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INTRODUCTION

This Article is about aspects of how the Supreme Court performs its work, more specifically about practicality in the face of increased requests that it hears cases. In particular, it explores how the Supreme Court chooses to deal with multiple cases on the same issues. Scholars have paid insufficient attention to the Court's exercise of its choices to grant several related petitions and then to consolidate them or instead to proceed on a single case-by-single case basis. The Court might hear more than one case on the same issue or subject over the course of a term and issue opinions in each as the opinion is ready for filing. Or the Court might release the opinions in those cases at the same time, whether or not their authors refer to the other case(s). Or the Justices might group cases on a legal issue for immediately sequential oral argument, with the Court releasing opinions simultaneously but each with its own caption. Or they may find that separately argued cases raise a common issue so that the Court should handle the cases in one opinion. Related is the question of how the Court handles multiple certiorari

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petitions raising the same issue. The Court might grant review to several such cases, have them argued at the same time, and decide them together. Or it might select one case—as a "stand-in" for all the others, without saying so—and then deny review to the others or grant cert, vacate, and remand ("GVR") in light of the lead case.

The foci in this article are, first, on consolidation and grouping in the Supreme Court and second, on the Court's GVR practice. Consolidation and GVRs are examined in the same article because of an inverse relationship that can be posited between the two; the decrease in the use of consolidation has been accompanied by an increase in the use of GVRs. This article was undertaken because accountings of both consolidation and GVRs have been needed for some time, despite the importance of both practices, and—especially in recent times—the frequent use of the latter. The phenomena of consolidation, grouping, and linkage will be discussed further, followed by an examination of the actual practice by the Court for them and for its use of GVRs in periods of varying length: the late 1950s; the late 1960s and early 1970s during the Warren Court-to-Burger Court transition; and a more extended period from the mid-1980s to the present. Changes in practices—as well as Court's "shrunken docket" of published opinions—could well have resulted from shifts in Court personnel, but—with some exceptions—particular Justices are not the focus of this examination.

I. CONSOLIDATION, GROUPING, AND LINKAGE

A. Overview of Consolidating or Grouping Cases

It is sometimes said that the Supreme Court "consolidates" cases. And the presence of several case names in the caption at the "top" of a case might suggest as much.[1] Yet not all "consolidation" is identical. The clearest instance occurs when the Supreme Court, to obtain great perspective on a legal issue, takes cases from different circuits, or different state high courts, and decides them as one case. The term also applies when, at times, the Court takes more than one case on the same issue from a single court below.[2]

However, there is a considerable difference between the Court's taking cases from several different courts for consideration and decision in one opinion and the

1. The practice in West's *Supreme Court Reporter* is to list the cases, one below the previous one. In the *United States Reports*, there are instances in which one case is listed, followed by an asterisk footnote showing "along with" the name(s) of the other cases(s).

2. The Court's treatment of its denials of certiorari is not treated in this article, but it should be noted that when more than one cert petition is filed from a single case, perhaps because there were multiple parties on the side that lost below, the Court does not necessarily list them together in the orders. *See, e.g.*, Rachel v. United States, Cutulle v. United States, and Brewer v. United States, below all at 692 F. App'x. 334 (9th Cir. 2017). The cert denial in *Rachel* appears at 138 S. Ct. 685 (2017), but the *Cutulle* and *Brewer* cert denials are at 138 S. Ct. 688 (2017).

not-uncommon event of having two case captions deriving from a single U.S. court of appeals ruling because of cross-petitions for certiorari.

Perhaps the best-known instance of consolidation happened with the 1954 and 1955 school desegregation cases brought together for argument, with four decided as *Brown v. Board of Education* (1954)[3] and the fifth case, *Bolling v. Sharpe*, receiving a separate opinion because it was based on the Fifth—rather than the Fourteenth—Amendment.[4] After *Brown*, one of the most notable instances in which multiple cases were consolidated for decision was *Miranda v. Arizona*,[5] one of four cases each from a different state; if the cases had been listed in a different order, we might have had the "Westover rights" or the "Vignera card" instead of the "Miranda rules."

In what might be called *grouping*, there are instances in which more than one case is argued sequentially over a one- or two-day period and the Court, while not consolidating them into a single ruling, issues the decisions in those cases at the same time, so that they are adjacent to each other in the case reports. A significant instance of grouping cases occurred in the "one person-one vote" state legislative redistricting cases. The lead case was *Reynolds v. Sims*,[6] from Alabama, which dealt with three rulings from the Middle District of Alabama and thus a modest consolidation. What was important, however, was that *Reynolds v. Sims* was immediately followed by—that is, grouped with—five other cases, from New York, Maryland, Virginia, Delaware, and Colorado.[7] These cases were not only grouped but linked (see discussion below) because of separate opinions applying to more than one case, with Justice Clark cross-referencing his *Reynolds* concurrence; Justice Harlan's notation of dissent referring to his *Reynolds* dissent; and Justice Stewart, writing a separate opinion in the Delaware case, referring to his dissent in the ruling on Colorado reapportionment.[8]

Grouping may also take place when cases are argued separately but then grouped for filing on the same day, or when the Court has agreed to review more than one case on a subject or closely-related subjects and the cases are argued at different times but they are handed down simultaneously, perhaps because the Justices in conference saw the close relationship and discussed them together, with the opinions in each relating to the others in this informal "set" of cases. Such cases would appear to be "consolidated" in the sense that they appear together in the case reports, but it is better to say they were "grouped," not consolidated. Nonetheless, when this happens, there may be no real difference between grouping and

3. 347 U.S. 483 (1954).

4. 347 U.S. 497 (1954).

5. 384 U.S. 436 (1966).

6. 377 U.S. 533 (1964).

7. WMCA v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964).

8. *See Md. Comm.*, 377 U.S. at 676; *Lucas*, 377 U.S. at 744; and *Roman*, 377 U.S. at 712.

consolidation. Conversely, cases on a related subject may be set for argument one after the other but receive separate opinions handed down at the same time.

In fact, there will be greater "consolidation"—for purposes of obtaining broader perspectives on an issue—when several cases on the same subject have been argued at the same time and handed down on the same day in separate opinions than when a case has several case captions but all stem from a single case below. On the other hand, the Court may decide several cases that appear to the reader to be related but which the Court hands down at different times during the Term in the "normal order," as in one Term when it had many cases related to the underdeveloped law of double jeopardy.

At times, grouped cases are also *linked.* This occurs when one or more justices write concurring or dissenting opinions applying across grouped cases. The abortion cases provide an example, as *Roe v. Wade*[9] and *Doe v. Bolton*[10] were handed down at the same time, and the three separate opinions—Chief Justice Burger, concurring; Justice Douglas, concurring; and Justice White (joined by Justice Rehnquist), dissenting—covering both cases.[11] Later, when the Court grouped the Akron and Kansas City abortion cases,[12] Justice O' Connor's dissent in the latter case provided a link between the two when she wrote, in part, "For reasons stated in my dissent in *Akron* . . ."[13] In another instance, in the 1976 capital punishment cases, Justices Brennan and Marshall filed a dissent, applying to the *Gregg*, *Profitt*, and *Jurek* cases.[14] Then in two additional cases decided at the same time, they filed brief opinions referencing that dissent.[15] Linkage is perhaps clearest when a Justice writes a separate opinion that covers more than one case. Thus, in two cases on the party plaintiff in securities suits, *Smith v. Sperling* and *Swanson v. Traer*,[16] Justice Frankfurter's dissent for four Justices (Justices Burton, Harlan, and Whittaker joined him) covered both cases.[17] And Frankfurter wrote a very long (nearly forty-page) dissent—far longer than the majority opinions—covering three cases on courts' jurisdiction under the Taft-Hartley Act, including *Textile Workers v. Lincoln Mills.*[18] Somewhat the same thing occurred in the

9. 410 U.S. 113 (1973).

10. 410 U.S. 179 (1973).

11. Respectively, 410 U.S. at 207 (Burger, C.J., dissenting), 410 U.S. at 209 (Douglas, J., concurring), 410 U.S. at 221 (White, J. dissenting).

12. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983).

13. *Planned Parenthood of Kansas City*, 462 U.S. at 504 (O'Connor, J., dissenting).

14. *See* Gregg v. Georgia, 428 U.S. 227 (1976) (Brennan, J., & Marshall, J., dissenting) (applying Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 242 (1976))).

15. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Brennan, J., concurring, & Marshall, J., concurring); Roberts v. Louisiana, 428 U.S. 325, 326 (1976) (Brennan, J., & Marshall, J., concurring).

16. Smith v. Sperling, 354 U.S. 91 (1957); Swanson v. Traer, 354 U.S. 114 (1957).

17. *Smith v. Sperling*, 354 U.S. at 98.

18. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting); Goodall-Sanford v. United Textile Workers, 353 U.S. 550 (1957); Gen. Electric Co. v. Local 205, United Electrical, Radio & Machine Workers, 353 U.S. 547(1957).

Garmon labor relations preemption.[19] In *Guss*, there was a note, "For dissenting opinion of Mr. Justice Burton and Mr. Justice Clark, see . . ," with a similar note in *Amalgamated Meat Cutters*, and the dissent by Justice Burton (joined by Justice Clark) ran under the captions for all three cases.[20] (One wonders why the three cases were not consolidated).

One would expect linkage to take place within a simultaneously decided pair or set of cases, as on June 4, 1956, when the Court issued a decision in *Autoworkers v. Wisconsin Employment Relations Board*[21] and a per curiam summarily affirming in *Autoworkers v. Anderson*,[22] with three Justices noting that their dissent applied to both.[23] And linkage might also occur in connection with cases in which the Court granted cert and reversed and remanded (see Sec. II). Thus, when cert was granted in *Shaw v. Atlantic Coast Line R.R. Co.*[24] with the case remanded for trial, Justice Frankfurter—who would not have granted the writ—referred to his dissent in *Rogers v. Missouri Pacific Railroad Co.*[25] decided a month earlier, and Justices Harlan and Whittaker dissented on the basis of Harlan's *Rogers* opinion.[26]

The linkages among cases could be complicated, as can be seen in a set of Federal Employee Labor Act ("FELA") cases, made more complex by Justice Frankfurter's long-standing resistance to the Court's handling such cases. On November 7, 1956, the Court heard arguments in several such cases and handed down decisions on February 25, 1957. The Court noted that the dissents by Justices Frankfurter and Harlan could be found at a later cite. What made this complex was that—apart from the separate dissents—the alignments of the Justices were not identical across the cases. In *Rogers v. Missouri Pacific Railroad Co.*,[27] Justice Brennan wrote for the Court, reversing the lower court with Justice Burton concurring in the result; Justice Reed dissented on the merits, on the basis of the Mississippi Supreme Court's ruling; Justice Harlan also dissented; and Justice Frankfurter voted to DIG the case (dismiss as improvidently granted).[28] Brennan also wrote for the Court in the second case, *Webb v. Illinois Central Railroad Co.*,[29] with Justice Burton again only concurring in the result, while Justice Reed would have confirmed the ruling of the court of appeals.[30] In *Herdman v. Pennsylvania*

19. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Amalgamated Meat Cutters and Butcher Workmen of N. Am., Local No. 427 v. Fairlaw Meats, 353 U.S. 20 (1957); and San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

20. *Guss*, 353 U.S. at 12; *Amal. Meat Cutters*, 353 U.S. at 1 (Burton, J., & Clark, J., dissenting).

21. 351 U.S. 266 (1956).

22. 352 U.S. 959 (1956).

23. *United Autoworkers*, 351 U.S. at 275 (Douglas, J., dissenting).

24. 353 U.S. 920 (1957).

25. 352 U.S. 500, 524 (1957).

26. The Burton dissent from *Shaw* was without opinion.

27. 352 U.S. 500 (1957).

28. *Id.* at 511 (Reed, J., dissenting); *id.* at 524 (Frankfurter, J., dissenting); *id.* at 559 (Harlan, J., dissenting).

29. 352 U.S. 512 (1957).

30. *Id.* at 517 (Burton, J., concurring & Reed, J. dissenting).

Railroad Co.,[31] Brennan again wrote, while Harlan concurred, and Frankfurter again dissented.[32]

In the last case of the four, *Ferguson v. Moore-McCormack Lines*,[33] Justice Douglas wrote for only a plurality which included Justice Brennan, with Justice Burton concurring in the result, Justice Reed saying he would affirm the court of appeals, and Justices Harlan and Frankfurter dissenting.[34] Harlan's separate opinion—addressing all four cases—indicated he concurred in one but dissented in the others. Frankfurter—in an example of his war with FELA cases—dissented, venting at great length against the FELA and attaching a five-to-six page list of FELA cases.[35] Over a month after these decisions, the Court issued a per curiam reversal on the basis of the previous cases, with Frankfurter again voting to DIG, and Justices Harlan and Whittaker dissenting based on the earlier Harlan dissent, and Burton also dissenting.[36] In a case argued after the above cases, the Court issued another per curiam decision on April 24–25, 1957 and simply cited the earlier series of FELA cases.[37]

B. Consolidation, Grouping, and Linking: More Basics

All these devices—consolidation, grouping, and linking—are ways in which the justices provide greater focus on particular issues they have agreed to decide. Even if different Justices could have opinions bearing on these issues "ready to go" at the same time, giving the appearance of coincidence, consolidation, grouping, and linking are intention. The Court is explicit about consolidating cases, stating as much when it grants cert or sets oral argument. Thus, in granting certiorari to *Flexer v. United States* from the D.C. Circuit, the cert grant order added, "and case assigned for argument immediately following No. 787."[38] A short time before, the Court had done the same with *F. Strauss & Son of Arkansas v. Commissioner of Internal Revenue*, stating, "Case transferred to the summary calendar and assigned for argument immediately follow No. 718,"[39] with the two cases consolidated for decision.[40] Likewise in other cases, the Court's cert-grant order at times showed the "grouping" of cases as they were placed on the argument calendar behind certain already-calendared cases, as when the order granting cert

31. 352 U.S. 518 (1958).

32. *Id.* at 524 (Frankfurter J., dissenting); *id.* at 559 (Harlan, J., concurring).

33. 352 U.S. 521 (1958).

34. *Id.* at 524 (Burton, J., concurring & Reed, J., dissenting); *id.* at 524 (Frankfurter, J., dissenting); *id.* at 559 (Harlan, J., dissenting).

35. *Ferguson*, 352 U.S. at 559–560 (Frankfurter, J., dissenting).

36. Deen v. Gulf, Colo. & Santa Fe Ry. Co., 352 U.S. 925 (1958).

37. Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360 (1958) (per curiam).

38. Flaxer v. United States, 357 U.S. 904, 904 (1958) (granting cert). The case was argued on November 19, 1958 and decided on December 15, 1958.

39. 356 U.S. 966, 966 (1958) (granting cert); Cammarano v. United States, 358 U.S. 498 (1959).

40. *See Cammarano*, 358 U.S. 498 (1959).

to *Trop v. Dulles* stated, "The case is assigned for arguing immediately following No. 572 and No. 415."[41]

Yet there are also many instances when the Court could have consolidated but did not. There have even been occasional explicit denials of motions to consolidate, perhaps with cases to which review had already been granted.[42] These motions may accompany petitions for certiorari or may be filed separately. At times, denial of consolidation is apparently only from examination of the Court's docket, with no mention in the order denying review.[43] When the Court does not explicitly state that it has declined to consolidate,[44] the consolidation may be obvious, as when the Court granted cert on the same day to two Second Circuit immigration cases relating to court jurisdiction over immigrants' habeas petitions under the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[45] And three weeks after the *Witkovich* case[46] (April 29 to May 20, 1957), the Court issued a per curiam affirmance in a related case, which seemed appropriate for Court consolidation.[47]

At times it may be difficult to determine—at least from the case caption alone—whether cases have been consolidated. In 2015, the Court decided *United States v. Kwai Fun Wong*; *United States v. June* was listed with it in the case caption and both cases were from the Ninth Circuit. But the cases were from different districts and the court of appeals had decided them separately.[48] In its ruling, the Supreme Court dropped a footnote saying "we did not consolidate these cases, [but] we address them together because everyone agrees that the same arguments for and against equitable tolling apply equally to both."[49] For analytic purposes, that is certainly consolidation—whatever the Court may be saying.

