appellant's indictment for conspiracy to commit aggravated murder was fatally defective because it not only failed to allege a specific, substantial, over act, but it also failed to recite the generic words of the statute. Reversal is mandatory despite Appellant's failure to object during the trial court proceedings.

***State v. Craig*, 2017-Ohio-4342**

Sentencing: Allied Offenses: Attempted Murder: Felonious Assault

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-4342.pdf

The trial court erred in failing to merge Appellant's convictions for attempted murder and felonious assault. It also erred in failing to merge his aggravated burglary convictions. It did not err, however, in not merging his aggravated burglary and felonious assault and/or attempted murder convictions.

Fifth Appellate District of Ohio

***State v. Kopp*, 2017-Ohio-4428**

OVI: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-4428.pdf

The trial court did not err when it granted Appellee's motion to suppress in his marijuana OVI case where, despite an odor of raw marijuana and an admission of smoking marijuana earlier, Appellee did not commit any moving violations, had no trouble with any of the interactions with the officer, exhibited no visible signs of impairment, and submitted to the field sobriety tests without incident.

Sixth Appellate District of Ohio

***State v. Roberson*, 2017-Ohio-4339**

Participating In A Criminal Gang: Sufficiency

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-4339.pdf

Appellant's conviction for participating in a criminal gang was based on insufficient evidence where the state presented no evidence he engaged in conduct that benefited the gang in question. He had tattoos, admitted to being a member of the gang, admitted to socializing with the gang's

members, and there was a photo of him using the gang's sign, but there was no evidence of active participation in the gang.

Seventh Appellate District of Ohio

***State v. Tribble*, 2017-Ohio-4425**

Sentencing: Probation

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/7/2017/2017-Ohio-4425.pdf

The trial court erred in imposing a non-definite term of probation on Appellant for his domestic violence conviction.

Eighth Appellate District of Ohio

***State v. Lewis*, 2017-Ohio-4300**

Sentencing

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-4300.pdf

Summary from the Eighth District:

"In the normal process of preparing a vehicle for tow and according to police policy, the officer's search under the hood of the vehicle was for inventory purposes, not investigative. The trial court did not err in denying appellant's motion to suppress. Appellant admitted to police that the gun found under the hood of the vehicle was his and it was determined that that location was in close enough proximity of appellant for retrieval; appellant also admitted that the drugs found in the car belonged to him; therefore, there was sufficient evidence to meet the firearm specifications and that appellant was trafficking in drugs, and that the convictions for these offenses were not against the manifest weight of the evidence. It was error where the trial court sentenced appellant to a three-year prison term. Under R.C. 2929.14(C)(1)(a), appellant's mandatory sentence for the firearm specification must run prior to and consecutive to the underlying felony prison term. Accordingly, under R.C. 2953.08(G)(2), appellant's current sentence is contrary to law and is vacated and remanded to the trial court for resentencing."

***State v. Beckwith*, 2017-Ohio-4298**

Sentencing: Sex Offender

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-4298.pdf

Summary from the Eighth District:

"Appellant's conviction of menacing by stalking is supported by sufficient evidence. His sentence for a failure to verify his address is reversed because the trial court improperly used a prior conviction of attempted failure to provide notice of change of address to enhance his penalty under R.C. 2950.99."

Ninth Appellate District of Ohio

Nothing to report.

Tenth Appellate District of Ohio

Nothing to report.

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

Nothing to report.

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

***Jenkins v. Hutton*, 582 U.S. ____ (2017)**

Capital Punishment: Federal Habeas

Full Decision: https://www.supremecourt.gov/opinions/16pdf/16-1116_i4dk.pdf

In Appellant's petition for federal habeas relief after his death penalty sentence, the Sixth Circuit Court of Appeals erred in holding that it could review Appellant's claim under the miscarriage of justice exception to procedural default. (Or something like that – federal law is not my forte.)

