Sherlock Holmes and the Mystery of the Pointless Remand

James J. Duane*

Sherlock had been seated for some hours in silence, with his long, thin back curved over an item that appeared to be giving off a sinister glow. Knowing his habits as I did, I suspected that it might be a vessel containing some chemical reaction. But when I peered over his shoulder I could see that he had merely been staring at his infernal new desktop computer.

"So, Watson," said he, suddenly, "I see that the Supreme Court of the United States will be making Mr. Tio Sessoms the next casualty in its ongoing feud with the United States Courts of Appeals over federal habeas corpus review of state court convictions, and that the justices have already decided to summarily reverse a decision the Ninth Circuit may be reaching in that case sometime in the next year."

I gave a start of astonishment. Accustomed as I was to Holmes's curious faculties, this sudden intrusion into the most private thoughts of Supreme Court justices in another nation across the ocean was utterly inexplicable.

"How on Earth could you know that?" I asked.

He wheeled round upon his stool, with a wireless mouse still in his hand and a gleam of amusement in his deep-set eyes.

"Now, Watson, confess yourself utterly taken aback," said he.

"I am."

"I ought to make you sign a paper to that effect."

"Why?"

"Because in five minutes you will say that it is all so absurdly simple."

* Professor, Regent University School of Law. Professor Duane is also a faculty member at the National Trial Advocacy College at the University of Virginia School of Law, and a faculty associate at Harvard University's Berkman Center for Internet and Society during 2013-14. This conversation was transcribed with no assistance, directly or indirectly, from anyone working at the Supreme Court of the United States, or anyone connected with the case of *Grounds v. Sessoms*, or anyone but the author.

"I am sure that I shall say nothing of the kind."

"You see, my dear Watson" – he began to lecture with the air of a professor addressing his class – "it is not really difficult to construct a series of inferences, each dependent upon its predecessor and each simple in itself. If, after doing so, one simply knocks out all the central inferences and presents one's audience with the starting point and the conclusion, one may produce a startling, though possibly a meretricious, effect. Now, it was not really difficult, by a simple inspection of information that the Supreme Court has made publicly available on its website, to deduce that it intends to summarily vacate the Ninth Circuit's upcoming decision on remand in the *Sessoms* case,[1] if that court once again sides with the prisoner in that case, and the Supreme Court will do so without even permitting oral argument from the attorneys."

"They have already announced such an intention?" I asked. "In a case that has not yet been decided by the lower court? I thought that the Court took extraordinary precautions to guard the secrecy of its deliberations, not to mention its appearance of being open-minded enough to wait until it has heard from the lower court and counsel for both sides before making a decision."

"Yes, all that is true," Holmes replied. "That is why the justices would never intentionally reveal such a plan, and would be justifiably mortified to learn they had done so through inadvertence or clumsiness. But they have done so in this case, just the same, by unambiguous implication that follows inexorably from both the bizarre nature and timing of their action, just as surely as if they had made a public pronouncement to that effect from the bench.

"But the actual decision of the Court," Holmes continued, "will not be officially announced for some time, because the Court just sent the case back to the Ninth Circuit for further consideration yesterday. And so, before the Court can publicly announce what it has already decided to do, it must go through the formality of waiting while the Ninth Circuit considers the briefs filed by the parties on remand, decides whether to hear oral argument, issues a variety of opinions and presumably reinstates its original judgment in favor of Sessoms, although once again over a dissent; the Supreme Court must then wait for the California Attorney General's next petition for certiorari, as well as the response by Sessoms, at which point the justices will pretend to

[1] Sessoms v. Runnels, 691 F.3d 1054 (9th Cir. 2012) (en banc), *remanded for no respectable reason sub nom.* Grounds v. Sessoms, 133 S. Ct. 2886 (2013).

give careful and open-minded consideration to the arguments that have not yet been made concerning the correctness of a final judgment that the Ninth Circuit has not yet announced. Only then will the Court summarily reverse that judgment without oral argument, and direct the Court of Appeals to dismiss Sessoms's petition for a writ of habeas corpus. The process will take at least one year and will not be completed until some time in 2014."

"Stuff and nonsense!" I cried. "Decision first, and arguments afterwards? It sounds as if we have passed over to the other side of the looking-glass! I must tell you, Holmes, that I see no way you could know such things except perhaps through some sort of intelligence you have secured from insiders at the Court."

"Not at all, my dear Watson. Indeed, you know that I have been nowhere near the United States in many weeks – indeed, I have barely left this room – and can assure you that I have had no contact with anyone working at the Court. My deductions are based on nothing but information that is available to anyone with an internet connection and access to the Court's website."

I still could not imagine how the Court could have been so careless as to inadvertently reveal so much about its plans, or how Holmes could have divined such detailed information about the Court's intentions from such sources. But I knew from sorry experience that I could believe him when he insisted that he had relied on nothing but that wretched internet connection we had installed only a few months earlier. Now that the glow of that cursed computer had come into our lives, I had grown to sorely miss the excitement and adventure we had once enjoyed as we bustled about darkened streets and fog-covered countryside in pursuit of clues.

Holmes sensed and seemed to relish my confusion. "Our starting point, of course, must be the seemingly inexplicable mystery of the Court's bizarre and utterly pointless remand in *Sessoms*.