This labeling is not merely a theoretical matter. How one counts multi-captioned cases affects how we view the amount of work the Supreme Court completes in a Term, and thus it has implications for how we view its caseload in this period of the Court's "shrunken docket," its extended recent period of 70 or

41. Trop v. Dulles, 352 U.S. 1023, 1023 (1957). *Trop*, which had been restored to the calendar for reargument, 354 U.S. 935 (1957), was decided at 356 U.S. 86 (1958); *see also* Perez v. Brownell, 356 U.S. 44 (1968); Nishikawa v. Dulles, 356 U.S. 129 (1958).

42. Glinsey v. United States, 531 U.S. 919 (2000) (denying consolidation with Bartnicki v. Vopper and United States v. Vopper, 530 U.S. 1260 (2000) (cert granted). The opinions in those two consolidated cases are at 532 U.S. 514 (2001); *see also* Dubin and Young v. Bank of Hawaii, 537 U.S. 943 (2002) (denying consolidation and denying certiorari).

43. *See, e.g.*, Larbie v. Larbie, 568 U.S. 1192 (2012).

44. It is not likely that it will be known whether they discussed the matter until—and if—the Justices leave their papers for our perusal.

45. These cases were granted certiorari and decided the same day. INS v. St. Cyr, 229 F.3d 406 (2d Cir. 2000), *cert. granted*, 533 U.S. 289 (2001); Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000), *cert. granted*, 533 U.S. 348 (2001).

46. *United States v. Witkoich*, 353 U.S. 194 (1957).

47. Barton v. Sentner, 353 U.S. 963 (1957).

48. Kwai Fun Wong v. United States, 732 F.3d 1030 (9th Cir. 2014); June v. United States, 560 F. App'x 505 (2014).

49. United States v. Kwai Fun Wong, 575 U.S. 402, 408 n.1 (2015).

fewer decisions per Term. It makes a difference how one counts the Court's rulings, regardless of the number of case captions in each case—for example, whether one counts each ruling as one case or instead counts each caption in a multi-captioned case separately. If one counts separate case titles in case captions, the number of cases the Court disposes of would be—perhaps significantly—higher than if one used the number of opinions (at the rate of one majority or plurality opinion per case). Given that additional case names in a case caption often reflect only multiple cert petitions from a single case below when both (or more) parties seek review, or cross-appeals in legislative redistricting cases (that come to the court on appeal from three-judge district courts, not on certiorari from the U.S. courts of appeals or from state high(er) courts), inclusion of those case titles would make it appear that the Court is doing more work than it in fact is accomplishing.

C. Captions and Consolidation

Not every time one sees more than one case caption at the beginning of a Supreme Court opinion has consolidation—or at least the same type of consolidation—occurred. In fact, the Supreme Court's "consolidation" of cases is of several types. At the start, there are instances in which two or more case names appear in the case caption. The most obvious instance of consolidation is when the Court has granted review to cases from more than one lower court, as when one case is from one U.S. court of appeals and another is from another circuit—or when cases are from state courts in different states. In this type of consolidation, the Court takes more than one case to provide itself with a wider range of factual situations impinging on the issue(s) for which it granted cert.

Alternatively, at times the two or more cases listed in the caption come from the same circuit. The Court's granting of cert to separate rulings below is but a slightly different instance of consolidation, *if* the separate rulings below are different applications of the same doctrinal matter. Yet the Court's decision to review more than one ruling from a given circuit court of appeals may not be real consolidation if the court of appeals cases resulted in closely related—even intermeshed—rulings and there was a multiplicity of parties, each of which might be in a position to file certiorari petitions. And what might appear to be the Court's consolidating cases when multiple case captions are present may in fact only reflect consolidation below. In short, a multi-case caption may not be "real" consolidation if the multiple cases stem from the same single ruling below and result from cert petitions filed by different parties objecting to the same result or to different aspects of a multi-part decision—which is not to be confused with the Court's joining of cases that were separate below. Thus, the granting multiple petitions from a single U.S. court of appeals ruling is not always "consolidation" in the sense used here, even though the Court might be said to be engaged in "house-cleaning consolidation" to account for all loose ends. When a court of appeals has consolidated several cases from different districts and issued a single opinion covering all of them, certainly consolidation has occurred. But it has not

necessarily occurred in the Supreme Court, even if there were several cert petitions from that court of appeals ruling. Thus, what might appear to be consolidation (the presence of multiple case captions) may in fact only reflect consolidation below.

D. Trends.[50]

In the first years of the Warren Court, O.T. 1955–1960, the Court was deciding 100 or more signed opinions each Term, along with, on average, 17 per curiam rulings. Per Term, there was an average of a half-dozen instances in which the Court consolidated cases from the lower courts and seven instances in which the Court grouped an average of 2.4 cases for filing; all the grouped cases constituted slightly under one-sixth of all plenary decisions (15.5%). Some of the grouped cases were linked through Justices' separate opinions, but with an opinion in each case, the cases were not consolidated.

Grouping is not hard to find in these earlier years, in part because the Court decided more cases than it has in recent decades. For example, in O.T. 1956, three of the "Communist cases"—*Service v. Dulles*, *Watkins v. United States*, and *Sweezey v. New Hampshire*,[51] in which the Court backed off from its earlier, severely criticized opinions—were handed down sequentially on the same day (June 17, 1957), although they had not been argued back-to-back (*Sweezey* on March 5 and *Watkins* on March 7, but *Service* not until a month later, on April 2–3). There could even be an explicit reference to the grouping, as when Justice Whittaker, writing in both of two cases argued sequentially and handed down on the same day, said, "This is a companion case to . . ."[52]

In O.T. 1969–1972, the beginning of the Burger Court and the transition to its full membership, was one in which the number of signed opinions per Term was over 120, with over 150 in O.T. 1972. The number of per curiam dispositions was much higher than in the earlier period: the average number was over 90, with a particularly large number (130) in O.T. 1972, perhaps in part be a result of Burger Court practice in designating certain dispositions as per curiams. Despite the larger number of cases, there were fewer consolidations—only nine in the entire four Terms, with five of those, including two per curiams, coming in O.T. 1969 and with *none* in O.T. 1972. The Court engaged in the same amount of grouping of cases per term (seven) as the Warren Court terms examined, with grouped cases constituting roughly one-eighth of the Court's plenary ruling, a slight decrease from the earlier period.

50. As noted earlier, the data presented here were collected by the author. Especially as to per curiam rulings, there are different modes of counting them, and the Court has used the "per curiam" label in different ways at different times.

51. Service v. Dulles, 354 U.S. 363 (1957); Watkins v. United States, 354 U.S. 178 (1957); and Sweezey v. New Hampshire, 354 U.S. 234 (1957).

52. Lehmann v. United States *ex rel.* Carson, 353 U.S. 686 (1957); Mulcahey v. Catalanotte, 353 U.S. 692 (1957). *Lehmann* had been argued March 26–27, *Mulcahey* on March 27. Opinions in both were issued June 3.

In the 1970s criminal procedure decisions, the capital punishment rulings provide a further instance of consolidation *and* grouping in lieu of consolidation, and the Court's many decisions on the Double Jeopardy Clause also show grouping but not in all instances. As to capital punishment, *Furman v. Georgia*,[53] in which the justices invalidated the death penalty as then practiced, was a consolidation of two cases from Georgia and one from Texas.[54] However, after the states had developed new death penalty procedures and challenges to those procedures returned to the Court in 1976, instead of consolidation, the Court grouped the almost half-dozen cases it decided, hearing argument in them over two days (March 30–31, 1976) and issuing the decisions in all of them, serially, on the last day of the Term, July 2, 1976, with *Gregg v. Georgia* being the lead case.[55] Perhaps the Court only grouped rather than consolidated because there were enough differences in individual states' new procedures that a broad statement—similar to *Furman*—was thought inappropriate, but whatever the reason, the way the Court handled the cases did differ from strict consolidation.

As to double jeopardy, when in the 1974–1977 Terms the Court decided more cases than in the preceding fifteen Terms,[56] one finds some of the Court's nearly one dozen rulings decided separately from other rulings on the same topic,[57] even when they are handed within close proximity to each other,[58] and there are two instances of grouping—one of two cases[59] and one of four cases[60]—but there are no consolidations. The reason for the latter may well be that the alignments of the Justices in these cases are by no means identical, which seems a prerequisite for full consolidation—and for linking as well.

The numbers and proportions of consolidated and grouped cases described above may not seem exceptionally large, but the Court would not again come close to those numbers, as the next Terms examined exhibited a very real change in the Court's practice. Where there had been modest differences between the Warren Court years examined and those from the early Burger Court, there was little consolidation and almost no grouping during the Rehnquist and early Roberts

53. Furman v. Georgia. 408 U.S. 238 (1972).

54. *See also* Jenkins v. Georgia 171 S.E.2d 501 (Ga. 1969); Branch v. Texas, 447 S.W.2d 963 (Tex. 1969).

55. *See* Gregg v. Georgia, 428 U.S. 153 (1976); *see also* Profitt v. Florida, 428 U.S. 292 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

56. STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 195 (4th ed. 1995).

57. *See, e.g.*, United States v. Martin Linen Co., 430 U.S. 564 (1977) (April 4, 1977); Brown v. Ohio, 432 U.S. 161 (1977) (June 16, 1977); Arizona v. Washington, 434 U.S. 497 (1978) (February 21, 1978); *see also* United States v. Dinitz, 424 U.S. 600 (1976) (March 8, 1976); Ludwig v. Massachusetts, 427 U.S. 618 (1986) (June 30, 1976).

58. *See* Lee v. United States, 432 U.S. 23 (1977), decided June 13, 1977, and Jeffers v. United States, 432 U.S. 137 (1977), decided June 16, 1977.

59. Wilson v. United States, 420 U.S. 332 (1975); United States v. Jenkins, 420 U.S. 358 (1975). Both cases decided February 20, 1975.

60. Burks v. United States, 437 U.S. 1 (1978); Crist v. Bretz, 437 U.S. 28 (1978); Sanabria v. United States, 437 U.S. 54 (1978); United States v. Scott, 437 U.S. 82 (1978). All cases filed on June 14, 1978.

Courts. In the 1986–1999 Terms, the number of cases with signed opinions after the first few years began a steep decline, from almost 150 per Term at the beginning to 100 in O.T. 1992, after which it remained in the 80s until a great further drop to 72 in O.T. 1999. Thereafter, from O.T. 2000 through O.T. 2016, the number of signed opinions remained basically in the 70s before falling to the low 60s at the end of the period. The number of per curiam dispositions showed some decrease but not of the same magnitude. The number of per curiams in the early period of this period is not unlike that for the Warren Court period; it then fell slightly starting with O.T. 1992 but exceeded ten per Term for O.T. 1995–1997 before remaining lower thereafter except for thirteen in O.T. 2009.

The decrease in signed opinions, whatever the reasons—a more stable Court (that is, one with fewer personnel changes) and a more conservative Court one (willing to allow, say, pro-prosecution decisions to stand), or a result of the elimination of all but a small number of cases in the *appeal* (as distinguished from certiorari) category in which a decision by the Court was mandated, or something else[61]—meant there was less output. With this substantial decrease in the number of signed opinion cases, it is obvious there were fewer opportunities for consolidation or grouping. Yet, one sees not only a decrease in the *number* of consolidations but also a reduction in the *proportion* of cases consolidated: consolidation and grouping decreased far more than the drop in the overall number of cases could explain. In the fourteen Terms O.T. 1986–1999, there were only twenty-seven consolidations, a hair under two per Term, with six in one Term (O.T. 1993), while in four Terms there were none. At the same time, there were only fourteen instances, accounting for twenty-nine cases, in which the Court grouped cases, but five Terms saw no groupings. (In one Term, there was a combination of consolidation and grouping). Overall, for this period, grouped cases were only 2.0% of the signed opinions, a proportion insignificant compared to earlier groupings.

The next 17 Terms (O.T. 2000–2016) saw basically the same amount of consolidation, with thirty-seven cases total or slightly more than two per Term, while two terms saw no consolidation, but there were seven in one Term (O.T. 2004) and five in two others. Grouping, however, decreased sharply, with only ten instances (twenty-seven cases), almost all in the first five of these Terms; there was a stretch of five consecutive Terms without any grouping of cases.[62] Grouped cases constituted even less than in the previous period, being only 0.8% of signed opinions.

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61. *See* Arthur D. Hellman, "The Shrunken Docket of the Rehnquist Court," 1996 SUP. CT. REV. 403 (1997); Ryan Owens & David A. Simon, "Explaining the Supreme Court's Shrinking Docket," 53 WM. & MARY L. REV. 1219 (2012) (discussing ideological and contextual factors).

62. The two cases related to same sex marriage, Hollingsworth v. Perry, 133 S. Ct. 2651 (2013), on whether proponents of a Proposition had standing to defend it in Court, and United States v. Windsor, 133 S. Ct. 2675 (2013), invalidating DOMA, were handed down on the same day, so one can say that they were grouped because of their underlying subject-matter although they were decided on different issues, but they had not been grouped for argument.

The death of Justice Scalia left the Court with only eight justices for the key part of the October 2015 Term, likely affecting its treatment of cases. There were sixty-two cases decided with signed opinions, plus eighteen per curiams, triple the previous five Terms' average number. (All but eleven of the signed opinion cases and five of the per curiams came after Justice Scalia's death). Continuing the pattern of the previous ten Terms, the Court did not group any cases for disposition. The Court also consolidated cases in three instances: one of which involved two North Dakota Supreme Court rulings and one Minnesota Supreme Court ruling on testing for blood-alcohol levels, but the more important of which involved consolidation of cases from *four* circuits (Third, Fifth, Tenth, and D.C.) in the cases challenging the application of the requirement of insurance coverage of contraceptives as it applied to religious non-profit organizations.[63]

In O.T. 2016, in which the Court was also short-handed because Justice Gorsuch was not seated until near its end, among the sixty signed opinions (and ten per curiams), there were only three instances of consolidation, accounting for seven cases. The October 2017 Term saw one obvious consolidation of cases from the Fifth, Seventh, and Ninth Circuits in a case in which the Court resolved a circuit split,[64] and three groupings. There was also another consolidation that did not pan out. It concerned challenges to the validity of appointments of an officer to two military appellate courts. The result was the single case of *Ortiz v. United States*,[65] rejecting defendants' claim. Initially, the Court granted certiorari to three cases and consolidated them for argument.[66]

Indeed, in its decision in *Ortiz*, the only one decided, the Court noted that it had "granted and consolidated petitions in two related cases." However, as the Court then explained, those cases "raise[d] issues of statutory jurisdiction that our decision today [in *Ortiz*] makes it unnecessary to resolve,"[67] and the Court thus DIG'd them when the *Ortiz* decision was filed—that is, dismissed the cert petitions in them as improvidently granted.[68] The DIG'd *Cox* case was itself a consolidation of six cases.[69]

One of the Term's groupings was of two cases involving aspects of *inter partes* review in patent cases, with both cases coming from the Federal Circuit, argued on November 27, 2017, and decided on April 24, 2018.[70] The other grouping was of

63. Zubik v. Burwell, 136 S. Ct. 1567 (2016).

64. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Ernst & Young v. Morris, 137 S. Ct. 809 (2017); NLRB v. Murphy Oil USA, 138 S. Ct. 51 (2017).