***McWilliams v. Dunn*, 582 U.S. ____ (2017)**

Capital Punishment: Indigent Defendants: Mental Health Experts

Full Decision: https://www.supremecourt.gov/opinions/16pdf/16-5294_h3dj.pdf

***Syllabus*:**

Ake v. Oklahoma, 470 U. S. 68, 83, clearly established that when an indigent "defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must" provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

One month after *Ake* was decided, Alabama charged petitioner McWilliams with rape and murder. Finding him indigent, the trial court appointed counsel, who requested a psychiatric evaluation of McWilliams. The court granted the motion and the State convened a commission, which concluded that McWilliams was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense. A jury convicted McWilliams of capital murder and recommended a death sentence. Later, while the parties awaited McWilliams' judicial sentencing hearing, McWilliams' counsel asked for neurological and neuropsychological testing of McWilliams. The court agreed and McWilliams was examined by Dr. Goff. Dr. Goff filed a report two days before the judicial sentencing hearing. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some genuine neuropsychological problems. Just before the hearing, counsel also received updated records from the commission's evaluation and previously subpoenaed mental health records from the Alabama Department of Corrections. At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and asked for the assistance of someone with expertise in psychological matters to review the findings. The trial court denied defense counsel's requests. At the conclusion of the hearing, the court sentenced McWilliams to death.

On appeal, McWilliams argued that the trial court denied him the right to meaningful expert assistance guarantee by *Ake*. The Alabama Court of Criminal Appeals affirmed McWilliams' conviction and sentence, holding that Dr. Goff's examination satisfied *Ake*'s requirements. The State Supreme Court affirmed, and McWilliams failed to obtain state postconviction relief. On federal habeas review, a Magistrate Judge also found that the Goff examination satisfied *Ake* and, therefore, that the State Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U. S. C. §2254(d)(1). Adopting the Magistrate Judge's

report and recommendation, the District Court denied relief. The Eleventh Circuit affirmed.

Held:

1. *Ake* clearly established that when certain threshold criteria are met, the state must provide a defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U. S., at 83. The Alabama courts' determination that McWilliams received all the assistance to which *Ake* entitled him was contrary to, or an unreasonable application of, clearly established federal law. Pp. 11–16.

(a) Three preliminary issues require resolution. First, the conditions that trigger *Ake*'s application are present. McWilliams is and was an "indigent defendant," 470 U. S., at 70, and his "mental condition" was both "relevant to . . . the punishment he might suffer," id., at 80, and "seriously in question," id., at 70. Second, this Court rejects Alabama's claim the State was relieved of its *Ake* obligations because McWilliams received brief assistance from a volunteer psychologist at the University of Alabama. Even if the episodic help of an outside volunteer could satisfy *Ake*, the State does not refer to any specific record facts that indicate that the volunteer psychologist was available to the defense at the judicial sentencing proceeding. Third, contrary to Alabama's suggestion, the record indicates that McWilliams did not get all the mental health assistance that he requested. Rather, he asked for additional help at the judicial sentencing hearing, but was rebuffed. Pp. 11–13.

(b) This Court does not have to decide whether *Ake* requires a State to provide an indigent defendant with a qualified mental health expert retained specifically for the defense team. That is because Alabama did not meet even *Ake*'s most basic requirements in this case. *Ake* requires more than just an examination. It requires that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." 470 U. S., at 83. Even assuming that Alabama met the examination requirement, it did not meet any of the other three. No expert helped the defense evaluate the Goff report or McWilliams' extensive medical records and translate these data into a legal strategy. No expert helped the defense prepare and present arguments that might, e.g., have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing. Since Alabama's provision of mental health assistance fell so dramatically short of *Ake*'s requirements, the Alabama courts' decision affirming McWilliams' sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. §2254(d)(1). Pp. 13–16.

2. The Eleventh Circuit should determine on remand whether the Alabama courts' error had the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, *Davis v. Ayala*, 576 U. S. ___, ___, specifically considering whether

access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires could have made a difference. P. 16.