"Just yesterday, June 27, 2013, on the final day of the 2012 term, the justices of the Supreme Court were making some last-minute arrangements to leave town for their annual summer vacation. The Court had handed down its final opinions for the term the day before, but still had a few loose ends it needed to tie together, including several dozen unresolved certiorari petitions. Technically, there is no legal requirement that the petitions all be disposed of before the summer recess, but the justices properly regard it as incumbent upon them to take some sort of action – or at least appear to do so – with respect to every

certiorari petition that has been pending for some time.

"And so the Court issued a set of orders disposing of nearly two dozen certiorari petitions that were still awaiting a decision, some of them for several months.[2] Sixteen of the petitions were denied. The Court granted three of the petitions outright, announcing that it would hear and decide those cases on the merits in the coming term after giving the lawyers a chance to submit briefs and oral argument for the Court's consideration. And the remaining four cases were the subject of a so-called GVR: the Court granted a writ of certiorari, vacated the judgment of the lower court, and remanded the case for further proceedings so the lower court could reconsider its judgment in light of some recent Supreme Court decision.

"In one of those cases that was sent back to the lower court, Justice Alito wrote a dissenting opinion, joined by Justice Kennedy, in which the two complained that '[t]he remand in this case is pointless,' and that the Court had 'completely lost touch with reality.'[3] That accusation, especially considering its source, was unspeakably ironic, because neither of those justices, nor any other member of the Court, registered any public objection to the Court's remand that same day in the *Sessoms* case – which may well have been the most pointless remand in the Court's history."

"Why do you say that?" I asked.

"In *Sessoms*, the Ninth Circuit Court of Appeals, sitting en banc, decided by a vote of 6-5 to grant a writ of habeas corpus to Tio Sessoms, a California prisoner serving a life sentence, after concluding that he had been convicted of murder at a trial that violated the requirements of the United States Constitution, and ordered the State to 'retry Sessoms within a reasonable time, or release him.'[4] But more than ten months went by before the Supreme Court ordered the Court of Appeals to reconsider that judgment in light of *Salinas v. Texas*,[5] a case which furnishes no conceivable justification for the Ninth Circuit to change any aspect of its ruling in any way. And the Court did so, I might add, in flagrant disregard of its own holdings that a GVR is appropriate on the

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[2] *See* Order List, 570 U.S. __ (June 27, 2013), *available at* http://www.supremecourt.gov/orders/courtorders/062713zr_c0nd.pdf. This website, and all internet sites cited in this article, was last visited on February 10, 2014.

[3] Marrero v. United States, 133 S. Ct. 2732, 2733 (2013) (Alito, J., dissenting).

[4] *Sessoms*, 691 F.3d at 1064.

[5] *Sessoms*, 133 S. Ct. 2886 (remanding in light of Salinas v. Texas, 133 S. Ct. 2174 (2013)).

basis of 'intervening developments' only if there is a 'reasonable probability' that the lower court would reverse itself if allowed to reconsider the case in light of those developments,[6] and only if the delay and additional cost of a remand can be 'justified by the potential benefits of further consideration by the lower court.'[7] In *Sessoms*, there is no possibility that the lower court will reverse itself because of anything the Supreme Court wrote in *Salinas* – and indeed, there has not even been a relevant intervening legal development at all."

"Why not?"

"There are almost too many reasons to list if I am to win our little wager," Holmes replied with a smile. "To begin with, *Salinas* was a case taken on direct review, and therefore did not involve the much higher standard for obtaining federal relief through habeas corpus.[8] (If the Ninth Circuit does not alter its judgment on remand, as you will see, it will be reversed by the Supreme Court in an opinion that relies almost entirely on its many recent cases involving that heightened standard.[9]) Moreover, the two cases are not even remotely analogous. Sessoms argued that his custodial confession should have been suppressed because the police did not cease his interrogation after he requested an attorney.[10] Salinas, in complete contrast, was not in custody, made no

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[6] Lawrence v. Chater, 516 U.S. 163, 167 (1996); *see also* Wellons v. Hall, 558 U.S. 220, 224-25 (2010).

[7] *Lawrence*, 516 U.S. at 168 ("[I]f the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.").

[8] Habeas corpus relief is now available only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This standard is "difficult to meet," and "even a *strong* case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (emphasis added); *see* Howes v. Fields, 132 S. Ct. 1181, 1194 (2012) (Ginsburg, J., joined by Breyer & Sotomayor, JJ., concurring) (stating that they would vote to reverse petitioner's conviction were the case being heard on direct review, but concurring that the Court's precedents were not sufficiently unambiguous to permit habeas corpus relief).

[9] *See* cases cited *supra* note 8 and *infra* notes 40-41.