65. 138 S. Ct. 2165–2166 n.2 (2018).

66. Dalmazzi v. United States, and Cox v. United States, *both at* 138 S. Ct. 53 (2017); Ortiz v. United States, 138 S. Ct. 54 (granting cert).

67. *Ortiz*, 138 S. Ct. at 2172 n.2.

68. Dalmazzi v. United States, 138 S. Ct. 2273 (2018); Cox v. United States, 138 S. Ct. 2273 (2018).

69. In addition to *Cox*: Craig v. United States; Lewis v. United States; Miller v. United States; Morchinek v. United States, and O'Shaugnessy v. United States, *consolidated at* 138 S. Ct. 2273 (2018).

70. SAS Inst. v. Iancu, 138 S. Ct. 1348 (2019); Oil States Energy Services g. Greene's Energy Grp., 138 S. Ct. 1365 (2018).

two cases from two different three-judge courts (Western Wisconsin and Maryland) on gerrymandering in which the Court yet again failed to reach the core question.[71] The third, on the effect of change in the Sentencing Guidelines, was a grouping of two cases from different circuits (the Eighth and Eleventh), both argued on March 27, 2018, and decided on June 4, 2018.[72] What is perhaps most notable is the Court's *not* consolidating two cases which, it is fair to say, it would have done under earlier practices—the cases on the travel ban Executive Order. Cases came from two different circuits—the Ninth and the Fourth—with each having emphasized different aspects of the challenge to the ban (presidential authority, religious discrimination). Had the Court wanted to deal with only one of those concerns, taking one case and then denying the other would have made sense. Yet, having granted review in the Ninth Circuit case—rather than also granting review to the Fourth Circuit's en banc ruling—the Court sought supplemental briefing in the Ninth Circuit case as to the religious discrimination question, and then deciding the Ninth Circuit case—*Trump v. Hawaii*[73]—the Fourth Circuit case was sent back with a GVR order "in light of *Trump v. Hawaii*."[74] This substitution of GVR for consolidation receives attention in the next section.

What about the Supreme Court's two most recent Terms, O.T. 2018 and O.T. 2019? A quick look at them is in order to see if previously described patterns continued. There was virtually no case-consolidation in the October 2018 Term, except on June 27, 2019, two days from Term's end, when the Court handed down a decision on the partisan gerrymandering cases, *Rucho v. Common Cause* and *Lamone v. Benisek*,[75] which had come to the Court on appeal from, respectively, the Middle District of North Carolina and the District of Maryland, and in which the Court had postponed jurisdiction until consideration on the merits. There was only one other case—the "Bladensburg Cross" case,[76] only a week prior to the gerrymandering cases—that might be considered consolidation, but its double caption was a result of two cert petitions from a single Fourth Circuit decision. Beyond those cases, there was only one grouping of cases when, on March 4, 2019, the Justices handed down two cases on copyright law, *Rimini Street, Inc, v. Oracle USA, Inc.*[77] on costs in copyright suits, and *Fourth Estate Public Benefit Corp. v. Wall Street. Com*. on copyright registration.[78] While the two cases had copyright in common, that was about it: their oral arguments were a week apart (*Fourth*

71. Gill v. Whitford, 138 S. Ct. 1916 (2018); Benisek v. Lamone, 138 S. Ct. 1942 (2018) (per curiam).

72. Hughes v. United States, 138 S. Ct. 1765 (2018); Koons v. United States, 138 S. Ct. 1783 (2018).

73. 138 S. Ct. 2392 (2018).

74. Int'l Refugee Assistance Project v. Trump, and Trump v. Int'l Refugee Assistance Project, *both at* 138 S. Ct. 2710 (2018).

75. Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Lamone v. Benisek, 139 S. Ct. 783 (2019).

76. Am. Legion v. Am. Humanist Ass'n and Maryland-National Capital Park & Planning Commission v. American Humanist Association, *both at* 139 S. Ct. 2067 (2019).

77. 139 S. Ct. 873, 875–76 (2019).

78. 139 S. Ct. 881 (2019).

Estate on January 8, 2019 and *Rimini Street* the following week, January 14) and each case had a different author, respectively, Justices Kavanaugh and Ginsburg.

The picture for October Term 2019 is, however, quite different in having a number of consolidations—roughly a half-dozen of one type or another, including some in major decisions— and there was also a de-consolidation. In all, the 2019 Term provides a sharp "bump up" in the Court's consolidations and grouping of cases as compared to the previous years, although it is not possible to tell whether this activity was only a one-Term event or whether it indicates the beginning of a shift in practice.

The clearest instances of consolidation came at Term's end, when two of the Court's most important decisions—on the employment rights of LBGT persons and the administration's rescission of DACA. Before those cases, however, there had been cases with other types of consolidation. In one of these, *Guerrero-Lasprilla v. Barr*,[79] the Court, in granting cert, consolidated two "unpublished" (non-precedential) Fifth Circuit dispositions and decided them in one decision on whether the U.S. courts of appeals had jurisdiction to review certain questions of law in immigration cases. In another, the Court handed down *Kansas v. Garcia*,[80] a ruling on three Kansas state court criminal convictions for aliens having used others' Social Security numbers to obtain employment; the Kansas Supreme Court had reversed each conviction in separate opinions but grouped them at decision.

In another case, *Maine Community Health Options v. United States*,[81] on payment of losses during the phase-in period for the Affordable Care Act, the four consolidated cases all came from the Federal Circuit, which, in three opinions by its chief judge (two consolidated in one opinion), had reviewed different decisions by different trial judges. Yet another consolidation occurred when the Court granted multiple cert petitions stemming from the First Circuit's Puerto Rico fiscal crisis case and consolidated the cases, deciding them as of *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment*.[82]

The Puerto Rico cases were handed down on June 1, 2020, but the serious consolidation took place in the Court's LGBT and DACA cases. In each, the Court granted review to cases from several circuits and decided them together. Announced first, on June 15, was *Bostock v. Clayton County, Georgia*,[83] which decided not only *Bostock* from the Eleventh Circuit and *Altitude Express v. Zarda* from the Second Circuit, both involving gay individuals, but also a Sixth Circuit case on discrimination against transgender people, *R.G. & G.R. Harris Funeral Homes v. E.E.O.C.*

79. 140 S. Ct. 1062 (2020); *see also* Oralles v. Barr, 140 S. Ct. 1062 (2020).

80. 140 S. Ct. 791 (2020), *with* Kansas v. Morales and Kansas v. Ohoa-Lara.

81. 140 S. Ct. 1308 (2020), *with* Moda Health Plan v. United States Blue Cross & Blue Shield of N.C. v. United States; Land of Lincoln Mutual Health Ins. Co. v. United States.

82. 140 S. Ct. 1649 (2020), *with* Aurelius Inv. v. Commonwealth of Puerto Rico; Off. Comm. of Unsecured Creditors v. Aurelius Inv.; United States v. Aurelius Inv.; Union de Trabajadores De La Industria Electrica Y Riego v. Fin. Oversight and Mgmt. Bd. for P.R.

83. 140 S. Ct. 1731 (2020).

Three days after Bostock came the ruling invalidating the rescission of the DACA program as arbitrary and capricious. To *Department of Homeland Security v. Regents of the University of California,*[84] came from the Ninth Circuit, the Justices joined *Trump v. NAACP* from the District of Columbia Circuit, and *Wolf v. Batalla Vidal* from the Second Circuit, in which the Court had granted certiorari in the latter two before judgment. In both the gay rights and DACA rulings, the cases were handed down as a single ruling even though the judgments were not the same as to each case to which review had been granted: in *Bostock*, one lower court ruling was reversed and remanded while those from the other two courts were affirmed, and in the DACA decision, one lower court ruling was vacated in part and reversed in part; one was affirmed; and the third was affirmed in part reversed in part and vacated in part.

During the same week of those decisions, there was also an instance of what might be called lesser consolidation, in which two cert petitions from the same Fourth Circuit ruling—on the effect of permits for a pipeline from including Appalachian Trail land in the National Park System—had been consolidated on being granted.[85] Likewise on June 29, there was also another decision of lesser consolidation, in which the Court granted two cert petitions from a single Fifth Circuit case on abortion limits and the matters were argued together in *June Medical Services v. Russo* and *Russo v. June Medical Services.*[86]

Then finally, as the Term extended beyond the usual final Decision Days well into July, there was more consolidation and grouping. The Court engaged in both in the Term's major religion cases. Handed down on July 8, *Little Sisters of the Poor v. Pennsylvania*[87] was joined with *Trump v. Pennsylvania* from the same Third Circuit ruling on the administration's broadening of the exception from the Affordable Care Act's requirement that employers provide contraceptive coverage in their employees' insurance. The Court then ruled on preclusion of Title VII suits by employees of religious schools and other social services under the Act's ministerial exception, with the Court saying so in the consolidated cases of *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*,[88] from separate Ninth Circuit rulings.

Then, on the Term's last day—July 9—there was more grouping along with some consolidation—in the cases on efforts to obtain President Trump's tax records, in which the president challenged subpoenas from the House of Representatives and from the District Attorney for Manhattan. Here, in addition to rejecting the president's claim of immunity, the Court—by identical 7–2 votes—upheld the subpoena from the Manhattan DA subject to potential narrowing in the

84. 140 S. Ct. 1891 (2020).

85. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1937 (2020); Atl. Coast Pipeline v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1841 (2020).

86. 140 S. Ct. 2103 (2020).

87. 140 S. Ct. 2367 (2020).

88. Our Lady Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049 (2020).

lower court, and essentially rejected the House's request subject to further litigation below. There were two rulings, *Trump v. Vance*[89] and *Trump v. Mazars USA*,[90] but three cases because the latter entailed consolidation of the *Mazars* case, which had come from the D.C. Circuit, with *Trump v. Deutsche Bank AG*, from the Second Circuit, also the origin of *Vance*.

One can also find instances of linkage in this Term, When the Justices handed down its 5–4 ruling in *McGirt v. Oklahoma*[91] on Indians' rights to much of Oklahoma, they issued *Sharp v. Murphy*,[92] in which Justice Gorsuch recused, deciding it for the reasons given in *McGirt.* And there was linkage in the Faithless Electors cases. After ruling unanimously in *Chiafalo v. Washington*,[93] the Court (minus the recused Justice Sotomayor) issued a per curiam disposition in *Colorado Department of State v. Baca*,[94] reversing based on *Chiafalo*. These cases also illustrate de-consolidation, which is rare but does occur. Earlier, on January 17, 2020, the Court had consolidated these cases, but less than two months later—on March 10—it terminated the consolidation. Another instance of de-consolidation had taken place at the end of the 2017 Term when the Court decided *Ortiz v. United States*[95] on the presence of active-duty military officers serving on both the Court of Appeals for the Armed Forces and the Court of Military Commission Review. In its *Ortiz* decision, the Court noted in a footnote that at the time it granted cert it "consolidated petitions in two related cases—*Dalmazzi v. United States* . . . and *Cox v. United States*," but because "[t]hose cases raise issues of statutory jurisdiction that our disposition today makes it unnecessary to resolve,"[96] the Court separated two cases and dismissed cert as improvidently granted (DIG).[97]

II. THE COURT'S GRANT, VACATE, AND REMAND (GVR) ORDERS

A. GVR as an Alternative

If the Supreme Court consolidated or grouped cases less frequently, has it also adopted an alternative consonant with the Court's smaller output? Indeed, that appears to have been the case. When faced with an issue, the Justices appeared to choose to focus on a single case in which it was raised and then to issue GVR (grant, vacate, and remand) orders, in light of a recent ruling, for the cert petitions waiting in line. Having seen instances in which, shortly after the Court has decided a case, it issued a number of GVRs in light of that case as its way of disposing of

89. 140 S. Ct. 2412 (2020).
90. 140 S. Ct. 2019 (2020.
91. 140 S. Ct. 2452 (2020).
92. 140 S. Ct. 2412 (2020).
93. 140 S. Ct. 2316 (2020).
94. 140 S. Ct. 2316 (2020).
95. 138 S. Ct. 2165 (2018).
96. *Id.* at 2172 n.2.
97. Dalmazzi v. United States, 138 S. Ct. 2273 (2018); Cox v. United States, 138 S. Ct. 2273 (2018).

cert petitions from cases that posed the same or a closely related issue, one is prompted to explore further. Along with the shift in the Court's practice with respect to consolidating cases, there is a related shift in the Court's GVR practice. Serious attention to that practice has been lacking except for Arthur Hellman's now thirty-year-old exploration, in which he examined their implications,[98] and Aaron-Andrew Bruhl's ten-year-old study, which provided an examination that was in large part empirical based on the 1996–2006 Terms (and thus ending fifteen years ago), but which also included some suggestions for reform in the Supreme Court's practice.[99] Just as there is need for an accounting of changes in practice with respect to consolidation, the same is true as to GVRs. Despite Bruhl's study, which provided some data explored below, more research is necessary. He had noted "serious gaps in our knowledge" and had said, "Even basic descriptive data are scarce; we do not know how many GVRs, and of what categories, the Court has been issuing."[100] Despite alternative uses of GVRs—and without engaging in the debate as to what they might mean or are intended to have the lower courts do—attention here is limited almost entirely to those cases with GVR orders directing reconsideration in light of a specific case as that type of GVR is by far the predominant GVR type, although there are others (Bruhl calls them "non-standard").

First however, some words are necessary about the relationship between the two practices of consolidation and GVR. While there continues to be GVRs based on the Solicitor General's brief or an intervening statute, there has been a particular shift as to those cases GVR'd "for consideration in light of *Jones v. Smith."* Those "in light of [a case]" GVRs had been present earlier but only in small numbers. Of course, there were also fewer cert petitions in earlier decades, so one would expect more GVRs now simply because of the increase in petitions. The Court itself has noted that earlier less frequent use of GVRs "may be explained in large part by the smaller size of our certiorari docket in earlier times."[101] However, the increase in such GVRs seems considerably greater than the growth of cert petitions can account for. In a process in which growth feeds on itself, some of the increase in cert petitions may itself result from the Court's greater use of GVRs, as litigants might file petitions in hopes of obtaining a "hold" for their cert petition and a subsequent GVR.[102]

The growth in cert petitions means that there are more petitions the Court can dispose of via GVRs after making decisions of the "lead" case on the issue. Some

98. Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5, 5–41 (1983); *see also* Hellman, *Granted, Vacated, and Remanded: Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984).

99. Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – And an Alternative*, 107 MICH. L. REV. 711 (2009).

100. *Id.* at 715.

101. Lawrence v. Chater, 516 U.S. 163, 166 (1996).

102. I appreciate Aaron Bruhl's suggestion of this phenomenon.

of the post-1980s shift may also be a result of the Court's "shrunken docket," the smaller number of cases decided with published opinion. The Court may be receiving more cases on any issue for which cert petitions are filed, with many of those then disposed of with a GVR, as the Court decides a single (or "lead") case and then GVRs other cert petitions—indeed often *many* cert petitions. GVRs also now seem to substitute—at least in part—for summary affirmances and reversals in which the Court once regularly engaged and which it now rarely does—and not simply because of the elimination of the "appeal" category, with almost everything now coming to the Court on certiorari.