634 Fed. Appx. 698, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and GORSUCH, JJ., joined.

***Packingham v. North Carolina*, 582 U.S. ____ (2017)**

First Amendment: Sex Offenders

Full Decision: https://www.supremecourt.gov/opinions/16pdf/15-1194_08l1.pdf

***Syllabus*:**

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§14–202.5(a), (e). According to sources cited to the Court, the State has prosecuted over 1,000 people for violating this law, including petitioner, who was indicted after posting a statement on his personal Facebook profile about a positive experience in traffic court. The trial court denied petitioner's motion to dismiss the indictment on the ground that the law violated the First Amendment. He was convicted and given a suspended prison sentence. On appeal, the State Court of Appeals struck down §14–202.5 on First Amendment grounds, but the State Supreme Court reversed.

Held: The North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. Pp. 4–10.

(a) A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers "relatively unlimited, low-cost capacity for communication of all kinds," *Reno v. American Civil Liberties Union*, 521 U. S. 844, 870, to users engaged in a wide array of protected First Amendment activity on any number of diverse topics. The Internet's forces and directions are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow. Here, in one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium. Pp. 4–6

(b) This background informs the analysis of the statute at issue. Even assuming that the statute is content neutral and thus subject to intermediate scrutiny, the provision is not " '"narrowly tailored to serve a significant governmental interest." ' " *McCullen v. Coakley*, 573 U. S. ___, ___. Like other inventions heralded as advances in human progress, the Internet and social media will be exploited by the criminal mind. It is also clear that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people," *Ashcroft v. Free Speech Coalition*, 535 U. S. 234, 244, and that a legislature "may pass valid laws to protect children" and other sexual assault victims, id., at 245. However, the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley v. Georgia*, 394 U. S. 557, 563.

Two assumptions are made in resolving this case. First, while the Court need not decide the statute's precise scope, it is enough to assume that the law applies to commonplace social networking sites like Facebook, LinkedIn, and Twitter. Second, the Court assumes that the First Amendment permits a State to enact specific, narrowly-tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

Even with these assumptions, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives. Pp. 6–8.

(c) The State has not met its burden to show that this sweeping law is necessary or legitimate to serve its purpose of keeping convicted sex offenders away from vulnerable victims. No case or holding of this Court has approved of a statute as broad in its reach. The State relies on *Burson v. Freeman*, 504 U. S. 191, but that case considered a more limited restriction—prohibiting campaigning within 100 feet of a polling place—in order to protect the fundamental right to vote. The Court noted, moreover, that a larger buffer zone could "become an impermissible burden" under the First Amendment. Id., at 210. The better analogy is *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U. S. 569. If an ordinance prohibiting any "First Amendment activities" at a single Los Angeles airport could be struck down because it covered all manner of protected, nondisruptive behavior, including "talking and reading, or the wearing of campaign buttons or symbolic clothing," id., at 571, 575, it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture. Pp. 9–10.

368 N. C. 380, 777 S. E. 2d 738, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and THOMAS, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