[10] Tio Sessoms was only nineteen years old when, on the advice of his father, he turned himself in to authorities who were investigating a murder. After four days of custody, he met with California police officers who sought to question him about the case. But at the outset of the interview, even before he was read his *Miranda* rights, Sessoms told the police: "There wouldn't be any possible way that I could have a—a lawyer present while we do this? . . . Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer." Sessoms v. Runnels, 1054, 1055-56 (9th Cir. 2012) (en banc). The police did not cease the interview or honor his request for a lawyer, but instead

confession, nor a request for counsel, but complained only about the admission of evidence that he did *not* waive his right to remain silent.[11]

"But the most fundamental and glaring absurdity in the Court's action was the fact that the *Salinas* case did not even produce a majority opinion on any issue that was before the Court. So there is simply nothing there to furnish any rational reason for any Ninth Circuit judges to reconsider their reasoning or their votes. There was not a single issue decided in *Salinas* on which five justices agreed, and the five votes in favor of affirming that conviction were split across two different opinions that agreed on absolutely *nothing* that possibly pertained to the proper disposition of the *Sessoms* case.[12]

"Justices Thomas and Scalia voted to affirm Salinas's conviction on the exceedingly narrow basis of their view that the Fifth Amendment can never be violated by the admission of evidence that the accused remained silent in the face of police questioning, regardless of whether

persevered and convinced him to speak to them without a lawyer. His statements were later used to help convict him of murder, and Sessoms was sentenced to life in prison without the possibility of parole. *Id*. at 1057. The issue presented on his appeal, and in his subsequent petition for habeas corpus, was whether his expressions of a desire for a lawyer were sufficiently unambiguous to require the police to cease their interrogation in light of *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Davis v. United States*, 512 U.S. 452 (1994).

[11] When Genovevo Salinas was approached by Houston police officers who were investigating a double murder, he agreed to hand over his shotgun for ballistics testing and to accompany them to the police station for questioning. He was not in custody, was not read his *Miranda* warnings, and answered almost every question during a one-hour interview, but remained silent when asked whether his shotgun "would match the shells recovered at the scene of the murder." Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013). When Salinas was prosecuted for the murders, prosecutors were allowed to use his silence as evidence of his guilt, despite his objection that the admission of this evidence violated the Fifth Amendment. The jury found him guilty and he received a 20-year sentence. *Id*.

[12] The only "common ground" on which five justices agreed in *Salinas* (albeit for completely different reasons) was the exceptionally narrow proposition that there is no violation of the Fifth Amendment privilege against self-incrimination or the holding in *Griffin v. California*, 380 U.S. 609 (1965), if a prosecutor reveals to a jury that the accused remained silent in the face of noncustodial police interrogation without saying anything in an attempt to assert that privilege. *See Salinas*, 133 S. Ct. at 2179, 2184. That exceedingly narrow proposition, for what it is worth, has nothing to do with the proper disposition of *Sessoms*, where the suspect was in custody, did not remain silent, did agree to make a statement to the police, did give an explicit indication of interest in an attorney, and did not rely on the holding in *Griffin*. *See Sessoms*, 691 F.3d at 1055-57.

he explicitly told the police he wished to invoke the Fifth Amendment.[13] But the three other members of the Court who voted to affirm Salinas's conviction expressly refused to decide that issue,[14] and a majority of the Court has already *rejected* the central premise of Thomas's concurrence.[15] So nothing in that concurring opinion could have the slightest logical tendency to persuade any judges to change their votes in *Sessoms* or any other case. Not even remotely, not even by implication, and the point is not even debatable. Even the Supreme Court will be forced to concede this embarrassing point, for you will not see any citation to Justice Thomas's concurrence when the Court ultimately reverses the Ninth Circuit in *Sessoms* if that lower court once again rules in favor of the prisoner in that case.

"So what can be found in *Salinas* that could possibly justify the Court's decision to remand *Sessoms* for further consideration? Certainly not the dissenting opinion by Justice Breyer and three other justices; they were dissenting, after all, and they sided with the prisoner in that case, as the Ninth Circuit did in *Sessoms*, so nothing they wrote could justify a different result in that case.[16]

"The unambiguous implication of the Supreme Court's order, therefore, must be that the Ninth Circuit has been directed to reconsider its judgment in light of what Justice Alito wrote in a plurality opinion that was joined by *only two other members* of the Court. There is no other way to make any sense of the Court's direction, although the Court

[13] *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring). Justice Thomas actually did not join *one word* of the reasoning in Justice Alito's plurality opinion, and he joined nothing but the judgment of the Court: "I agree with the plurality that Salinas' Fifth Amendment claim fails and, therefore, concur in the judgment." *Id*. at 2184-85.

[14] Justice Alito's opinion, joined by Chief Justice Roberts and Justice Kennedy, declined to reach that question. *Id.* at 2179.

[15] The entire basis of the concurring opinion by Justices Thomas and Scalia was the reaffirmation of their minority view, as they had outlined in their dissents in *Mitchell v. United States*, 526 U.S. 314 (1999), that *Griffin*, 380 U.S. 609, was so poorly reasoned that it should never be extended to any other context. *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring). But that same argument was considered and explicitly rejected by the Court in *Mitchell*, which reaffirmed and significantly extended *Griffin* to the entirely different category of cases in which the Fifth Amendment is invoked during the sentencing of an accused after his guilty plea. *Mitchell*, 526 U.S. at 327-30. And the majority opinion in *Mitchell* was written by Justice Kennedy, one of the five who joined the plurality opinion and the judgment of the Court in *Salinas*. No wonder, therefore, that Justice Thomas was not able to get more than one colleague to join his concurrence.