The two shifts—less consolidation, more GVRs—seem related and the two changes interact. The "shrunken docket" means fewer cases decided with full opinion, and it is more likely that the Court will decide only one case per issue and send back related cases to the lower courts through the GVR process. If the Court heard arguments for some GVR'd cases, they might well have consolidated those cases with the initial single case decided on the issue. Conversely, with large numbers of cases on an issue, to take one or two more to consolidate may not make sense, as it may be easier to dispose the remainder of the petitions beyond the "lead" case with GVR orders. If the issue is clear and clearly presented in the case to which cert is granted, the perspective that other related cases might provide would be less necessary.

B. About GVRs

Before turning to closer examination of the Court's GVR practice, it is useful to discuss GVRs somewhat further and to address what some judges have said about them. Bruhl defined a GVR as "a summary disposition that, without purporting to find any error, returns the case to the court below for further consideration in light of [any] matter."[103] The "any matter" on which the present study focuses are those cases remanded for reconsideration "in light of" a Supreme Court ruling. However, not all GVRs are issued "in light of" a previous case. Cert might be granted and the case remanded in light of an intervening event or the Solicitor General's position in that case, as when the Court, in light of a Solicitor General memorandum, remanded a case to the district court to consider defendant's *in forma pauperis* application "after review of the full transcript of the criminal trial."[104] Another reason for a GVR appeared when the Court GVR'd to allow a defendant to have an attorney to challenge a district court ruling.[105] GVRs are also used to dispose of cases, as when they are remanded with instructions to dismiss for mootness.[106]

103. Bruhl, *supra* note 99, at 717.

104. Delbridge v. United States, 354 U.S. 906, 906 (1957) (citing Johnson v. United States, 352 U.S. 565 (1957)).

105. Johnson v. United States, 352 U.S. 550, 550 (1957).

106. *See, e.g.*, United States v. Amarillo-Borger Express, and Ark. La. Mo. Ry. Co. v. Amarillo-Borger

The Court might also tie a GVR order to an instruction to reconsider "in light of" other elements, such as the Court's "consideration of the entire record" and confession of error by the Solicitor General, as occurred in the obscenity case of *Mounce v. United States*,[107] with *Roth v. United States*[108] being the "in light of" case. Although one might, however, compare that with a case from almost the same time, the *Roth*-based reversal in *Times Film Co. v. City of Chicago*.[109] There was also a reversal on the basis of "consideration of the entire record" and the government's confession of error in cases following in *Jencks* ruling in October 1957.[110] There could also be GVRs in light of an intervening statute, as when the Court GVR'd *Breaton v. United States*[111] in light of P.L. 86-20, which had become law only two months earlier.

The GVRs of which one usually thinks, those remanding for reconsideration in light of a specific earlier case, seem to leave matters open for the lower courts. Indeed, the more GVRs, the greater the chance for those lower courts to evade the "in light of" case. Remember, the Court also remands in many of the cases which receive plenary treatment; the Court "reverses *and remands*" and "vacates *and remands*," and in those situations, while there is the Court's opinion for the lower court to apply, at times the Justices' opinions are less than clear, leaving wiggle room for the lower court, and it may be that the Supreme Court has not dealt with some other issues decided below, as to which the lower court on remand may adhere to its prior decision.

Although some observers argue that such GVR's embody the Justices' broad hints to those lower courts, the Court can be more directive and close off avenues that the lower court might otherwise take. When the Court accompanies a GVR order with an instruction to reinstate the district court's ruling[112] or some other instruction on the merits, that case—while in some ways a GVR and the Court so indicates—might better be considered a summary reversal because the order goes to the merits. In such an instance, in a GVR in which the remand was so that the case would go to trial, the Court—while agreeing with the court of appeals as to summary judgment (that it should have been denied)—remanded to clear away what the court of appeals had said that the Justices thought it should not have said.[113] There are other instances in which a GVR contains a definite instruction: in a desegregation case in the mid-1960s, the GVR order directed the district court

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Express, *both at* 352 U.S. 1028 (1957).

107. 355 U.S. 180 (1957).

108. 354 U.S. 476 (1957).

109. 355 U.S. 35 (1957).

110. Jencks v. United States, 353 U.S. 657, 657 (1957); *see* Scales v. United States, 355 U.S. 1, 1 (1957); Lightfoot v. United States, 355 U.S. 2, 2 (1957).

111. 361 U.S. 117 (1959).

112. *See, e.g.*, Wilson v. Simler, 350 U.S. 892, 893 (1955).

113. Lawlor v. Nat'l Screen Serv. Corp., 352 U.S. 992, 992 (1957). Three justices dissented about the additional language in the Court's per curiam.

"to enter a decree . . . in conformity with" an immediately-previous case.[114]

These directive GVRs come close to the Court's practice—clearly evident in the late 1950s—of issuing orders, not unlike summary reversals, that might be called GVRRs—of granting cert, *reversing*, and remanding. This occurred, for example, in *United Steelworkers v. Galland-Henning Mgfr. Co.*,[115] in which the Court granted cert, reversed, and remanded in light of the week-old *Lincoln Mills* case[116] and thus fitting the pattern of GVRs coming soon after decision of the lead case. Similar is *Carr v. Beverly Hills Corp.*,[117] a reversal based on two cases from a week earlier.[118] Or the Court might order a case "remanded for trial," as in both *Shaw v. Atlantic Coast Line RR Co.* and *Futrelle v. Atlantic Coast Line RR Co.*[119] In the former, the Justices granted cert "limited to that part of the judgment in favor of Southern Railway Company" and said "that part of the judgment is reversed and the cause is remanded for trial." The Court cited the recently decided *Rogers v. Missouri Pacific R Co*.[120] in support of its ruling. Related to remanding for trial was the issuance of a GVR "for consideration on the merits," as the Court did in November 1956, citing *United States v. Hayman*,[121] with each of two cases from different circuits.[122] In these situations, the Court has decided not only that its new case applies to the lower court ruling but also has made error of it, and the Justices do so rather than using a full GVR under which the Justices would have the lower court take first crack at applying the new Supreme Court decision.

What can be said about the cases in light of which the Court GVRs? Overall, the GVR "in light of cases" most often appear almost immediately—a week later or sometimes only a few days—after the lead decision, as the Court disposes of petitions it holds for decision on the case for which it grants review. Indeed, the Court may bunch GVRs immediately after the lead ruling. At other times the Court spaces out GVRs and may take some time before disposing all the cert petitions from cases the lead decision potentially affects, leaving an extended "tail" of GVRs from a case. One reason for the extension is that litigants file petitions immediately after a key ruling, hoping the Court will GVR their case. Some time will also likely pass between when the Court files the lead case and the GVRs deriving from it. And particularly when the Court decides a case at the very end of Term in June, instead of releasing the resulting GVRs then, the GVRs may not appear until the

114. *See* Holmes v. City of Atlanta, 350 U.S. 379, 379 (1956), decided Nov. 7, 1965, to be made congruent with Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1956), decided the same day.

115. 354 U.S. 906 (1957).

116. Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

117. 354 U.S. 917 (1957).

118. Smith v. Sperling, 354 U.S. 91 (1957); Swanson v. Traer, 354 U.S 114 (1957).

119. Shaw v. Atl. Coast Line R.R. Co., 353 U.S. 920 (1957); Futrelle v. Atl. Coast Line R.R. Co., 353 U.S. 920 (1957).

120. 352 U.S. 500 (1957).

121. 342 U.S. 205, 209 n.4 (1952).

122. Jordan v. United States, 352 U.S. 904 (D.C. Cir. 1956); McGann v. United States, 352 U.S. 904 (2d Cir. 1956).

beginning of the next Term. As an example, after the Court decided *Reed v. Town of Gilbert*,[123] on municipal restrictions on signs, on June 18, 2015, two GVRs in light of that case appeared roughly ten days later, on June 29,[124] but another GVR in light of that case then appeared on October 5, 2015, the next Term's "first Monday in October."[125] There may, however, be a gap of some magnitude between the lead case and GVR, as could be seen when, on November 14, 1955, the Court GVR'd for further proceedings,[126] citing two cases from 1944 and one from 1952.[127]

Contemporary GVRs, in addition to following quickly upon the heels of the "in light of" case, tend to be based on only a single case. Yet in the late 1950s, as a previous example also shows, the Court, in issuing a GVR order, might include more than one case for the lower Court to consider on remand. Thus, in *Hill v. United States*,[128] the GVR was in light of *Ellis v. United States*,[129] decided a week earlier, "and also" in light of two earlier cases of varying vintage from the previous Term, *Farley v. United States*[130] and *Johnson v. United States*.[131] Two weeks later, the Court also GVR'd another case[132] in light of *Ellis* while adding *Hill*.[133] *Farley* and *Johnson* also became the basis of a GVR to give petitioner "an opportunity to substantive his allegations."[134]

While a GVR'd case may have arisen in a court other than the one from which the lead ("in light of") case came to the Court, a GVR order may be directed to the very court which had produced the lead case. This is likely the result of cert having been sought from a particular court in several cases raising the same issue, with the Justices, having selected one case, then GVR the others. This phenomenon was seen frequently in later years as the Court received more cert petitions, making it more likely the Court would receive multiple petitions raising the same question, but there is an instance in O.T. 1957, when the justices GVR'd *Ross v. Schneckloth* and *Woods v. Rhay*,[135] from the Supreme Court of Washington, in light of the two-week-earlier *Eskridge v. Washington State Board of Prison Terms and Pardons*,[136] which had come from the same court.

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123. 576 U.S. 155 (2015).

124. Thayer v. City of Worcester, 135 S. Ct. 2887 (2015); Wagner v. City of Garfield Heights, 136 S. Ct. 2888 (2015).

125. Herson v. City of Richmond, 136 S. Ct. 46, 46 (2015).

126. Syres v. Oil Workers, 350 U.S. 842, 842 (1955).

127. Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood, 323 U.S. 210 (1944); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952).

128. 356 U.S. 704 (1958)

129. 356 U.S. 674 (1958).

130. 354 U.S. 521 (1957).

131. 352 U.S. 565 (1957).

132. Cash v. United States, 357 U.S. 219 (1978).

133. What is puzzling is that *Hill* itself was a GVR, to the same court, so it is a GVR in light of a GVR.

134. Edwards v. United States, 355 U.S. 36, 36 (1957).

135. Ross v. Schneckloth, 357 U.S. 575 (1978); Woods v. Rhay, 357 U.S. 575 (1978).

136. 357 U.S. 214 (1958).

Multiple GVRs on cert petitions from the same court as the lead case are not uncommon. They result because that lower court has, after deciding the case which prompted the granted cert petition, applied that ruling to its own later cases, and cert has been sought to raise the same issue as in the initial petition. As the Court itself has noted, in addition to situations in which the Supreme Court case came after a lower court decision, GVRs are also used when the relevant Supreme Court decision was issued shortly before the lower court ruled so that the latter could not apply it. Indeed, some decisions antedating the key ruling may have been brought up on cert and those petitions may have been pending when the Supreme Court accepted what would become the lead case. When a GVR order is directed to the court whose ruling led to the Court's decision, the GVR may also serve a purpose equivalent to the petitioner's filing a second PFR in the court of appeals on the basis of the Court's new ruling or the lower court's granting a rehearing *sua sponte*. It is part of the process by which the lower courts clean up their circuit law in the aftermath of Supreme Court decisions.

If the GVRs that come very shortly after a specific lead case are for cert petitions in cases from the court which decided the lead case, those cases *might* be independent of each other, but more likely they are related in some way, likely as part of a set of cases on an issue decided below. They result from multiple cert petitions from the same multi-party case but the Supreme Court had not consolidated them with the lead case; or they may have been non-precedential ("unpublished) rulings based on the circuit precedent that became the lead "in light of") case taken and decided by the Supreme Court.

When the GVR is instead from another court, it is most likely that the cert petition, involving the same issue as the lead case, was simply held until the Court ruled in the lead case. Multiple GVRs from individual other courts result because those courts had been "going their own way" and following their own precedents when the Supreme Court granted review in a case from another court, something particularly likely when an inter-circuit split has developed but the Justices are not yet ready to grant review to resolve it. The result can be a "pile-up" of cases for the Court to resolve after it issues the lead decision—with immediate resolution taking the form of multiple GVRs to courts that have decided related cases. Some GVRs in cases from the same circuit as the lead case will be GVR'd quickly—with some coming almost immediately, that is, within a week—showing that they have been held until decision of the primary case, the one to which cert was granted. (It has been said, "We regularly hold cases that involve the same issue as a case in which certiorari has been granted and plenary review is being conducted in order that . . they may be 'GVR'd when the case is decided.").[137] Others further back in the "tail" of GVRs after the case is decided may not have been reached in the cert process so these new cases are GVR'd. "Trailer" cases may be those

137. Lawrence v. Chater, 516 U.S. 163, 177 (1996) (Scalia, J. dissenting); Stutson v. United States, 516 U.S. 163, 177 (1996) (Scalia, J. dissenting).

decided under now rejected circuit precedent and which are now working their way up to the Supreme Court.

Bruhl recognized that cert petitions leading to GVRs come at different times in relation to the Court's decision in the lead case, as well as in relation to the Court's granting of cert in that case.[138] He created three categories: petitions filed before the Court granted cert to what would become what is being called here the lead case, which had denominated "pre-grant petitions"; those filed after cert was granted, called "post-grant petitions"; and those filed after the decision itself, or "post-decision petitions."[139]

In a less visible aspect of the interaction between lower courts and the Supreme Court, the need for GVRs may be at least somewhat reduced if a lower court—learning that a cert petition on the issue before it has been filed from another court or that the Supreme Court has granted review to a case raising the issue the lower court is confronting—suspends action in a case until the Supreme Court either denies review without addressing the issue at interest or decides the case to which review has been granted. This lower court suspension of activity in the face of potential Supreme Court action is "anticipatory compliance." If, however, the lower courts do not wait in the face of possible or likely Supreme Court action but instead proceed to decide a case and file the opinion on the issues the Justices are considering, more GVRs are likely to result when the cert petitions from those rulings reach the Supreme Court.[140]

C. What the Justices Say About GVRs

What—if anything—has the Court said about usage of GVRs? Some Justices have engaged in disputation about GVRs, but that has been rare. And for the Justices to refer to the Court's GVR in its opinions is rarer still. However, in a recent case, concerning the "residual clause" of Sec. 16(b) of the Immigration and Naturalization Act after the Court's earlier invalidation in *Johnson v. United States*[141] of a similar clause in the Armed Career Criminal Act, Justice Kagan—writing for the Court—reported that "while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the § 16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those § 16(b) cases and remanded them for further consideration."[142]

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138. Bruhl, *supra* note 99, at 741.

139. *Id.*

140. *See* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 203 (2011) (discussing whether lower courts should proceed and when change may be in the offing or should wait).

141. 576 U.S. 591, 606 (2015).

142. Sessions v. Dimaya, 138 S. Ct. 1204, 1222–23 (2018); *id.* at 1223 n.13 (providing a list of those cases).

In issuing its simple GVR orders, the Court almost invariably says nothing one way or the other about the implications of its order as to what the lower court should do on remand. Only seldom does it do so, leaving it to others to divine whether a GVR means no more than what it says: that the lower court should "consider" the case a-new or whether it is more like a directive pointing to having the lower court reverse its now-vacated earlier ruling, as would seem to be obvious when a GVR'd case has come from the same court whose rule the Justices have overturned.

In a recent instance in which a Justice underscored that in issuing a GVR case the Court was not speaking one way or the other to case outcomes, Justice Alito—in a long series of at least three dozen cases with GVR orders on the basis of *Johnson v. United States*[143] in which he had dissented—explained that, on the Solicitor General's suggestion, the many cases had been held by the Court until *Johnson* itself was decided. He then explained that in this slew (my word, not his) of GVRs, "the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984 . . . is void for vagueness and cases in which relief would not be warranted for a procedural reason."[144] Thus, he added, the lower court "should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief."