***Turner et al. v. United States*, 582 U.S. ____ (2017)**

Evidence: *Brady*

Full Decision: https://www.supremecourt.gov/opinions/16pdf/15-1503_4357.pdf

***Syllabus*:**

Petitioners—Timothy Catlett, Russell Overton, Levy Rouse, Kelvin Smith, Charles and Christopher Turner, and Clifton Yarborough— and several others were indicted for the kidnaping, robbery, and murder of Catherine Fuller. At trial, the Government advanced the theory that Fuller was attacked by a large group of individuals. Its evidentiary centerpiece consisted of the testimony of Calvin Alston and Harry Bennett, who confessed to participating in a group attack and cooperated with the Government in return for leniency. Several other Government witnesses corroborated aspects of Alston's and Bennett's testimony. Melvin Montgomery testified that he was in a park among a group of people, heard someone say they were "going to get that one," saw petitioner Overton pointing to Fuller, and saw several persons, including some petitioners, cross the street in her direction. Maurice Thomas testified that he saw the attack, identified some petitioners as participants, and later overheard petitioner Catlett say that they "had to kill her." Carrie Eleby and Linda Jacobs testified that they heard screams coming from an alley where a "gang of boys" was beating someone near a garage, approached the group, and saw some petitioners participating in the attack. Finally, the Government played a videotape of petitioner Yarborough's statement to detectives, describing how he was part of a large group that carried out the attack. None of the defendants rebutted the prosecution witnesses' claims that Fuller was killed in a group attack. The seven petitioners were convicted.

Long after their convictions became final, petitioners discovered that the Government had withheld evidence from the defense at the time of trial. In postconviction proceedings, they argued that seven specific pieces of withheld evidence were both favorable to the defense and material to their guilt under *Brady v. Maryland*, 373 U. S. 83. This evidence included the identity of a man seen running into the alley after the murder and stopping near the garage where Fuller's body had already been found; the statement of a passerby who claimed to hear groans coming from a closed garage; and evidence tending to impeach witnesses Eleby, Jacobs, and Thomas. The D. C. Superior Court rejected petitioners' Brady claims, finding that the withheld evidence was not material. The D. C. Court of Appeals affirmed.

***Held*: The withheld evidence is not material under *Brady*. Pp. 9–14**

(a) The Government does not contest petitioners' claim that the withheld evidence was "favorable to the defense." Petitioners and the Government, however, do contest the materiality of the undisclosed Brady information. Such "evidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U. S. 449, 469–470. "A 'reasonable probability' of a different result" is one in which the suppressed evidence " 'undermines confidence in the outcome of the trial.' " *Kyles v. Whitley*, 514 U. S. 419, 434. To make that determination, this Court "evaluate[s]" the withheld evidence "in the context of the entire record." *United States v. Agurs*, 427 U. S. 97, 112. Pp. 9–11.

(b) Petitioners' main argument is that, had they known about the withheld evidence, they could have challenged the Government's basic group attack theory by raising an alternative theory, namely, that a single perpetrator (or two at most) had attacked Fuller. Considering the withheld evidence "in the context of the entire record," *Agurs*, *supra*, at 112, that evidence is too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards.

A group attack was the very cornerstone of the Government's case, and virtually every witness to the crime agreed that Fuller was killed by a large group of perpetrators. It is not reasonably probable that the withheld evidence could have led to a different result at trial. Petitioners' problem is that their current alternative theory would have had to persuade the jury that both Alston and Bennett falsely confessed to being active participants in a group attack that never occurred; that Yarborough falsely implicated himself in that group attack and yet gave a highly similar account of how it occurred; that Thomas, an otherwise disinterested witness, wholly fabricated his story; that both Eleby and Jacobs likewise testified to witnessing a group attack that did not occur; and that Montgomery in fact did not see petitioners and others, as a group, identify Fuller as a target and leave together to rob her.

As for the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioners already had and used at trial. This is not to suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence, *see Wearry v. Cain*, 577 U. S. ___, ___–___. But in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to undermine confidence in the jury's verdict, *see Smith v. Cain*, 565 U. S. 73, 75–76. Pp. 11–14.

116 A. 3d 894, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, ALITO, and SOTOMAYOR, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, J., joined. GORSUCH, J., took no part in the consideration or decision of the cases.