[16] *Salinas*, 133 S. Ct. at 2185 (Breyer, J., dissenting).

wisely refrained from saying so directly, or drawing too much attention to the absurdity of its order. Imagine how embarrassing it would have been for the Court if it had been forced to explicitly disclose – or if someone had the audacity to publicly point out – that a United States Court of Appeals had in effect been told that:

> The petition for a writ of certiorari is granted, and the carefully considered en banc judgment of the Ninth Circuit Court of Appeals is vacated and remanded for further consideration in light of the plurality opinion by Justice Alito for three justices in *Salinas v. Texas*, even though not one word of that controversial opinion was joined by a majority of the Court, and despite the fact that every assertion in that plurality opinion was explicitly rejected by *four out of the seven* members of the Court who thought those issues deserving of discussion.

That would be sheer nonsense, for the opinions expressed in a plurality opinion do not have the binding force of any legal precedent, especially when they represent the views of a *minority* of the members of the Court who weighed in on that issue. (In *Marrero*, by contrast, the case in which Justice Alito objected that '[t]he remand in this case is pointless,'[17] at least the Court was remanding in light of a Supreme Court opinion that had been joined by seven members of the Court, and in which nobody had dissented but Justice Alito.[18]) The Court's action in *Sessoms* was no less absurd than it would have been to order the Ninth Circuit to reconsider its holding in light of an interesting law review article, or maybe the National Anthem.

"Besides," Holmes added, "Justice Alito's plurality opinion in *Salinas* was not even arguably relevant to the issue before the Court in *Sessoms*. Writing for a minority of three out of seven justices who addressed the issue, Justice Alito explained why he believed that a criminal suspect who wishes to invoke the protection of the Fifth Amendment during noncustodial interrogation must claim it explicitly and do something more than 'simply standing mute'[19] – although Alito's opinion acknowledged that this rule does not apply to suspects in custodial interrogation,[20] and did not devote any discussion (because it

[17] Marrero v. United States, 133 S. Ct. 2732, 2733 (2013) (Alito, J., dissenting).
[18] *Id*. at 2732 (remanding in light of Descamps v. United States, 133 S. Ct. 2276 (2013)).
[19] *Salinas*, 133 S. Ct. at 2178 (plurality opinion).
[20] *Id*. at 2180 (distinguishing Miranda v. Arizona, 384 U.S. 436, 467-68 (1966)) (noting that a suspect "need not invoke the privilege" in the face of the inherently compelling pressures of an "unwarned custodial interrogation").

was not even relevant in that case) to the separate issue of how much specificity or precision should be required of a suspect who wishes to somehow assert a constitutional right.[21] That minority opinion therefore has nothing to do with *Sessoms*, which involved a defendant who *was* subjected to custodial interrogation, who did *not* stand mute, and who *did* give an explicit indication of an interest in having an attorney. The only issue that divided the judges on the Ninth Circuit in *Sessoms* was whether that defendant's explicit indications of interest in an attorney were sufficiently unambiguous to require the cessation of further police questioning, an issue that was neither discussed nor implicated in *Salinas* in any way."[22]

"Well then, Holmes," I observed, "would it be safe to presume that the Ninth Circuit Court of Appeals will simply reinstate its original judgment on remand?"

"Yes, Watson, that would be an exceptionally reliable conclusion to draw – unless one has also taken the time to follow the obituaries. Because as it turns out, by a most unlikely coincidence, the Ninth Circuit may reach a different result on remand, but not for any reason given by the Supreme Court. The Court's fractured medley of opinions in *Salinas* does not furnish any rational reason for the judges on the Court of Appeals to change their votes in *Sessoms* on remand, and not one of them will do so. But that does not mean the Ninth Circuit's judgment will remain the same, because one member of the panel has since died and must now be replaced. The Court's en banc decision in favor of Sessoms was a closely divided opinion by a vote of 6-5; the deciding vote was cast, and the majority opinion was written, by Judge Betty Fletcher, who died shortly before the California Attorney General filed the petition for certiorari.[23] Under the rules of the Ninth Circuit,

[21] On the contrary, far from laying down any new guidelines concerning the level of detail that should be required from one who attempts to assert his rights aloud, Justice Alito conceded that "no ritualistic formula" is necessary to claim the privilege against Self-Incrimination. *Id*. at 2178 (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

[22] And we are putting entirely to the side the fact that the reasoning of Justice Alito's plurality opinion is so exceptionally dubious, and has been quite correctly criticized as "troubling because it is so divorced from reality." Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 367-68 (2013).

[23] Judge Fletcher also wrote the dissent from the original panel decision in the case, which initially voted 2-1 to deny the writ of habeas corpus. Sessoms v. Runnels, 650 F.3d 1276 (9th Cir. 2010). Her later opinion for the en banc court in *Sessoms* was one

Judge Fletcher is to be replaced by another judge chosen at random, unless perhaps the Court decides to order a rehearing by the full court.[24] So the Supreme Court's utterly pointless remand, ironically, could have the effect of altering the judgment of the Ninth Circuit, but only because it will force the lower court to decide the case again with a new judge whose vote will necessarily break the tie one way or the other. But that possibility, which is technically present in virtually any case where the Court considers whether to GVR a petition for certiorari, cannot serve as a legitimate basis for such an order. Indeed, the Supreme Court has categorically denied the accusation that it would ever GVR a case merely because it 'observes that there has been a postjudgment change in the personnel of the [lower] court, and wishes to give the new [judge] a shot at the case,'[25] insisting that a remand on such grounds would be inconsistent with '[r]espect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket.'[26]

"But although it may be uncertain whether the Ninth Circuit will reach the same result again on remand," Holmes continued, "the pointlessness of the Supreme Court's GVR in *Sessoms* will be confirmed through the events of the next year.[27] First, if the Ninth Circuit Court of Appeals decides to reinstate its judgment in favor of Sessoms (unless it chooses to have the case reargued before the full court), it will do so once again in a 6-5 opinion that will make many of

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of the last opinions of her long career. She passed away on October 22, 2012, after more than three decades on that court – and just a few weeks before the California Attorney General petitioned the Supreme Court for a writ of certiorari in the case.