In the early period examined in this study, there were some dissents to GVR orders, but they have seldom been seen in recent times. Just as Justices who vote to grant certiorari most often do not note their dissent when certiorari is denied, so Justices who disagreed with a GVR order seldom reveal that disagreement in the reports. Seldom—but not never—as from time to time there has been a flare-up within the Court over GVRs and their purported misuse. Justice Scalia was the most outspoken in this regard, but Justices Alito and Thomas seem to be the present standard-bearer for those who would limit the frequency and use of GVRs.

Two 1996 GVRs led to an extensive exchange between Justice Scalia—objecting to extensive use of GVRs—and the Court's other Justices. In those cases, the competing sides went well beyond disputing whether GVR was appropriate in *those* cases to a full-blown debate on GVR use. In *Lawrence v. Chater*,[145] upon a suggestion by the Solicitor General, the Court GVR'd in light of a new statutory interpretation by the Commissioner of Social Security. In the face of the Scalia dissent, the Justices—in an extended per curiam—stated the rationale for use of the GVR, extolled the virtue of that use, and talked about when a GVR would be "inappropriate." While acknowledging that "a large proportion" of GVRs fit in three categories to which Scalia would have limited their use, the Justices found both those categories were "too narrow" as Scalia interpreted them and found his

143. 135 S. Ct. 2551 (2015).

144. *See, e.g.*, Brown v. United States, 135 S. Ct. 2924, 2924 (2015).

145. 516 U.S. 163 (1996).

approach "too restrictive."[146] The Court then applied its discussion from *Lawrence* to a criminal case, *Stutsun v. United States*,[147] issuing a GVR order because:

> [T]his is a case where (1) the prevailing party below, the Government, has now repudiated the legal position that it advanced below; (2) the only opinion below did not consider the import of a recent Supreme Court precedent that both parties now agree applies; (3) the Court of Appeals summarily affirmed that decision; (4) all six Courts of Appeals that have addressed the applicability of the Supreme Court decision that the District Court did not apply in this case have concluded that it applies to Rule 4 cases; and (5) the petitioner is in jail having, through no fault of his own, had no plenary consideration of his appeal.[148]

Justice Scalia, joined by Justice Thomas, issued a dissent applicable to both cases. As the majority described his views, Scalia would have limited GVRs to three categories: "(1) where an intervening factor has arisen that has a legal bearing upon the decision"; where clarification of the lower court's ruling was necessary, for procedural reasons; and (3) in confession of error situations.[149] Scalia asserted that the present GVRs—which he called "no fault V[acate] & R[emand]"—were "improper extensions of our limited power to vacate without finding error below."[150] He found that the Court had imposed *no* limit on its use of GVR—although the *Lawrence* per curiam certainly suggests otherwise. He explored the situations (or categories of cases) in which the Court had come to use GVRs and then asserted that *Lawrence* and *Stutson* "come within none of these categories of 'no-fault V&R,' not even the questionable . . . one"[151] (in which the Solicitor General said a ground below was mistaken). Then, after parsing at length the Court's use of GVRs in the two cases, he complained not only that the Court's action in these cases "extends our prior practice just a little bit," but he also expressed dismay at the majority's "expansive expression of the authority that supports those judgments;" he said the Court admitted to neither constitutional or "any prudential restraint."[152] Speaking of the Court's new/expanded practice, he said that "innovation cannot be limitless without altering the nature of the power conferred."

Ten years after the *Lawrence*/*Stutson* controversy, the Court—in its per curiam in *Youngblood v. West Virginia*[153]—GVR'd to allow the lower court to examine the defendant's claim of a *Brady* violation, which the Court said had not been

146. *Id.* at 169.
147. 516 U.S. 193 (1996).
148. *Id.* at 195.
149. Lawrence v. Chater, 516 U.S. at 168 (Scalia, J., dissenting).
150. *Id.* at 177.
151. *Id.* at 184.
152. *Id.* at 190.
153. 547 U.S. 867 (2006) (per curiam).

addressed below;[154] it thus used what was then a forty-plus-year-old case as the basis for the lower court's reconsideration. Justice Scalia dissented, again stating his dismay at the Court's further expansion of GVR.[155] Bruhl—who called attention to this case—referred to this type of GVR as an "antecedent-event GVR," one in which an event already on the books when the lower court decided the case was used as the basis for the GVR.[156]

In two cases only a few years later, Justice Scalia—this time alone—again spoke out while dissenting from GVR orders. Both dissents were nowhere near as extensive as those in *Lawrence*/*Stutson*, and each was more focused on the specific GVR order at hand. Yet, he again moved beyond the specifics to a more general complaint. In *Webster v. Cooper*,[157] his beef was that the "in light of" case was decided well before ("more than two months") the lower court rulings and thus could not appropriately be an "intervening factor" that could properly serve as the basis for a GVR.[158] Moreover, because the petitioner had not invoked below the relevant court case, the Court's GVR action was giving petitioner another opportunity to raise a matter foregone below. This led Scalia to complain that "we are developing a new system in which all arguably valid points not raised and not discussed below . . . will be sent back for a redo by the Court."[159]

In *Wellons v. Hall*,[160] Scalia pressed the Court for "outdo[ing] itself" even under the "flabby standard" he had earlier protested, in which the Court would GVR—here quoting from *Lawrence*—on "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation."[161] In the present case, he said, other grounds supported the lower court decision, so the GVR would have no effect. Thus, he asserted, "The power to 'revise and correct for error,' which the Court has already turned into 'a power to void for suspicion,' . . . has now become the power to send back for a redo," which he called part of "[t]he systematic degradation of our traditional requirements for a GVR."[162]

154. *Id.* at 867.

155. *Id.* at 871–75.

156. Bruhl, *supra* note 99, at 727 (2009) (describing one of two categories of GVRs that Bruhl called "controversial," the other being GVRs based on the government's confession of error).

157. 558 U.S. 1039 (2009), GVR'd in light of Jimenez v. Quarterman, 553 U.S. 113 (2009).

158. *Webster*, 558 U.S. at 1039.

159. *Id.*

160. 558 U.S. 220, 227–28 (2010) (Scalia, J., dissenting), GVR'd in light of Cone v. Bell, 556 U.S. 449 (2010).

161. *Wellons*, 558 U.S. at 225.

162. *Id.* at 227–28.

D. GVRs Term-by-Term.

Although many examples provided thus far have been drawn from the latter half of the 1950s, attention now turns more specifically to the patterns in each of the Terms in this study, starting with that earlier period before moving on to Terms of Court from the mid-1980s onward.

1. O.T. 1956-1960.

In the 1956 Term, there was one set of GVRs—five cases remanded in light of two of that year's "Communist cases"—plus one single-case GVR sent back in light of another of those cases. The five-GVR set came at Term's end, a week after the *Watkins* and *Sweezey* decisions,[163] the "in light of " cases the lower courts were to consider.[164] Some of these cases were to reappear in the Supreme Court after remand and be part of the Court's withdrawal from its earlier position after the narrow defeat of the jurisdiction-stripping Jenner-Butler bills.[165] In that Term, the only other standard GVR "in light of X case" had been issued a month earlier, in light of *Konigsberg v. State Bar of California* and *Schware v. Bar Examiners of New Mexico.*[166]

In the 1957 Term, no one previous case led to a large number of GVRs; instead, a number of separate cases each led to one or two such orders. The Term's GVRs tended to come at the first part of the Term, based on rulings from the previous Term[167] or at the end in June shortly after new Court rulings.[168] One came on the same day as the lead case, so noted in both the GVR order and the dissent.[169] On the same day, the Court issued a summary reversal also based on "decided this day" cases,[170] perhaps indicating the relatively small space between a summary decision on the merits and a GVR.

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163. Watkins v. United States, 354 U.S. 178 (1957); Sweezey v. New Hampshire, 354 U.S. 234 (1957).

164. Raley v. Ohio, 354 U.S. 929 (1957); Flaxer v. United States, 354 U.S. 929 (1957); Barenblatt v. United States, 354 U.S. 930 (1957); Sacher v. United States, 356 U.S. 576 (1958); Morgan v. Ohio, 354 U.S. 929 (1957).

165. *See, e.g.*, *Barenblatt*, 354 U.S. at 930; Barenblatt v. United States, 360 U.S. 109 (1959).

166. Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957); Schware v. Bar Exam'r of N.M., 353 U.S. 232 (1957); *In re* Patterson, 353 U.S. 952 (1957).

167. *E.g.*, McCrary v. Aladdin Indus., 355 U.S. 8 (Oct. 14, 1957), in light of Teamsters v. Kerrigan Iron Works, 343 U.S. 968 (1957); Watson v. United States, 355 U.S. 14 (Oct. 14, 1957), in light of Service v. Dulles, 354 U.S. 363 (1957).

168. *E.g.*, Hill v. United States, 356 U.S. 704 (June 2, 1958) (per curiam), in light of Ellis v. United States, 356 U.S. 614 (May 26, 1958) (per curiam), in light of Farley v. United States, 354 U.S. 521 (1957) and Johnson v. United States, 352 U.S. 565 (1957).

169. Joines v. United States, 357 U.S. 573 (June 30, 1958), GVR'd to the Third Circuit Court of Appeals in light of Jones v. United States, 357 U.S. 493 (June 30, 1958), "decided this day," with dissents noted by Justices Burton and Clark, on the basis of their *Jones* dissent.

170. First Methodist Church of San Leandro v. Horstmann, 357 U.S. 368 (1958) (reaching reversal on the basis of First Unitarian Church of L.A. v. County of L.A., 357 U.S. 548 (1958) and Speiser v. Randall, 357 U.S. 513 (1958), with Justice Clark dissenting, referring to is dissents in those cases))).

In the 1958 Term, there was only an occasional or infrequent GVR "in light of" a case, along with some on the basis of the Solicitor General's position.[171] The thin line separating summary rulings and GVRs continued, as could be seen in cases disposed of on the basis of *San Diego Building Trades v. Garmon*.[172] *Garmon* came down on April 20, 1959; two weeks later, on May 4, the Court GVR'd a case in light of it.[173] Although the case had been brought as an appeal, the Court treated it as a certiorari case and then gave it the GVR treatment. Only two weeks later, on May 18, the Court summarily reversed a judgment on the basis of *Garmon.*[174] So one sees both types of dispositions shortly after decision in the lead case. Another summary disposition that came a week after the lead case was *E.T. & N.C. Transportation Co. v. Curre*,[175] affirmed with a citation to *Northwestern States Portland Cement Co. v. Minnesota/Williams v. Stockham Valve & Fittings*,[176] with three Justices (Frankfurter, Whittaker, and Stewart) dissenting based on their earlier dissents.

The 1959 Term had only a handful of GVRs—and not a large handful at that (just over a half-dozen)—and of those, one was in light of a statute[177] and another, while "in light of" a case, came at the Solicitor General's suggestion.[178] There was also a GVR with a remand to an administrative agency;[179] another remand directly to a district court;[180] and a remand in light of cases from several Terms earlier.[181] There were also some "standard" GVRs—that is—those in light of a specific, recently-decided case, with the "lead" case handed down a week earlier in one instance and in another to a case decided the same day.[182]

October Term 1960 had two GVRs in light of legislation or legislative action,[183] one of which was the case that was to become the Court's *School Prayer*

171. WIRL Television Corp. v. United States, 358 U.S. 52 (1958) (material in brief) and WORZ v. FCC, 358 U.S. 55 (1958) (material in brief), and Sangamon Valley Television Corp. v. United States & FCC, 358 U.S. 49 (1958) (describing representations about legislative testimony given after a U.S. court of appeals ruling).

172. 359 U.S. 236 (1959).

173. Grocery Drivers Union Local 848 v. Seven Up Bottling Co. Of L.A., 359 U.S. 434 (1959).

174. De Vries v. Baumgartner's Elec. Constr., 359 U.S. 498 (1959).

175. 359 U.S. 28 (1959).

176. 358 U.S. 450 (1959).

177. Breaton v. United States, 361 U.S. 117 (1959).

178. McAbee v. United States, 361 U.S. 537 (1960).

179. Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n, 361 U.S. 195 (1959).

180. United States *ex rel.* Poret v. Warden, 361 U.S. 375 (1960).

181. Smith v. United States, 361 U.S. 13 (1959).

182. United R.R. Workers Div. of Transp. Workers Union of Am. v. B & O R.R. Co., 369 U.S. 270 (June 27, 1960), in light of Brotherhood of Locomotive Engineers v. Mo.-Kan.-Tex. R. Co., 363 U.S. 528 (June 20, 1960); Camara v. United States, 364 U.S. 263 (1960), in light of Ellem v. United States, 364 U.S. 206 (1960) (both June 27, 1960).

183. *See* All Am. Airways v. United Air Lines, 364 U.S. 297 (1960) (reaching GVR "with instructions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86-661, 74 Stat. 527, has expired"); *see also* Sch. Dist. of Abington Township v. Schempp, 364 U.S. 298 (1960) (reaching same result and remanding "for such proceedings as may be appropriate in light of Act. No. 100 of the Laws of the General Assembly of the Commonwealth of Pennsylvania, passed at the Session of 1959 and approved by the Governor . . . on December 17, 1979").

Case;[184] and another, to a state high court, was for "clarification."[185] These were in addition to eight "standard" GVRs, one of which was a remand to the Second Circuit, which was instructed to remand to a regulatory agency.[186] The other "standard" GVRs appeared both at the beginning of the Term (two in October), the middle (one in February based on a January decision),[187] and then the remainder in the last part of the Term—one in May, in light of an April case, and four in June with two of the latter GVRs coming on the same day as the ruling on which they were based.[188] One of these late-in-Term GVRs came from a rehearing petition; the Court denied cert, but on petition for rehearing the Court substituted a GVR for its earlier cert denial.[189]

Some other observations about the Court's GVR practice in the latter half of the 1950s are in order. For one, the Court frequently used summary dispositions on the merits—often reversals—in part as a function of the presence of many cases that came to the justices on appeal, which required a disposition of this sort. There were summary affirmances as well as reversals, also seen in the aftermath of *Brown v. Board of Education*, when the Court dealt with desegregation of Montgomery's buses in *Gayle v. Browder*[190] by affirming with citations to *Brown*, *Mayor and City Council of Baltimore v. Dawson*,[191] and *Holmes v. City of Atlanta.*[192] The elimination of most three-judge district courts in 1978 and of the remainder of the Supreme Court's mandatory docket—its appeal category—in 1988 meant there was no *need*— that is, no legal requirement—for disposition on the merits, allowing the Court to use cert denials instead—although given the decreased docket of cases with published opinion one would certainly think Justices had adequate time to dispose of at least some cases in this fashion rather than denying cert. Use of cert denials instead of GVRs was at times a matter of disagreement within the Court. For example, when the Court in *Johnson v. Union Pacific P.R. Co.*[193] reversed the Ninth Circuit on the basis of an Idaho decision,[194]

184. Abington School District v. Schempp, 394 U.S. 203 (1963).

185. State Tax Comm'n of Ariz. v. Murray Cnty. of Tex., 364 U.S. 289 (1960) (citing Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940)).

186. Local 553, Teamsters, v. NLRB, 366 U.S. 763 (1961) (remanding in light of Local 357, Teamsters v. NLRB, 365 U.S. 667 (1961), decided six weeks earlier)).

187. NLRB v. Celanese Corp. Of Am., 365 U.S. 297 (Feb. 20, 1961) (remanding in light of NLRB v. Mattison Mach. Workers, 365 U.S. 123 (Jan. 23, 1961)).