***Weaver v. Massachusetts*, 582 U.S. ___ (2017)**

Public Trial: Ineffective Assistance of Counsel

Full Decision: https://www.supremecourt.gov/opinions/16pdf/16-240_dc8e.pdf

***Syllabus*:**

When petitioner was tried in a Massachusetts trial court, the courtroom could not accommodate all the potential jurors. As a result, for two days of jury selection, an officer of the court excluded from the courtroom any member of the public who was not a potential juror, including petitioner's mother and her minister. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. Petitioner was convicted of murder and a related charge. Five years later, he filed a motion for a new trial in state court, arguing, as relevant here, that his attorney had provided ineffective assistance by failing to object to the courtroom closure. The trial court ruled that he was not entitled to relief. The Massachusetts Supreme Judicial Court affirmed in relevant part. Although it recognized that the violation of the right to public trial was a structural error, it rejected petitioner's ineffective-assistance claim because he had not shown prejudice.

***Held*:**

1. In the context of a public-trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial. Pp. 5–14.

(a) This case requires an examination of the proper application of the doctrines of structural error and ineffective assistance of counsel. They are intertwined, because the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error. Pp. 5–10

(1) Generally, a constitutional error that "did not contribute to the verdict obtained" is deemed harmless, which means the defendant is not entitled to reversal. *Chapman v. California*, 386 U. S. 18, 24. However, a structural error, which "affect[s] the framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U. S. 279, 310, defies harmless error analysis, id., at 309. Thus, when a structural error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm.

There appear to be at least three broad rationales for finding an error to be structural. One is when the right at issue does not protect the defendant from erroneous conviction but instead protects some other interest—like the defendant's right to conduct his own defense—where harm is irrelevant to the basis underlying the right. See *United States v. Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4. Another is when the error's effects are simply too hard to measure—e.g., when a defendant is denied the right to select his or her own attorney—making it almost impossible for the government to show that the error was

"harmless beyond a reasonable doubt," *Chapman, supra*, at 24. Finally, some errors always result in fundamental unfairness, e.g., when an indigent defendant is denied an attorney, see *Gideon v. Wainwright*, 372 U. S. 335, 343–345. For purposes of this case, a critical point is that an error can count as structural even if it does not lead to fundamental unfairness in every case. See *Gonzalez-Lopez, supra*, at 149, n. 4. Pp. 5–7.

(2) While a public-trial violation counts as structural error, it does not always lead to fundamental unfairness. This Court's opinions teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. See *Waller v. Georgia*, 467 U. S. 39; *Presley v. Georgia*, 558 U. S. 209, 215–216. The fact that the public-trial right is subject to exceptions suggests that not every public-trial violation results in fundamental unfairness. Indeed, the Court has said that a public-trial violation is structural because of the "difficulty of assessing the effect of the error." *Gonzalez-Lopez, supra*, at 149, n. 4. The public-trial right also furthers interests other than protecting the defendant against unjust conviction, including the rights of the press and of the public at large. *See, e.g., Press Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 508–510. Thus, an unlawful closure could take place and yet the trial will still be fundamentally fair from the defendant's standpoint. Pp. 7–10.

(b) The proper remedy for addressing the violation of the right to a public trial depends on when the objection was raised. If an objection is made at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." *Neder v. United States*, 527 U. S. 1, 7. If, however, the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance claim, the defendant generally bears the burden to show deficient performance and that the attorney's error "prejudiced the defense." *Strickland v. Washington*, 466 U. S. 668, 687. To demonstrate prejudice in most cases, the defendant must show "a reasonable probability that . . . the result of the proceeding would have been different" but for attorney error. *Id.*, at 694. For the analytical purposes of this case, the Court will assume, as petitioner has requested, that even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the defendant shows that attorney errors rendered the trial fundamentally unfair.

Not every public-trial violation will lead to a fundamentally unfair trial. And the failure to object to that violation does not always deprive the defendant of a reasonable probability of a different outcome. Thus, a defendant raising a public-trial violation via an ineffective assistance claim must show either a reasonable probability of a different outcome in his or her case or, as assumed here, that the particular violation was so serious as to render the trial fundamentally unfair.