[24] The en banc panel that decided *Sessoms* was an example of what the Ninth Circuit calls a "limited en banc court," which consists "of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court." 9TH CIR. R. 35-3. That rule also provides, however, that "[i]n appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc." *Id*.

[25] Lawrence v. Chater, 516 U.S. 163, 173 (1996) (citation omitted). The Court was denying an accusation by Justice Scalia, who had complained and predicted – perhaps correctly, as it now turns out – that the Court might one day GVR a case for just such a reason, under what he regarded as the Court's undisciplined approach to that practice. *Id.* at 189-90 (Scalia, J., dissenting).

[26] *Id*. at 174.

[27] At the time Holmes made these predictions, and even as recently as October 2013, when this transcript of our conversation was accepted by the editors of this journal for publication, the Ninth Circuit had not yet even announced whether it would allow oral argument on remand in *Sessoms*, much less whether it would reinstate its original judgment in favor of the habeas corpus petitioner in that case.

the same points I have outlined here, with no judges changing their votes in that case, and the deciding vote cast by the new member of the panel. It will do so, moreover, in an opinion that barely even mentions *Salinas*, because the sheer irrelevance of that case is so painfully obvious.[28] And if the Court votes once again to grant the writ of habeas corpus to Sessoms, the Supreme Court will summarily reverse the Ninth Circuit's judgment without oral argument, most likely in a fairly brief *per curiam* opinion. Finally, and most tellingly of all, the Supreme Court's opinion will most likely be devoid of any citation to *Salinas*! That will be a most remarkable, albeit indirect, acknowledgment of the absurdity of the Court's insistence that the Ninth Circuit reconsider its holding in light of a case that, truth be told, has nothing to do with the case which the Court of Appeals has already decided. The only way I might be wrong about that last prediction, Watson, would be the possibility – if you should publish these remarks and they come to the attention of the Supreme Court – that the justices might be embarrassed enough to include a gratuitous citation to *Salinas* for the sole purpose of trying to prove me wrong and save a bit of face, after we will have publicly called their bluff."

"I follow you so far, Holmes," I conceded, "and now see the absurdity of what the Supreme Court ordered in that case. But how does that enable you to predict with such specificity that the justices will grant California's next certiorari petition after the remand and summarily vacate with instructions to dismiss the petition for habeas corpus, without full briefing or oral argument? How could you know such things so long before they have taken place, especially when so many other possible dispositions are available to the Court?"

Holmes patiently explained: "Because there is no other conceivable explanation for the decision to order such an utterly pointless remand, under circumstances when the Court knew that it was merely making busy work for the Ninth Circuit while stalling for time

[28] Indeed, if it were not for the unfortunate death of Judge Fletcher, the Ninth Circuit probably would have reinstated its original judgment without even wasting its time on further oral argument, because the absolute irrelevance of *Salinas* to that case is so plain. But now that the Court of Appeals will be required to assign a new judge to the case, and may even decide to have the case considered by the full court, the otherwise pointless exercise of oral argument is now likely, even if only as a courtesy to the new member (or members) of the panel. *Cf.* FED. R. CRIM. P. 24(c)(3) (describing the analogous requirement that jurors begin their deliberations anew after one juror is replaced by an alternate during deliberations).

and postponing the inevitable. Come now, Watson, you know my methods. How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?

"The most critical fact," Holmes continued, "is that the absurdity of the Court's remand, once it has been carefully examined, is so self-evident that there is no way the Court could have been unaware of what I have just explained to you. This means there is no possibility that even a single justice seriously supposed that the Ninth Circuit might change its ruling because of the badly fractured opinions in *Salinas*, none of them joined by a majority of the Court, and all of them with no real bearing on the issue before the Ninth Circuit. But because the Court remanded *Sessoms* for reasons that were absolutely pointless, and with no genuine expectation that anything different might happen on that remand on the basis of those reasons, the Court must have had some ulterior motive for its action.[29]

"Consider the options that were open to the Court when it ended its term on Thursday, June 27. It had been a most hectic week at the Court, as is usually true during the final week of each term. During the preceding three days of that week, the Court had issued opinions in twelve major cases, including several of the most noteworthy cases decided that year.[30] The justices were surely tired and a bit frazzled. But the Court still needed to decide what to do about the unresolved certiorari petition before it in *Sessoms*. The Court had several obvious options, and we learn a great deal from the fact that all of them were evidently unacceptable to the justices.