188. Comm'r of Internal Revenue v. Schlude, 367 U.S. 911 (June 19, 1961) (reaching GVR in light of AAA v. United States, 367 U.S. 687 (June 19, 1961)); Comm'r of Internal Revenue v. Milwaukie Suburban Transp. Corp., 367 U.S. 906 (1961) (reaching the same result in light of both *AAA* and United States v. Consol. Edison of N.Y., 366 U.S. 80 (1961), decided a month earlier).

189. Conner v. Simler, 367 U.S. 486 (1961), GVR'd to the Tenth Circuit in light of an Oklahoma case.

190. 352 U.S. 903 (1956).

191. 350 U.S. 877 (1955).

192. 350 U.S. 879 (1955).

193. 352 U.S. 957 (1957).

194. Russell v. City of Idaho, 305 P.2d 740 (Idaho, 1956).

four Justices would not have granted cert, but upon cert being granted, they would have GVR'd in light of that ruling.

In the "standard" GVRs of those days in light of a case, the Court's form of order was not invariably that to which we are now accustomed. At times, the Court did more than point to the already-decided case on the basis of which there should be reconsideration—that is, it went beyond the "reconsideration in light of" language. In one instance,[195] the Court remanded to the district court for retrial, specifying that trial was to be "on the admiralty side," and citing a case on that point[196] before noting the "in light of" case.[197] Another slightly different form was in *Townsend v. Sain*,[198] granting cert, vacating the Seventh Circuit's judgment, and remanding, not saying "for consideration in light of" but citing the two-month-old ruling in *United States ex rel. Jennings v. Ragen.*[199]

When cases that will be GVR'd arrive at the Supreme Court on certiorari from a U.S. court of appeals, the Court in its earlier practice did not always simply remand to that court—which in turn might remand to the district court or to the agency where the case originated. At times, the Justices remanded to the district courts, thus "skipping a step," as they did in remanding a Fifth Circuit case directly to the district court "for disposition of the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panel in violation of the Federal Constitution."[200] Or they might remand to an agency or at least direct such a remand. One such case was *Public Service Commission of State of New York v. Federal Power Commission / United Gas Improvement v. F.P.C.*,[201] GVR'd to the Third Circuit to be remanded to the Federal Power Commission in light of a case from the prior term.[202]

We can also learn about earlier practice by seeing what took place after a major ruling that would have affected large numbers of cases in the pipeline held for decision of the lead case. *Miranda v. Arizona*[203] provides such an instance. So might *Miranda*'s precursor. After *Escobedo v. Illinois*,[204] hundreds of petitions arrived at the Court that implicated *Escobedo*, including possible extension (that became *Miranda*). Chief Justice Warren "directed his law clerks to segregate all the *Escobedo* cases on the docket,"[205] and from that pool, the Court fished the cases to be decided, then consolidated them to become what we know as *Miranda*.

195. Aho v. Jacobsen, 359 U.S. 25, 25 (1959).
196. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 391 (1959).
197. Kermarec v. Campagne Gen. Transpostatlantique, 358 U.S. 629 (1959).
198. 372 U.S. 293 (1963).
199. 358 U.S. 276 (1959).
200. United States *ex rel.* Poret v. Warden, 361 U.S. 375 (1960).
201. 361 U.S. 195 (1954).
202. Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378 (1959).
203. 384 U.S. 436 (1966).
204. 378 U.S. 478 (1964).
205. Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 117–18 n.42 (1998).

Escobedo does not appear to have been followed by GVRs. More important, nor did they appear following *Miranda*. The point is made clear in a series of some 60 cases disposed of by cert denial, but in which Justice Douglas noted that he would have granted certiorari and GVR's in light of *Miranda*. This also illustrates the previously noted disagreement over whether to grant (or deny) cert or instead to GVR. In a few cases, Douglas would have granted cert and either: reversed outright on the basis of *Miranda*,[206] or affirmed finding "no violation of *Miranda* principle."[207] In others, he observed that it was impossible to say from the record that *Miranda*'s principles were not violated,[208] or—more strongly—that it was clear from the record that its principles were not applied.[209] As will be seen, in current times—as in after the *Booker* sentencing case—the Court would likely have GVR'd most if not all of them. One reason it might not have done so in the immediate aftermath of *Miranda* is that the Court had not yet committed to the retroactive application of new criminal procedure rules, so the only outcome—for the other Justices, at least—was to deny certiorari.

2. The Late 1970s

The late 1970s were not included in this study, but Bruhl has provided data for O.T. 1975–O.T. 1979, indicating the total number of GVRs for each Term and then the number of "non-standard" GVRs, that is, those not in light of a specific case. The number of total GVRs per Term varied from a low of fifty (O.T. 1977) to a high of ninety-one (O.T. 1976), and the numbers bounced up and down: 56–91–50–68–87.[210] The number of "non-standard" GVRs decreased from twenty-two (O.T. 1976) to five and seven (O.T. 78 and O.T. 79), leaving between forty (O.T. 77) and eighty (O.T. 79) GVRs in light of a specific case. Bruhl's observation that "pro-defendant criminal procedure and sentencing rulings tend to generate the biggest booms"[211] was to be born out in later years, especially as to sentencing.

3. 2000 Onward

a. From Before O.T. 2000 Through O.T. 2005.

Bruhl has provided data for O.T. 1996–O.T. 2006, at the core of his study.[212] That is presented before the present study turns to more intensive Term-by-Term examination starting with O.T. 2000. Close attention is given to more than simply

206. *See* California v. Flores, 384 U.S. 1010 (1966), and California v. Furnish, 384 U.S. 1011 (1966).
207. *See* Sullins v. California, 384 U.S. 1011, 1011 (1966).
208. *See* Britten v. Georgia, 384 U.S. 1014 (1966); Anthony v. Yaegar, 384 U.S. 1018 (1966).
209. *See* Morris v. West Virginia, 384 U.S. 1022 (1966).
210. *See* Bruhl, *supra* note 99, at 725, Table 2.
211. *Id.* at 725.
212. *See id.* at 720, Table 1.

the number of GVRs, in order to include, for example, time between lead case and GVRs.

For the four Terms O.T. 1996–O.T. 1999, there are fewer GVRs than for the just-discussed late 1970s, with never more than 50 "standard" (in light of a case) GVRs per term. In O.T. 2000, Bruhl records 61 standard GVRs along with—as was his practice with criminal cases producing a large volume of GVR—50 GVRs based on *Apprendi v. New Jersey*, for a total over 111, providing further evidence for the statement that "the number of GVRs varies substantially from year to year,"[213] even with the exclusion of such major generators of GVRs as *United States v. Booker*[214] and *Cunningham v. California*,[215] to be discussed *infra*. According to Bruhl, the number of standard GVRs dropped from the over 100 GVRs in O.T. 2000 to 56 the following Term, to 40 in O.T. 2001, and to 37 in O.T. 2001 before rising to 57 in O.T. 2004, along with an amazing 740 *Booker*-based GVRs—to which one must add 37 such GVRs the following Term. For O.T. 2005, Bruhl's data then reveals only 44 standard non-*Booker* GVRs in O.T. 2005, with an increase to 63 in O.T. 2006 to which must be added approximately 200 GVRs based on *Cunningham.*

By O.T. 2000[216] the Court had begun to GVR cases frequently, doing so 109 times that Term in light of 31 different cases, plus more than 50 cases GVR'd in light of *Apprendi v. New Jersey*,[217] the first of several rulings requiring that juries—not judges—make fact determinations affecting sentences. In some instances, there is but one case GVR'd in light of the lead case, as in the first GVR of the term from October 2, *Adler v. Duval County School Board*,[218] GVR'd in light of *Santa Fe Independent School District v. Doe*,[219] decided at the very end of the previous Term; or the late February 2001 *Interactive Flight Technologies v. Swissair Swiss Air Transport*,[220] GVR'd in light *Green Tree Financail Corp. Alabama v. Randolph*,[221] decided the previous December, thus indicating a slight lag between lead case and GVR.

Often the GVR ruling was released very soon—a week or less—after the lead case was filed, as when *Daniels v. United States*,[222] decided on April 25, 2001, was the basis for the April 30, 2001 GVR of *United States v. Clark*;[223] or when *PGA Tour v. Martin*,[224] decided May 29, 2001, was the basis on June 4 for the GVR

213. *Id.* at 721.
214. 543 U.S. 220 (2005).
215. 549 U.S. 270 (2007).
216. To be clear: the data presented here is that collected by the author, not by Professor Bruhl.
217. 530 U.S. 466, 497 (2000).
218. 531 U.S. 801 (2000).
219. 530 U.S. 290 (2000).
220. 531 U.S. 1187 (2001).
221. 531 U.S. 79 (2000).
222. 532 U.S. 374 (2001).
223. 532 U.S. 1005 (2001).
224. 532 U.S. 661 (2001).

order in *Olinger v. U.S. Golf Association*.[225] At the end of the Term, the time between release of the lead case and GVR might be less, such as the GVR in *McQueen v. South Carolina Department of Health and Environmental Control*,[226] filed *one day* after *Palazzolo v. Rhode Island*,[227] the "in light of" case. The close relationship between a lead case and those GVR'd in light of it could also be seen in a set of cases—all from the Ninth Circuit—involving Circuit City Stores, in which, having decided one on the merits on March 21, 2001,[228] the Court GVR'd three others five days later.[229]

When—as in these instances—the Court held related cert petitions for decision, it quite obviously made its GVR decision(s) along with the decision in the lead case. Thus, any difference in date of release is accounted for by Court practice in releasing Orders Lists, including the GVRs, separately from release of opinions. When a GVR "lagged" the lead case by a greater period of time, this was likely the result of cert petitions arriving for—or being held for—decision after the lead case was decided. An instance of the latter is the GVR order in *Rapanos v. United States*[230] in light of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,[231] decided on January 9, 2001, while the GVR did not come until June 18. The other three GVRs on that date were all in light of cases a week earlier and each was GVR'd in light of a single case.[232]

While the most frequent situation is one in which a lead case resulted in a single GVR, a lead case may result in multiple GVRs, ranging from several to a "a whole lot." Thus in O.T. 2000, while the great majority of lead cases led to only a single GVR or perhaps two,[233] there were cases resulting in three (from the *Circuit City Stores* case[234]) or five (from *I.N.S. v. St. Cyr*[235]) to as many as ten (*Artuz v. Bennett*)[236] or twelve (*Zadyvas v. Davis*[237]). But the greatest number by far was the more than 50 GVRs stemming from *Apprendi*. In the latter situation, not surprisingly, the GVRs took place shortly after the lead case was filed but they were spread over an extended period. The Court decided *Apprendi* on June 26,

225. 532 U.S. 1054 (2001).

226. 533 U.S. 943 (2001).

227. 533 U.S. 606 (2001).

228. Cir. City Stores v. Adams, 532 U.S. 105 (2001).

229. Cir. City Stores v. Ahmed, Cir. City Stores v. Ingle, and Circuit Stores v. Al-Safin, all at 532 U.S. 938 (2001).

230. 533 U.S. 913 (2001).

231. 531 U.S. 159 (2001).

232. Acker v. United States, 533 U.S. 913 (2001) (reaching GVR in light of Kyllo v. United States, 533 U.S. 27 (2001) and Campbell v. St. Tammany's Sch. Bd., 533 U.S. 913 (2001), in light of Good News Club v. Milford Central Sch., 533 U.S. 96 (2001))).

233. *E.g.*, Houston v. Kilpatrick and Booker v. Ward, both 531 U.S. 1108 (2001) (reaching GVR in light of Lopez v. Davis, 531 U.S. 230 (2001)).

234. *Adams*, 532 U.S. at 105.

235. 533 U.S. 289 (2001).

236. 531 U.S. 4 (2000).

237. 533 U.S. 678 (2001).

2000, at the very end of the Term. That Term saw only one GVR based on it in the same Term, on June 29, followed by four (from three circuits) on the next Term's first day (October 2, 2001, then two on each of the next five days announcing orders before four (again, from three circuits) on November 27. January and February 2001, saw larger clumps—ten on January 8 (from four circuits and one state court) and nine on February 20 (four circuits) before tailing off to one each on four days in March through May. This illustrates again that if the decision in light of which a case is GVR'd for reconsideration comes at Term's end, the resulting GVRs may not appear until the beginning of the next Term, at "first Monday" and/or thereafter.

In addition to straightforward GVRs, there were some dispositions that were not clean GVRs but which seem related. In one, the Court said it had reversed the judgment in a separate case,[238] then, without saying it was vacating the lower court judgment, granted cert and remanded for further proceedings.[239] In another, after affirming in part and remanding in part in *Whitman v. American Trucking*,[240] the Court remanded two cases to the D.C. Circuit "for further proceedings."[241]

If *Apprendi* produced a sizeable number of GVRs in O.T. 2000, the next ruling on judges or juries making certain findings, *Blakely v. Washington*,[242] did not, although its subject-matter could have been expected to produce numerous GVRs. *Blakely* was decided at the end of the 2003 Term, on June 24, and it resulted in only one GVR four days later, to the Supreme Court of Oregon.[243]

That, however, is the "calm before the storm," as on January 12 of the next Term, the Court decided *United States v. Booker* and *United States v. Fanfan*,[244] a combination of case-consolidation and GVR-generation. *Booker* was the blockbuster case leading to GVRs and it was also illustrative of the possible length of a GVR "tail." By the end of O.T. 2004, in which the Court decided *Booker*, and the following O.T. 2005, the Court had issued *almost 800* such dispositions. The *Booker* GVRs started almost two weeks after the decision, when, beginning with *Meza v. United States*,[245] 400 GVRs based on *Booker* were handed down on January 24, 2005. The next five Orders days added another more than 200, and the next nine Orders days produced yet another 135 GVRs, with 34, 36, and 26, respectively, on April 25, May 2, and May 6, then only 12 on June 6 and 4–6 on each of June 13, 20, and 27, accumulating a total of 744 during that Term. But

238. Cleveland v. United States, 531 U.S. 12, 14 (2000).

239. Goodson v. United States, 531 U.S. 987, 987 (2000).

240. 531 U.S. 457 (2001).

241. Massachusetts v. Am. Trucking Ass'n and Am. Lung Ass'n v. Am. Trucking Ass'n, *both at* 532 U.S. 901 (2001).

242. 542 U.S. 296 (2000).

243. Dilts v. Oregon, 542 U.S. 934 (2004).

244. 543 U.S. 220 (2005); United States v. Fanfan, 558 F.3d 105 (2009).

245. 543 U.S. 1098 (2005). Cases are listed differently in the *United States Reports* from the listings in the *Supreme Court Reporter*, which was the basis for the research, so a different case might be listed first in the former.

wait! The flow did not end there but only went on summer recess with the Court. On the first day of the next Term, October 3, 2005, there were another twenty-nine, accumulated over the summer. The next week (October 11, 2005), there were five more, but after that, only another scattered six.

If we put aside the extremely high number of GVRs resulting from the *Booker* decision, what else of note took place in O.T. 2003? One case, *Norton v. Southern Utah Wilderness Alliance*,[246] which had come from the Tenth Circuit, led to three GVRs, one from the same circuit[247] and two from the Ninth Circuit,[248] and another case from the Ninth Circuit[249] resulted in four GVRs a week later in three cases from the Second Circuit and one from the D.C. Circuit.