Neither this reasoning nor the holding here calls into question the Court's precedents deeming certain errors structural and requiring reversal because of fundamental unfairness, see *Sullivan v. Louisiana*, 508 U. S., at 278–279; *Tumey v. Ohio*, 273 U. S. 510, 535; *Vasquez v. Hillery*, 474 U. S., at 261–264, or those granting automatic relief to defendants who prevailed on claims of race or gender discrimination in jury selection, e.g., *Batson v. Kentucky*, 476 U. S. 79, 100. The errors in each of these cases were

preserved and then raised on direct appeal. The reason for placing the burden on the petitioner here, however, derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance claim.

When a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed, but when a defendant first raises the closure in an ineffective-assistance claim, the trial court has no chance to cure the violation. The costs and uncertainties of a new trial are also greater because more time will have elapsed in most cases. And the finality interest is more at risk. See *Strickland, supra*, at 693–694. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or in an ineffective-assistance claim. Pp. 10–14.

2. Because petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial. Although potential jurors might have behaved differently had petitioner's family or the public been present, petitioner has offered no evidence suggesting a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to demonstrate fundamental unfairness. His mother and her minister were indeed excluded during jury selection. But his trial was not conducted in secret or in a remote place; closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers, not the judge; venire members who did not become jurors observed the proceedings; and the record of the proceedings indicates no basis for concern, other than the closure itself. There was no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case, e.g., misbehavior by the prosecutor, judge, or any other party. Thus, even though this case comes here on the assumption that the closure was a Sixth Amendment violation, the violation here did not pervade the whole trial or lead to basic unfairness. Pp. 14–16.

474 Mass. 787, 54 N. E. 3d 495, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, SOTOMAYOR, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. ALITO, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined.

***Maslenjak v. United States*, 582 U.S. ____ (2017)**

18 U.S.C. §1425(a): 18 U.S.C. §1015(a): Immigration: Naturalization

Full Decision: https://www.supremecourt.gov/opinions/16pdf/16-309_h31i.pdf

***Syllabus*:**

Petitioner Divna Maslenjak is an ethnic Serb who resided in Bosnia during the 1990's, when a civil war divided the new country. In 1998, she and her family sought refugee status in the United States. Interviewed under oath, Maslenjak explained that the family feared persecution from both sides of the national rift: Muslims would mistreat them because of their ethnicity, and Serbs would abuse them because Maslenjak's husband had evaded service in the Bosnian Serb Army by absconding to Serbia. Persuaded of the Maslenjaks' plight, American officials granted them refugee status. Years later, Maslenjak applied for U. S. citizenship. In the application process, she swore that she had never given false information to a government official while applying for an immigration benefit or lied to an official to gain entry into the United States. She was naturalized as a U. S. citizen. But it soon emerged that her professions of honesty were false: Maslenjak had known all along that her husband spent the war years not secreted in Serbia, but serving as an officer in the Bosnian Serb Army.

The Government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U. S. C. §1425(a). According to the Government's theory, Maslenjak violated §1425(a) because, in the course of procuring her naturalization, she broke another law: 18 U. S. C. §1015(a), which prohibits knowingly making a false statement under oath in a naturalization proceeding. The District Court instructed the jury that, to secure a conviction under §1425(a), the Government need not prove that Maslenjak's false statements were material to, or influenced, the decision to approve her citizenship application. The Sixth Circuit affirmed the conviction, holding that if Maslenjak made false statements violating §1015(a) and procured naturalization, then she also violated §1425(a).

Held:

1. The text of §1425(a) makes clear that, to secure a conviction, the Government must establish that the defendant's illegal act played a role in her acquisition of citizenship. To "procure . . . naturalization" means to obtain it. And the adverbial phrase "contrary to law" specifies how a person must procure naturalization so as to run afoul of the statute: illegally. Thus, someone "procure[s], contrary to law, naturalization" when she obtains citizenship illegally. As ordinary usage demonstrates, the most natural understanding of that phrase is that the illegal act must have somehow contributed to the obtaining of citizenship. To get citizenship unlawfully is to get it through an unlawful means—and that is just to say that an illegality played some role in its acquisition.