"Perhaps the most obvious possibility, of course, was that the Court could have made no decision at all, and forced Sessoms to wait a few more months for a ruling in the case.[31] The justices quite rightly

[29] The Court surely did not imagine that the Ninth Circuit might be persuaded to change its judgment in light of *Salinas*. This necessarily means that the Supreme Court knew that it was ordering a pointless remand with no hope of a different result – unless perhaps the Court knew of Judge Fletcher's death and ordered a remand solely in the hope that her replacement would vote in a different way, but the Court has promised that it would never order a GVR on such an unprincipled and illegitimate basis, *see* Lawrence v. Chater, 516 U.S. 163, 173 (1996), and our respect for the Court's institutional integrity precludes us from imagining that the Court could ever break such a vow.

[30] U.S. SUPREME COURT, 2013 TERM OPINIONS OF THE COURT, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=12.

[31] Technically, the petition for certiorari in *Sessoms* was filed by the Attorney General

regarded that as unthinkable, at least as a public relations matter. Tio Sessoms was only nineteen years old at the time of his arrest, and he had been in custody for more than thirteen years, including more than a decade of appellate litigation, before finally obtaining a ruling in his favor from the Ninth Circuit.[32] In August 2012, that court concluded that Sessoms had been illegally incarcerated in violation of the United States Constitution for more than a decade, and ordered the State of California to either 'retry Sessoms within a reasonable period, or release him.'[33] Such a direction from an en banc United States Court of Appeals, whether right or wrong, is a solemn and momentous occasion, and it had been issued more than ten months before the justices of the Supreme Court prepared to depart for their summer recess in June 2013. After Sessoms obtained an order granting him a new trial and his possible exoneration after a decade of allegedly illegal imprisonment, the justices knew it was out of the question to expect him (or any sensible observer) to understand why his scheduled retrial would need to be put on hold for another several months without *any* action by the Supreme Court. So the Court had to appear to be doing something, even if only by falsely pretending to be taking some action that might advance the ultimate resolution of the case in some meaningful way.

"A second possibility, and equally obvious, was that the Court could have simply denied California's petition for a writ of certiorari, thus allowing the judgment of the Ninth Circuit to stand and Sessoms's retrial to proceed. That is what the Supreme Court does with about 99%

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of California on behalf of the prison warden, who lost that case in the Court of Appeals. But although the parties were waiting for the Supreme Court to rule on the State's petition, it is much more accurate to say that it was Sessoms who was kept waiting, because he was the one who was anxiously waiting for word on whether and when the State would be forced to comply with the Ninth Circuit's order that he be given another trial after more than a decade in prison. No matter how this case is eventually decided, the State surely had no objections to the remand that added at least another year or two to the sentence that will eventually be served by Sessoms even if he is someday retried or released.

[32] Sessoms has been in custody since his surrender, which took place in November 1999. People v. Sessoms, No. C041139, 2004 WL 49720 (Cal. Ct. App. Jan. 12, 2004). He was convicted and sentenced to life without the possibility of parole, *id*., and he filed his notice of appeal in May 2002. Docket, People v. Sessoms, No. C041139 (Cal. Ct. App. May 13, 2002). On that date, when Sessoms and his lawyers began their monumental uphill effort to overturn his conviction, four of the current Supreme Court justices were not yet even on the Court.

[33] Sessoms v. Runnels, 691 F.3d 1054, 1064 (9th Cir. 2012) (en banc).

of the certiorari petitions it receives,[34] and would have been the most appropriate disposition if a majority of the justices thought that the Ninth Circuit's opinion was either correct or within a tolerable margin of error.[35] Such a course would have carried no precedential significance, for the Court's refusal to hear a case does not mean that it agreed with the lower court, and is not binding on any court in future cases.[36] But the Court obviously regarded that option as unthinkable, for it insisted instead on keeping the case alive, even if it could only do so by ordering a pointless remand which gave the lower court no logical reason to modify any aspect of its judgment. There is no way the Court would have opted for such an unnatural choice unless it was determined to ensure the case would be back again in the same posture later, in order to buy some time and give itself another chance to decide the merits of the case, if need be, about a year from now.

"And what does the Court plan to do when the case returns next year?" Holmes asked aloud. "Surely it has no intention to wait another year to *affirm* the Ninth Circuit's grant of habeas corpus, especially not in a case where the order under review is one concluding that the State must promptly remedy a severe injustice that took place more than ten years ago. That would be entirely out of line with the way the Supreme Court handles habeas corpus cases these days, as I shall demonstrate in just a moment. But even more fundamentally, it is unimaginable that the Court would gratuitously postpone the final decision in this case by another year – not to mention the ten months the Court had already made Sessoms wait for a decision on the original petition for certiorari – if the Court perceived there was any substantial possibility that it might ultimately agree with the lower court's judgment that Sessoms is entitled to immediate release or retrial after a decade of illegal imprisonment.

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[34] During the 2011 term, the Supreme Court heard oral argument and reached a decision in only 78 cases, or less than 1% of the 8,952 cases on its docket. *See* U.S. COURTS, SUPREME COURT OF THE UNITED STATES–CASES ON DOCKET, DISPOSED OF, AND REMAINING ON DOCKET AT CONCLUSION OF OCTOBER TERMS, 2007 THROUGH 2011 (2012), *available at* http://www.uscourts.gov/uscourts/ Statistics/JudicialBusiness/2012/ appendices/A01Sep12.pdf. It also reviewed and "decided" an additional 137 cases, *id*., but virtually all of those cases were petitions, primarily by pro se prisoners, that were summarily denied.