Explosive as *Booker* was in producing GVRs, it was hardly the only O.T 2004 ruling to lead the Court to GVR cases. Indeed, there were sixty-two such cases, in light of thirty-two rulings (*Booker* included). As usual, in the largest number of instances, a lead ruling led to only one GVR. However, there were a number of lead cases resulting in more than one GVR: seven cases produced two and another three cases led to three GVRs each. *Gonzales v. Raich*[250] was the "in light of" case in three GVRs (two to the Ninth Circuit, from which *Gonzalez* had come and one to the Fifth Circuit), but in one,[251] the GVR was also in light of the previous Term's *Tennessee v. Lane*.[252]

Johanns v. Livestock Marketing Association[253] led to five GVRs of cases from three other circuits—the Third (two), Fifth (one), and Sixth (two) Circuits. *Roper v. Simmons*,[254] on imposition of the death penalty to those under eighteen years of age at the time of commission of their crime, which had come from the Missouri Supreme Court, spawned six GVRs—two to the Fifth Circuit and four to as many different state high courts. And *Crawford v. Washington*,[255] decided in the previous Term, led to six GVRs at the beginning of this Term, with three going to the Second Circuit and the other three to state appellate courts. This situation—of GVRs to a combination of federal and state courts—was less common than one in which all of a single lead case's multiple GVRs going to only to federal courts or only to state courts. In addition, the ruling on reapportionment in *Vieth v. Jubilirer*,[256] which had come to the Court from a three-judge court in the Middle District of

246. 542 U.S. 55 (2004).

247. Utah Shared Access All. v. S. Utah Wilderness All., 542 U.S. 914 (2004).

248. Veneman v. Mont. Wilderness Ass'n and Blue Ribbon Coalition v. Mont. Wilderness Ass'n, *both at* 542 U.S. 917 (2004).

249. Republic of Austria v. Altmann, 541 U.S. 677 (2004).

250. 545 U.S. 1 (2005).

251. Klinger v. Dep't of Revenue of Mo., 545 U.S. 1111 (2005).

252. 541 U.S. 509 (2005).

253. 544 U.S. 550 (2005) (combining with Neb. Cattlemen v. Livestock Marketing Ass'n, 544 U.S. 550 (2005), both from the same Eighth Circuit case).

254. 543 U.S. 555 (2005).

255. 541 U.S. 36 (2004).

256. 541 U.S. 267, 273 (2004).

Pennsylvania and had been decided in O.T. 2003, led the Court early in this Term to GVR a set of five related cases from the Eastern District of Texas.

Beyond the already-noted forty *Booker* GVRs issued in O.T. 2005, there were thirty-two others GVR'd in light of lead cases, three more in light of a statute of regulation,[257] and one on the basis of a state's acknowledgment that a state appellate court had denied rehearing.[258] Half of the thirty-two in-light-of-case GVRs were single instances, but three lead cases led to multiple GVRs. *Exxon Mobile Corp. v. Saudi Basic Industries*,[259] decided late the previous Term, resulted in four GVRs starting on the first day of the Term and continuing into November. *Burlington Northern v. Santa Fe Railroad v. White*,[260] handed down on June 22, 2006, almost at Term's end, led only eight days later to five GVRs (to several courts). And *Davis v. Washington*,[261] which had come from the Supreme Court of Indiana and was also decided quite late in the Term (June 19, 2006), led to seven GVRs, on either June 20 or June 30, all but one of which were directed to state appellate courts. (One redistricting case—an appeal from a three-judge district court in the Eastern District of Texas—led to two GVRS to the same court of related cases only two days later).[262]

b. The 2006 Term Forward

In O.T. 2006, once again saw a large number of GVRs—233—and as with *Booker*, a high proportion (177) of them were accounted for by one case, *Cunningham v. California*,[263] another in the series of those dealing with whether a judge or jury should make certain determinations. Counter to the *Booker* aftermath, where almost all the GVRs were in cases from federal appellate courts, all the *Cunningham*-based GVRs were of petitions from state appellate courts. All but fourteen of those were from either the California Supreme Court or various districts of the California Court of Appeal; the bulk came on February 20, 2007, a month after *Cunningham* was handed down on January 22, 2007, with ten coming a month later and the remainder scattered in April through June.

What about the other more than fifty non-*Cunningham* GVRs? There were the frequent single GVRs after a lead case, three instances of two GVRs, and one case that led to three. There were, however, some cases producing more, even if not of

257. Artega-Ruis v. Gonzales, 546 U.S. 1059 (2005); Mohanned Lamine Didwara v. Gonzales, 546 U.S. 1086 (2006) (reaching GVR in light of 8 U.S.C. § 1252 (a)(2)(O) and Morelle v. Gonzales, 548 U.S. 401 (2006), in light of Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27, 585 (May 12, 2006))).

258. England v. Dretke, 546 U.S. 1136 (2006).

259. 544 U.S. 280 (2005).

260. 548 U.S. 53 (2006).

261. 547 U.S. 813 (2006).

262. *See* Henderson v. Perry and Soechting v. Perry, *both at* 548 U.S. 922 (2006) (reaching GVR in light of League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006)).

263. 549 U.S. 270 (2007).

the dimensions of those stemming from *Cunningham*. Relatively early in the Term on December 5, 2006, the Court handed down *Lopez v. Gonzales*,[264] on whether immigrants were not disqualified from discretionary cancellation of removal, which had come from the Eighth Circuit. Six days later came seventeen GVRs in light of this ruling. The only other case in this Term producing more than a few GVRs was *Jones v. Bock*,[265] a Sixth Circuit case which led to eight GVRs, four of which were also to the Sixth Circuit, but the others went to other courts of appeals.

Three GVRs based on *Cunningham* carried over to the 2007 Term's first day. That Term saw a total of 177 GVRs, a decrease from the previous Term. The great majority of these GVRs were the result of only two cases: *Gall v. United States*[266] and *Kimbrough v. United States*,[267] both decided on December 10, 2007. The GVRs in light of each (one was in light of both) took place quite soon, with thirty-two *Gall* GVRs (of a total of seventy-four) and forty-two *Kimbrough* GVRs (of a total of sixty-one) being issued a month after the lead case, on January 7, 2008. Further *Gall* GVRs came a week later—six on January 14 and six more on January 22, with the remainder extending throughout the remainder of the Term, with a "lump" of seven on May 12. The smaller numbers of *Kimbrough* GVRs tailed off more rapidly, as after January 7 there were nine on January 14 and four on January 22, but only five more thereafter.

It is interesting that, although single GVRs based on the lead case had been standard in previous Terms, in O.T. 2007 only half the cases leading to GVRs produced only one such order. Six cases each led to 2–4 GVRs and one case to six such dispositions, where *Danforth v. Minnesota*[268] led to GVRs in five Idaho cases along with one from Texas. The only other "clot" of GVRs from a single case resulted from *Begay v. United States*,[269] which led to thirteen GVRs, all to the Tenth Circuit, where *Begay* had originated (two), Fourth Circuit (two), and the Eighth Circuit (nine).

The number of GVRs in O.T. 2008 was noticeably less than in previous Terms, only seventy-six, and thirty-one of these were the result of *Chambers v. United States*,[270] decided on January 13, 2009, with all but a few of the GVR's stemming from it came a week later, on January 26. Of the remainder, two each were late GVRs from *Gall* and *Begay*, with *Begay* added to *Chambers* as an "in light of" case in three instances. Only a slight majority were the one-GVR-from-lead-case situations. Two cases led to five GVRs each—*Jimenez v. Quarterman*,[271] with all but one sent to the Fifth Circuit, from which *Jimenez* had come, and *Melendez-*

264. 549 U.S. 47 (2006).
265. 549 U.S. 199 (2007).
266. 552 U.S. 38 (2007).
267. 552 U.S. 85 (2007).
268. 552 U.S. 264 (2008).
269. 553 U.S. 137 (2008).
270. 555 U.S. 122 (2009).
271. 555 U.S. 113 (2009).

Diaz v. Massachusetts,[272] with the GVRs it produced also going to state courts in Massachusetts (three) and one each to Ohio and California. The *Gant* search case[273] produced a mix of GVRs to federal courts (four cases to three circuits) and three separate state courts. One should not forget that in addition to GVRs issued "in light of" a (usually) recent Supreme Court ruling, there are occasional GVRs in light of something else, as apparent in two cases in this Term that were GVR'd in light of a position in the Solicitor General's brief.[274]

The number of GVRs continued to decline in O.T. 2009, with only fifty-five issued in light of a case, with the smaller number was likely a result of the absence of any single case that led to large numbers of GVRs. The largest number of GVRs resulting from a single case was fifteen, stemming from *Carachuri-Rosendo v. Holder*.[275] Only one other case prompted more than four GVRs—the end-of-Term *Skilling v. United States*,[276] which led to vacating the convictions of Richard Scrushy[277] and former Governor Don Siegelman.[278] Both were Eleventh Circuit cases.

Among the GVRs in light of the previous Term's *Melendez-Diaz* case, one finds the different wording, "We vacate the judgment . . . and remand the case for further proceedings not inconsistent with the opinion. . ."[279] There were also two Seventh Circuit cases GVR'd in light of an en banc ruling from that court.[280] One should also note the several GVRs not in light of a case but in light of some other element. In this Term, one finds a GVRs in light of the DHS Appropriations Act of 2010 and a certification by the Secretary of Defense[281] and six cases GVR'd light of a position taken by either the Solicitor General or Acting Solicitor General.[282]

The Court issued further reduced numbers of GVRs in O.T. 2010 and, most importantly, no ruling led to as many as ten. Indeed, the largest number of GVRs stemmed from the previous Term's *Carachuri-Rosendo* decision,[283] and the Court handed them down on the first day of the present Term. As to cases decided in this Term, none prompted more than five GVRs: the late-in-Term (June 23, 2011) *Freeman v. United States*,[284] leading to one GVR to the Sixth Circuit, from which

272. 557 U.S. 305 (2009).

273. Arizona v. Gant, 556 U.S. 332 (2009).

274. Dallangra v. United States, 555 U.S. 1092, 1092 (2009); Jackson v. United States, 555. U.S. 1183 (2009).

275. 560 U.S. 563 (2010).

276. 561 U.S. 368 (2010).

277. Scrushy v. United States, 561 U.S. 1040 (2010).

278. Siegelman v. United States, 561 U.S. 1040 (2010).

279. Briscoe v. Virginia, 559 U.S. 32, 33 (2010).

280. Welton v. United States, 559 U.S. 1034 (2010); Ryals v. United States, 561 U.S. 1003 (2010); United States v. Corner, 598 F.3d 411 (7th Cir. 2010) (en banc).

281. Dep't of Def. v ACLU, 558 U.S. 1042 (2009).

282. *See* Williamson v. United States, 561 U.S. 1003 (2010) (garnering four dissents to the GVR).

283. Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010).

284. 564 U.S. 522 (2011).

Freeman had come, and two GVRs each to the First and Third Circuits. One GVR resulted when a cert petition came from a case which had been reversed in another Supreme Court case,[285] and another derived from the very case the Court had decided—*Brown v. Plata*[286]—the prison overcrowding case from a three-judge district court.

October Term 2011 also at first seemed to reflect the decreased number of GVRs, with only fifty-four total (and one in light of the Solicitor-General's position) recorded in the *Supreme Court Reporter* for this Term, with no more than six GVRs resulting from any single case. There were two such: *Reynolds v. United States*,[287] from the Third Circuit, which led to GVRs to the First, Second, and Eighth Circuits, and *Martinez v. Ray*,[288] a Ninth Circuit case that prompted GVRs to that circuit (one), the Fifth and Sixth Circuits (two each), and one to a state appellate court. Another case from the Ninth Circuit, *Holder v. Martizez-Gutierrez*,[289] led to four GVRs, all to that same court of appeals.

As occasionally happened and was to take place in the carryover from O.T. 2011 to O.T. 2012, West Publishing included a very large number (fifty-nine) of end-of-Term GVRs, from June 29, 2012, in the following Terms *Supreme Court Reporter* (133 S. Ct.), which covered O.T. 2012. There were ten GVRs prompted by *Williams v. Illinois*,[290] three going to federal courts and seven to state courts, but the bulk of them were accounted for by forty-three GVRs deriving from *Dorsey v. United States*,[291] decided only five days earlier. There were fifteen more *Dorsey*-based GVRs on the first day of O.T. 2012, with further overlap between Terms as a result of GVRs based on *Miller v. Alabama*,[292] two of which took place on June 29 and three on October 1, 2012. If the "misplaced" GVRs are counted, as they should be, in O.T. 2011, the number of GVRs becomes 113, an increase from the prior Terms, but the number remaining for O.T. 2012 then reflects a further decrease in GVRs per Term. Excluding the June 29, 2012, GVRs from the O.T. 2012 count, there were only forty-five (additional) GVRs in light of cases decided in that Term. Of the cases that prompted GVRs, slight less than half (twenty-two of forty-six) resulted in only one or two GVRs, but two produced more: *Alleyne v. United States*[293] resulted in twelve, all but one of which were to U.S. courts of

285. Amara v. Cigna Corp., 563 U.S. 1004 (2011) (reaching GVR in light of the week-earlier Cigna Corp. v. Amara, 563 U.S. 421 (2011)).

286. 563 U.S. 493 (2011). The GVR'd case is Cal. State Republican Legis. Intervenors v. Plata, 563 U.S. 1018 (2011).

287. 565 U.S. 432 (2012).

288. 566 U.S. 1 (2012).

289. 566 U.S. 583 (2012). This was a consolidated case, the other case with it being Holder v. Sawyers.

290. 567 U.S. 50 (2012).

291. 567 U.S. 260 (2012).

292. 567 U.S. 460 (2012).

293. 570 U.S. 99 (2013).

appeals, and *Trevino v. Thaler*[294] from the Fifth Circuit, all but two of which went back to the court of appeals which had originated the lead case.

In October 2013, there were only forty-nine GVRs in light of a specific case, with another five in light of the Solicitor-General's position and two more because of the government's confession of error. One would expect at least some GVRs early in the Term to be based on the previous Term's cases, but not until December 9 was a GVR was based on a ruling made during the previous Term. For once, by far the greatest number of cases resulting in GVRs led to only one each—nineteen of the twenty-eight "in light of" cases—and only one case—*Paroline v. United States*,[295] regarding restitution for victims of child pornography, which produced nine GVRs—led to more than four. One GVR to the Fourth Circuit was for reconsideration in light of that court's own ruling.[296]

The number of GVRs in O.T. 2014 was roughly double the previous Term's number. That overall picture is misleading, however, as two-thirds of the GVRs are accounted for by two end-of-Term cases. With those excluded, the pattern for the remaining thirty-two cases—eight of which came at Term's end—was like that for the previous Term; with most Supreme Court rulings (thirteen of twenty) leading to only one GVR. Of those rulings, one was another *Parolene*-based GVR. Another—*Teva Pharmaceuticals USA v. Sandoz*,[297] a Federal Circuit case—lead to five GVRs, all to that same court of appeals.

At the end of the Term, however, "all hell broke loose" for GVRs, although this was only relatively speaking, as the number nowhere achieved the volume of *Booker* GVRs. First, on June 1, 2015, came the bankruptcy case of *Bank of America NA v. Caulkett*,[298] which led to twenty-one GVRs. From a period of June 8 to June 15, all twenty-one were sent to the Eleventh Circuit, from which *Caulkett* had come. All the petitions had been from non-precedential rulings, indicating that Eleventh Circuit panels had applied the circuit precedent which was then reversed by the Supreme Court. This was followed on June 26—at Term's end—by *Johnson v. United States*,[299] on the so-called "residual clause" of the Armed Career Criminal Act (ACCA). This prompted forty-two GVRs, an indication that any case implicating sentencing—like *Apprendi*, *Booker*, and *Cunningham*—is a producer of many GVRs. The cases GVR'd in light of *Johnson* came from all circuits but the District of Columbia and Tenth Circuits, with the largest number (eleven) from the Eleventh Circuit.