The Government's contrary view—that §1425(a) requires only a violation in the course of procuring naturalization—falters on the way language naturally works. Suppose that an applicant for citizenship fills out the paperwork in a government office with a knife tucked away in her handbag. She has violated the law against possessing a weapon in a federal building, and she has done so in the course of procuring citizenship, but nobody would say she has "procure[d]" her citizenship "contrary to law." That is because the violation of law and the acquisition of citizenship in that example are merely coincidental: The one has no causal relation to the other. Although the Government

attempts to define such examples out of the statute, that effort falls short for multiple reasons. Most important, the Government's attempted carve-out does nothing to alter the linguistic understanding that gives force to the examples the Government would exclude. Under ordinary rules of language usage, §1425(a) demands a causal or means-end connection between a legal violation and naturalization.

The broader statutory context reinforces the point, because the Government's reading would create a profound mismatch between the requirements for naturalization and those for denaturalization: Some legal violations that do not justify denying citizenship would nonetheless justify revoking it later. For example, lies told out of "embarrassment, fear, or a desire for privacy" (rather than "for the purpose of obtaining [immigration] benefits") are not generally disqualifying under the statutory requirement of "good moral character." *Kungys v. United States*, 485 U. S. 759, 780; 8 U. S. C. §1101(f)(6). But under the Government's reading of §1425(a), any lie told in the naturalization process would provide a basis for rescinding citizenship. The Government could thus take away on one day what it was required to give the day before. And by so unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences—which this Court would need far stronger textual support to believe Congress intended. The statute Congress passed, most naturally read, strips a person of citizenship not when she committed any illegal act during the naturalization process, but only when that act played some role in her naturalization. Pp. 4–9.

2. When the underlying illegality alleged in a §1425(a) prosecution is a false statement to government officials, a jury must decide whether the false statement so altered the naturalization process as to have influenced an award of citizenship. Because the entire naturalization process is set up to provide little room for subjective preferences or personal whims, that inquiry is properly framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.

If the facts the defendant misrepresented are themselves legally disqualifying for citizenship, the jury can make quick work of that inquiry. In such a case, the defendant's lie must have played a role in her naturalization. But that is not the only time a jury can find that a defendant's lies had the requisite bearing on a naturalization decision, because lies can also throw investigators off a trail leading to disqualifying facts. When relying on such an investigation-based theory, the Government must make a two-part showing. Initially, the Government must prove that the misrepresented fact was sufficiently relevant to a naturalization criterion that it would have prompted reasonable officials, "seeking only evidence concerning citizenship qualifications," to undertake further investigation. *Kungys*, 485 U. S., at 774, n. 9. If that much is true, the inquiry turns to the prospect that such an investigation would have borne disqualifying fruit. The Government need not show definitively that its investigation would have unearthed a disqualifying fact. It need only establish that the investigation "would predictably have disclosed" some legal disqualification. Id., at 774. If that is so, the defendant's misrepresentation contributed to the citizenship award in the way §1425(a) requires.

This demanding but still practicable causal standard reflects the real-world attributes of cases premised on what an unhindered investigation would have found.

When the Government can make its two-part showing, the defendant may overcome it by establishing that she was qualified for citizenship (even though she misrepresented facts that suggested the opposite). Thus, whatever the Government shows with respect to a thwarted investigation, qualification for citizenship is a complete defense to a prosecution under §1425(a). Pp. 10–15.

3. Measured against this analysis, the jury instructions in this case were in error. The jury needed to find more than an unlawful false statement. However, it was not asked to—and so did not—make any of the necessary determinations. The Government's assertion that any instructional error was harmless is left for resolution on remand. Pp. 15–16.

821 F. 3d 675, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined. ALITO, J., filed an opinion concurring in the judgment.