[35] The Court does not reverse every opinion it thinks mistaken, and has in fact declared that certiorari will be "rarely granted" in a case in which the alleged error merely consists of "the misapplication of a properly stated rule of law," SUP. CT. R. 10, which is probably an accurate description of the alleged error in *Sessoms*.

[36] Teague v. Lane, 489 U.S. 288, 296 (1989).

"Since a majority of the Court has obviously decided that it will not allow any judgment in favor of Sessoms to stand, the most natural way to accomplish such a result would have been through the third option open to the Court: it could have granted the State's certiorari petition, thus agreeing to decide the case on its merits, and advising the lawyers to start working over the summer on their briefs and preparing for oral argument in the coming fall – just as the Court did with three other petitions granted the same day it remanded *Sessoms*. But that was evidently also out of the question. Although the Court is determined that the Ninth Circuit opinion will not be allowed to stand, it has no desire to lavish its precious time on full briefing and oral argument in the *Sessoms* case. If the Ninth Circuit reinstates its judgment granting Sessoms a writ of habeas corpus, the Supreme Court will summarily vacate that judgment in a brief *per curiam* opinion the same day that it grants the State of California's next certiorari petition in that case.

"This is why I told you, Watson, that *Sessoms* is just the latest salvo in the Supreme Court's running feud with the United States Courts of Appeals, and especially with the Ninth Circuit, over the standards for granting habeas corpus relief. In just the past four years, going back to the beginning of 2010, the Court has accepted and ruled on the merits of twenty-seven cases in which a state prisoner sought a writ of habeas corpus from the federal courts.[37] The Court sided with the prisoner only once,[38] and that was in the rare situation in which the State Attorney General *conceded* that the conduct of the prisoner's trial lawyer 'fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment.'[39] So the facts of that case furnish scant warrant for any optimism by anyone who hopes to be the next to obtain habeas relief. In the other twenty-six cases, or more than 96% of the total, the Supreme Court sided with the State and concluded that habeas corpus had been improperly granted[40] or properly denied.[41] (Remarkably,

[37] This total includes every case in which the Court granted a writ of certiorari and rendered a ruling on the merits of a judgment by a United States Court of Appeals in a habeas corpus proceeding brought by a prisoner in state custody. It does not include the hundreds of habeas corpus petitions filed directly in the Supreme Court by state court prisoners who were representing themselves, all of which are invariably and summarily denied in one-sentence orders.
[38] Lafler v. Cooper, 132 S. Ct. 1376 (2012).
[39] *Id*. at 1383.
[40] Nevada v. Jackson, 133 S. Ct. 1990 (2013); Metrish v. Lancaster, 133 S. Ct. 1781 (2013); Marshall v. Rodgers, 133 S. Ct. 1446 (2013); Johnson v. Williams, 133 S. Ct. 1088 (2013); Parker v. Matthews, 132 S. Ct. 2148 (2012); Coleman v. Johnson, 132 S.

however, the Court's voting pattern is far more mixed when the Court decides some *procedural* issue in a habeas corpus proceeding. During the same time frame in which the Court reversed two dozen judgments granting habeas corpus to some prisoner, it ruled ten times in favor of a habeas corpus petitioner in cases involving nothing more than a mere procedural hurdle![42] The Court evidently has little difficulty cobbling together a majority to side with a habeas petitioner with respect to procedural issues, even if only to maintain an appearance of balance, thus giving some prisoners a temporary victory and a remand that almost invariably leads to a hopeless dead end in their quest to obtain their release. It is all just harmless fun, so long as virtually no prisoner is ultimately able to prevail on the merits and obtain the writ.)

"And let us take a closer look at the twenty-four cases in which the Supreme Court reversed a judgment by the Court of Appeals and ruled that a prisoner was improperly awarded a writ of habeas corpus,[43] in a pattern that 'increasingly resembles a concerted campaign against

Ct. 2060 (2012); Howes v. Fields, 132 S. Ct. 1181 (2012); Wetzel v. Lambert, 132 S. Ct. 1195 (2012); Hardy v. Cross, 132 S. Ct. 490 (2011); Bobby v. Dixon, 132 S. Ct. 26 (2011); Cavazos v. Smith, 132 S. Ct. 2 (2011); Bobby v. Mitts, 131 S. Ct. 1762 (2011); Cullen v. Pinholster, 131 S. Ct. 1388 (2011); Felkner v. Jackson, 131 S. Ct. 1305 (2011); Swarthout v. Cooke, 131 S. Ct. 859 (2011); Premo v. Moore, 131 S. Ct. 733 (2011); Harrington v. Richter, 131 S. Ct. 770 (2011); Wilson v. Corcoran, 131 S. Ct. 13 (2010); Berghuis v. Thompkins, 560 U.S. 370 (2010); Renico v. Lett, 559 U.S. 766 (2010); Berghuis v. Smith, 559 U.S. 314 (2010); Thaler v. Haynes, 559 U.S. 43 (2010); Smith v. Spisak, 558 U.S. 139 (2010); McDaniel v. Brown, 558 U.S. 120 (2010).