O.T. 2015 saw a total of 119 GVR orders for the Term in light of a case, plus one resulting from a confession of error. Roughly half (sixty-one) were accounted

294. 569 U.S. 413 (2013).

295. 572 U.S. 434 (2014).

296. Newbold v. United States, 571 U.S. 1119 (2014) (reaching GVR in light of Miller v. United States, 735 F.3d 141 (4th Cir. 2013)).

297. 135 S. Ct. 831 (2015).

298. 135 S. Ct. 1995 (2015).

299. 135 S. Ct. 2551 (2015).

for by two cases: *Johnson*, from the previous Term (twenty GVRs), and *Montgomery v. Louisiana*[300] with forty-one GVRs. Federal courts of appeals (two) and numerous state appellate courts issued the GVRs based on *Montgomery*, with the largest numbers going to courts in Louisiana, from which the case had come (nine) and Alabama (twenty-six).

As usual, the majority of cases that were the basis for GVRs (thirteen of twenty-five) led to only a single GVR. However, while nineteen lead cases produced no more than four GVRs, three cases led to eight or nine GVRs. The first of those was *Zubik v. Burwell*,[301] one of the decisions on challenges to required contraceptive coverage in employees' insurance, with cases returned to the Second, Third, Fifth, and Sixth Circuits (one case each), the Seventh (three), and the Eighth Circuit (two). The other case stimulating eight GVRs was *Birchfield v. North Dakota*,[302] at Term's end, but the Court returned all of those cases to the Supreme Court of North Dakota, from which the lead case had emanated. *Mathis v. United States*,[303] an Eighth Circuit case on which the Court ruled on June 23, produced nine GVRs—two of which went back to the Eighth Circuit while two each also went to the Fifth, Sixth, and Ninth Circuits, and one to the Eleventh Circuit.

October Term 2015 was quite interesting in the Court's GVR practice for another reason. Since the brouhaha over *Lawrence*, seldom had a Justice's separate statement accompanied a GVR order, although there had been a dissent by several Justices (noted earlier) and Justice Alito had filed a concurrence to GVRs in light of to the GVRs stemming from the previous Term's *Johnston v. United States*.[304] Now in the *Montgomery* GVRs, one finds an extended statement by Justice Thomas—joined by Justice Alito—concurring in those GVRs. They noted that the GVR'd cases had been held until *Montgomery* was decided and they provided GVR-related guidelines rarely seen. Furthermore, they emphasized that "the Court has not assessed whether petitioner's asserted entitled to retroactive relief" was presented properly below, and they reminded lower courts that a GVR order "does not reflect any view regarding petitioner's entitlement to relief."[305]

However, the two Justices went further in their criticism of the Court's practice in a dissent by Justice Alito joined by Justice Thomas, from a GVR issued in light of *Foster v. Chatman.*[306] Justice Alito began by noting that GVRs were often used "when we believe that the lower court should give further thought to the decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could

300. 136 S. Ct. 718 (2016).
301. 136 S. Ct. 1557 (2016).
302. 136 S. Ct. 2160 (2016).
303. 136 S. Ct. 2243 (2016).
304. Arroyo v. United States, 135 S. Ct. 2925 (2015); *see also* 135 S. Ct. 2551 (2015).
305. Tolliver v. Louisiana, 136 S. Ct. 1354 (2016).
306. 136 S. Ct. 1737 (2016).

possibly alter the decision of the lower court."[307] Here however, while *Foster*—the "in light of" case—had "postdated" the state court's ruling, it "did not change or clarify" the underlying rule of *Batson v. Kentucky*.[308] As a result, the Court was not ordering GVR in light of *Foster* but instead in light of *Batson* itself, a 30-year-old decision which was fully available to the state high court.[309] Moreover, Alito argued that the Court, not wanting to engage in careful review of "case-specific factual questions" (about the prosecutor's intent in striking prospective jurors), had sent the case back "so that the lower court can do—or, redo—that hard work," something he believed was "not a responsible use of the GVR power," adding "If the majority is not willing to spend the time that full review would require, it should deny the petition."[310]

Justices Thomas and Alito were not the only Justices to add comments to GVRs during this Term. The post-*Zubik v. Burwell* GVRs were accompanied by identical statements by Justices Sotomayor and Ginsburg, concurring for reasons they had stated in *Zubik* itself as to the government's ability to ensure access to contraceptives by relying on the challenging litigants' statements as notice.[311]

O.T. 2016 puts the numbers of GVRs back below a total of fifty, six of which were additions to the previous Term's *Montgomery v. Louisiana* GVRs, with Justice Alito and Thomas continuing to dissent from this set of orders, and eleven were also from the previous Term's *Mathis* case, with the later cases being returned to several courts of appeals. (There was also a GVR in light of respondent's brief and another sent back to dismiss for mootness). Some 29% of the GVRs other than in light of *Montgomery* were of the one-GVR-per-lead-case type. Of the several lead cases that led to 2–4 GVRs, in one situation, three of four GVRs in light of *Trinity Lutheran Church of Columbia v. Currier*,[312] from the Eighth Circuit, were to the same Supreme Court of Colorado case.

There was a statement from Justice Sotomayor concurring in the *Montgomery* GVRs.[313] Justice Alito made a brief reference to his *Montgomery* GVR dissent, but then took a tack specific to this case. Here he "expect[ed] that the Arizona courts will be as puzzled by this [GVR] directive as I am."[314] The *Montgomery* ruling had held *Miller v. Alabama*[315] retroactive, he noted, and "[t]he Arizona cases at issue here were decided after *Miller*, and in each case the court expressly assumed that *Miller* was applicable to the sentence that had been imposed." Accordingly, that left "nothing for those courts to do."[316] Continuing his earlier argument that the

307. Flowers v. Mississippi, 136 S. Ct. 2157 (2016) (Alito, J., dissenting from denial of certiorari).
308. *Id.* at 2158; *see also* Batson v. Kentucky, 476 U.S. 79 (2006).
309. *Flowers*, 136 S. Ct. at 2159.
310. *Id.*
311. *See* Burwell v. Dordt College, 136 S. Ct. 2006 (2016).
312. 137 S. Ct. 2012 (2017).
313. *See* Tatum v. Arizona, 137 S. Ct. 11, 11 (2016) (Sotomayor, J., concurring).
314. *Id.* at 14 (Alito, J., dissenting).
315. 132 S. Ct. 2485 (2012).
316. *Tatum*, 137 S. Ct. at 13 (Alito, J., dissenting).

Court was misusing its GVR authority, he said, "We do not GVR so that a lower court can reconsider the application of a precedent that it has already considered."[317] In the present instance, as the state courts had already examined the relevant precedent, with "eminently reasonable" conclusions, "It is not clear why this Court is insisting on a do-over, or why it expects the results to be any different the second time around."[318]

In October Term 2017, which saw the retirement of Justice Kennedy at Term's end, there were seventeen cases resulting in a total of sixty-two GVRs. Half of the "lead" cases each led to only one or two GVRs; one of those was the travel ban case, *Trump v. Hawaii*,[319] which was handed down on June26, 2018 at Term's end, and was followed two days later by two GVRs—both deriving from the same Fourth Circuit case.[320] However, *Sessions v. Dimaya*[321] was a "large generator," leading to twenty-seven GVRs by mid-March and another five at Term's end.[322] Several other cases prompted more than a couple of GVRs. *Hughes v. United States*[323] and *National Institute of Family and Life Advocates v. Becerra*[324] each resulted in four GVRs, but those stemming from *Hughes* were to differing circuits, while all those from *Dimaya* were directed to the Ninth Circuit, the source of the lead case. Five GVRs—to both federal and state courts—resulted from *Carpenter v. United States*,[325] concerning use of signal tower locator data, but as *Carpenter* was decided on June 22 and the GVRs came six days later, more such orders would be likely at the beginning of O.T. 2018. As well, seven GVRs from petitions from the Fifth Circuit, resulted from *Rosales-Mireles v. United States.*[326]

For O.T. 2018, the GVR picture is not particularly striking, with just under fifty such orders, all but eight of which were in light of lead cases; the others were four to consider mootness—a higher-than-usual number, two in light of the Solicitor General's position and two in light of the First Step Act of 2018. Of those in light of a case, a dozen were in light of rulings from the previous Term, with four stemming from *Sessions v. Dimaya*[327] and each of the remaining eight single GVRs deriving from different cases, with one coming from *Janus* on union dues[328]

317. *Id.*

318. *Id.* at 14.

319. 138 S. Ct. 2392 (2018).

320. Int'l Refugee Assistance Project v. Trump, 138 S. Ct. 2710 (2018); Trump v. Int'l Refugee Assistant Project, 138 S. Ct. 2710 (2018).

321. 138 S. Ct. 1204 (2018).

322. This is an undercount as one GVR to the Fifth Circuit applied to multiple non-precedential rulings that had appeared in *Federal Appendix*.

323. 138 S. Ct. 1765 (2018).

324. 138 S. Ct. 2361 (2018).

325. 138 S. Ct. 2706 (2018).

326. 138 S. Ct. 1897 (2018).

327. 138 S. Ct. 1204 (2018).

328. Fleck v. Wetch, 139 S.Ct. 590 (2018) (reaching GVR in light of Janus v. Am. Fed'n of State, Cnty. & Mun. Emp., 138 S. Ct. 2448 (2018)).

and one in light of *Masterpiece Cakeshop*.[329] The remaining twenty-eight GVRs were in light of cases decided within the Term. In just under half of those, a lead case generated only one GVR and in five, the GVR order was filed immediately after the Court's decision or very shortly thereafter. Only three lead cases resulted in multiple GVRs. One, *Stokeling v. United States*[330] from the Eleventh Circuit and decided early in the Term, led to a half-dozen GVRs, all to the Seventh Circuit. The other two rulings only started generating GVRs in this Term, with many more coming in O.T. 2019: *Rehaif v. United States*,[331] which resulted in four GVRS, and *United States v. Davis*,[332] which prompted a half-dozen, a relatively small proportion of the number of GVRs each was ultimately to generate. As both cases dealt with aspects of sentencing (scienter as to guns; violent felony residual clause), they fit within the dominant pattern in which sentencing-related lead cases produced great numbers of GVRs.

In O.T. 2019, the incidence of GVRs continued the previous pattern. A small number of cases were GVR'd in light of statutory provisions, such as three in light of the National Defense Authorization Act and others in light of the First Step Act of 2018 and the Promoting Security and Justice for Victims of Terrorism Act of 2019. Several Supreme Court decisions each prompted either a single GVR or two, and there were three in light of *Rucho v. Common Cause*—the partisan gerrymander ruling from the end of the previous Term—two from the Southern District of Ohio and one from the Eastern District of Michigan. Of particular note, however, are the multiple GVRs prompted by the *Rehaif* and *Davis* sentencing-related cases, which had begun to produce GVRs shortly after they were decided at the end of the previous Term. The numbers of GVRs these cases generated do not reach those resulting from *Booker*, but they are substantial—thirty by March 2010 for GVRs based on *Rehaif* and almost a dozen for *Davis*-based GVRs, with a few coming later. Also of note is that almost a dozen cases were returned to various districts of the Court of Appeals of Louisiana (and one to the Court of Appeals of Oregon) in light of the unanimous-verdict decision, *Ramos v. Louisiana*[333] a week after that decision.

As O.T. 2019 extended into July 2020, the Court issued seventeen GVRs based on nine different cases, all but one of which had been decided toward Term's end. Of note were four in light of the *McGirt* case on Indian territory in Oklahoma[334] and three in light of the *Little Sisters of the Poor* case on the religious exemption from contraceptive coverage under employees' insurance.[335] Just as had taken

329. Klein v. Or. Bureau of Lab. & Indus., 139 S. Ct. 2713 (2019) (reaching GVR in light of Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

330. 139 S. Ct. 544 (2019).

331. 139 S. Ct. 2191 (2019).

332. 139 S. Ct. 2319 (2019).

333. 140 S. Ct. 1390 (2020).

334. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

335. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

place at the end of O.T. 2011, orders from Term's end were not reported in the *Supreme Court Reporter* until its first advance sheet issue in O.T. 2020.

III. Concluding Comments

The Supreme Court's patterns of practice with respect to consolidation, grouping, and linkage of opinions, and its use of GVR orders, have been examined in this Article. The pattern with respect to each has exhibited change over time, from the late 1950s to the period of Warren Court–Burger Court transition of the late 1960s–early 1970s, and then to the decades beginning the in mid-1980s. Over time, the Court has engaged in less consolidation of cases, less grouping, and likewise, less linking of cases. Over the same period, there has been a considerable growth—over and above the increase in the number of cert petitions—in the Court's use of GVR dispositions, especially those sent back to the lower court for consideration "in light of" a particular Supreme Court decision. As noted earlier, the growth in cert petitions may itself result in part from the increase in GVRs as litigants file cert petitions—one that, at an earlier time might not have been filed—in hopes of obtaining a GVR. Patterns of GVR practice have also become relatively stable, with most GVRs in light of a leading case following soon after the lead case has been filed, and there are relatively few GVRs for any individual "lead" case, the principal exception relating to sentencing, such as *Booker*, the outlier in GVRs generated.

That the two patterns—decreased consolidation, increased GVRs—are related seems clear. Certainly, it is important that changes in each of the two practices be understood in their own rights, but the possible interrelationship should not be ignored. It is not only that, over the same period they happened simultaneously, or in parallel. Something more seems to be at work. In particular, both patterns are related to the decrease in the number of cases the Court has decided after plenary treatment: there are few cases to be consolidated and grouped, the continued increase in the number of cert petitions brings more cases that could be GVR'd.

Is this situation one of coincidence, of correlation, or of causation? Certainly, the decrease in the Court's output was not coincidental. Through their individual votes, the Justices decided to grant review to fewer cases, even if they never issued a statement saying, "We are decreasing the size of our docket." That decrease was not a result of "things that go bump in the night." It can be fairly said that the Court did engage in purposeful action, even if doing so without explicit announcement of a change in policy or the promulgation of a rule.

Certainly, a change in the Court's rules is a matter of formal announcement, but changes in practice may not be embodied in a rule. See, for example, the Court's shift in the 1960s from convening for oral argument at noon to convening at 10:00AM, or the shift at roughly the same time from exclusive use of Mondays as Decision Day to use as well of other days on which opinions were to be released. Instead, observers' watchful examination over time may be required for changes in practice to be clear. Although of course, when the Justices do occasionally speak

out—for example, as Justice Scalia did in *Lawrence* and *Stutson*—practices and their changes may be exposed, but that type of situation is the exception.

The decrease in the consolidation of cases and their grouping or linking—which has gone beyond what might be expected with a smaller docket—required that some direction be provided by the Justices, likely after discussion in conference, as the Clerk of Court could not have done it on his own, and the linking of cases, as when a dissent applied to multiple cases, did not happen except through the Justices' own actions. Likewise, with the increased use of GVRs: whatever the reasons that lead an individual Justice to support a specific GVR order, the Justices are obviously not unaware of each other's votes and their collective action was purposeful.

Yet did the Justices intentionally tie the two together? They must have been aware of the actions constituting each pattern, but they have not told us whether they were aware of the relationship. Individuals intensely involved in a certain activity, such as getting cases out by Term's end, may pay less attention to the overall picture created by their actions with respect to individual cases. It remains for the reader to decide whether the patterns portrayed here and their relationship is sufficiently persuasive to say they are causally related. If not persuaded of that, at least it is hoped that changes in these practices have now been made more clear.