***Lee v. United States*, 582 U.S. ____ (2017)**

Ineffective Assistance: Immigration

Full Decision: https://www.supremecourt.gov/opinions/16pdf/16-327_3eb4.pdf

***Syllabus*:**

Petitioner Jae Lee moved to the United States from South Korea with his parents when he was 13. In the 35 years he has spent in this country, he has never returned to South Korea, nor has he become a U. S. citizen, living instead as a lawful permanent resident. In 2008, federal officials received a tip from a confidential informant that Lee had sold the informant ecstasy and marijuana. After obtaining a warrant, the officials searched Lee's house, where they found drugs, cash, and a loaded rifle. Lee admitted that the drugs were his, and a grand jury indicted him on one count of possessing ecstasy with intent to distribute. Lee retained counsel and entered into plea discussions with the Government. During the plea process, Lee repeatedly asked his attorney whether he would face deportation; his attorney assured him that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted a plea and was sentenced to a year and a day in prison. Lee had in fact pleaded guilty to an "aggravated felony" under the Immigration and Nationality Act, 8 U. S. C. §1101(a)(43)(B), so he was, contrary to his attorney's advice, subject to mandatory deportation as a result of that plea. See §1227(a)(2)(A)(iii). When Lee learned of this consequence, he filed a motion to vacate his conviction and sentence, arguing that his attorney had provided

constitutionally ineffective assistance. At an evidentiary hearing, both Lee and his plea-stage counsel testified that "deportation was the determinative issue" to Lee in deciding whether to accept a plea, and Lee's counsel acknowledged that although Lee's defense to the charge was weak, if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. A Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated. The District Court, however, denied relief, and the Sixth Circuit affirmed. Applying the two-part test for ineffective assistance claims from *Strickland v. Washington*, 466 U. S. 668, the Sixth Circuit concluded that, while the Government conceded that Lee's counsel had performed deficiently, Lee could not show that he was prejudiced by his attorney's erroneous advice.

Held: **Lee has demonstrated that he was prejudiced by his counsel's erroneous advice. Pp. 5–13.**

(a) When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U. S. 52, 59.

Lee contends that he can make this showing because he never would have accepted a guilty plea had he known the result would be deportation. The Government contends that Lee cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to acquittal. Pp. 5–8.

(b) The Government makes two errors in urging the adoption of a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. First, it forgets that categorical rules are ill suited to an inquiry that demands a "case-by-case examination" of the "totality of the evidence." *Williams v. Taylor*, 529 U. S. 362, 391 (internal quotation marks omitted); *Strickland*, 466 U. S., at 695. More fundamentally, it overlooks that the *Hill v. Lockhart* inquiry focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. *See INS v. St. Cyr*, 533 U. S. 289, 322–323. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For Lee, deportation after some time in prison was not meaningfully different from deportation after somewhat less time; he says he accordingly would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial. Pointing to *Strickland*, the Government urges that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." 466 U. S., at 695. That statement, however, was made in the context of discussing the presumption of reliability applied to judicial proceedings, which has no place where, as here, a defendant was deprived of a proceeding altogether. When the inquiry is focused on what an individual defendant would have done, the possibility of even a highly improbable

result may be pertinent to the extent it would have affected the defendant's decisionmaking. Pp. 8–10.

(c) Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences. In the unusual circumstances of this case, Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation: Both Lee and his attorney testified that "deportation was the determinative issue" to Lee; his responses during his plea colloquy confirmed the importance he placed on deportation; and he had strong connections to the United States, while he had no ties to South Korea.

The Government argues that Lee cannot "convince the court that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla v. Kentucky*, 559 U. S. 356, 372, since deportation would almost certainly result from a trial. Unlike the Government, this Court cannot say that it would be irrational for someone in Lee's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation. Pp. 10–13.

825 F. 3d 311, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined except as to Part I. GORSUCH, J., took no part in the consideration or decision of the case.