[41] Greene v. Fisher, 132 S. Ct. 38 (2011); Wood v. Allen, 558 U.S. 290 (2010). These were the only two cases accepted on the merits at the request of a prisoner after the State won in the Court of Appeals; such cases evidently hold much less attraction these days for the Court. *See also* Barber v. Thomas, 560 U.S. 474 (2010) (affirming the denial of habeas corpus to prisoners in federal custody).

[42] *E.g.*, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (procedural default); McQuiggins v. Perkins, 133 S. Ct. 1924 (2013) (statute of limitations); Wood v. Milyard, 132 S. Ct. 1826 (2012) (waiver of limitations defense); Martinez v. Ryan, 132 S. Ct. 1309 (2012) (procedural default); Maples v. Thomas, 132 S. Ct. 912 (2012) (procedural default); Wall v. Kholi, 131 S. Ct. 1278 (2011) (statute of limitations); Magwood v. Patterson, 561 U.S. 320 (2010) (rule limiting successive petitions); Holland v. Florida, 560 U.S. 631 (2010) (tolling of statute of limitations); Jefferson v. Upton, 560 U.S. 284 (2010) (the standard for presumption of correctness concerning findings by state court); Wellons v. Hall, 558 U.S. 220 (2010) (standards for requiring discovery and an evidentiary hearing). In every one of those cases, the Court sided with the prisoner on some procedural question without expressing any view as to whether the prisoner would ultimately prevail on the merits of his habeas claim.

[43] *See* cases cited *supra* note 40.

the circuit courts.'[44] In thirteen of those cases, more than half, the Court granted the writ of certiorari the same day that it summarily reversed the lower court (almost always unanimously), without giving the parties an opportunity for full briefing or oral argument.[45] These summary dispositions have been aptly described as 'smackdowns' of the lower court,[46] and send the emphatic message that the Supreme Court does not regard these habeas corpus petitions as close questions, and that it refuses to dignify them with any significant investment of its time or attention. And ten (nearly half) of the Court's twenty-four reversals, including five of those summary smackdowns, were reversals of the Ninth Circuit,[47] including one in which the Supreme Court reversed the Ninth Circuit three times in the same case,[48] in addition to four other cases during the same period in which the Ninth Circuit was reversed for siding with a habeas corpus petitioner on some procedural issue other than the merits.[49] It is thus no surprise that the Court has decided to summarily reverse that same Circuit Court of Appeals, if need be, once again in *Sessoms*.

[44] Recent Case, Bunch v. Smith, *685 F.3d 546 (6th Cir. 2012)*, 126 HARV. L. REV. 860, 866 (2013).
[45] Nevada v. Jackson, 133 S. Ct. 1990 (2013); Marshall v. Rodgers, 133 S. Ct. 1446 (2013); Parker v. Matthews, 132 S. Ct. 2148 (2012); Coleman v. Johnson, 132 S. Ct. 2060 (2012); Wetzel v. Lambert, 132 S. Ct. 1195 (2012); Hardy v. Cross, 132 S. Ct. 490 (2011); Bobby v. Dixon, 132 S. Ct. 26 (2011); Cavazos v. Smith, 132 S. Ct. 2 (2011); Bobby v. Mitts, 131 S. Ct. 1762 (2011); Felkner v. Jackson, 131 S. Ct. 1305 (2011); Swarthout v. Cooke, 131 S. Ct. 859 (2011); Wilson v. Corcoran, 131 S. Ct. 13 (2010); Thaler v. Haynes, 559 U.S. 43 (2010).
[46] Jonathan H. Adler, *Sixth Circuit Smackdown Watch*, VOLOKH CONSPIRACY (June 11, 2012, 10:49 AM), http://www.volokh.com/2012/06/11/sixth-circuit-smackdown-watch/.
[47] *Jackson*, 133 S. Ct. 1990; *Marshall*, 133 S. Ct. 1446; Johnson v. Williams, 133 S. Ct. 1088 (2013); *Cavazos*, 132 S. Ct. 2; Cullen v. Pinholster, 131 S. Ct. 1388 (2011); *Felkner*, 131 S. Ct. 1305; *Swarthout*, 131 S. Ct. 859; Premo v. Moore, 131 S. Ct. 733 (2011); Harrington v. Richter, 131 S. Ct. 770 (2011); McDaniel v. Brown, 558 U.S. 120 (2010). Of these ten cases which reversed the Ninth Circuit on the merits, five were summary reversals without oral argument, decided the same day the Court granted certiorari: *Jackson*, *Marshall*, *Cavazos*, *Felkner*, and *Swarthout*.
[48] *Cavazos*, 132 S. Ct. at 7 ("This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention.")
[49] Ryan v. Schad, 133 S. Ct. 2548 (2013) (issuance of mandate); Ryan v. Gonzalez, 133 S. Ct. 696 (2013) (suspension of proceeding during incompetence of prisoner); Martel v. Clair, 132 S. Ct. 1276 (2012); (appointment of counsel); Walker v. Martin, 131 S. Ct. 1120 (2011) (procedural default).

"But perhaps the greatest mystery of all is this. Which justices voted to GVR the *Sessoms* case? We do not know whether that unsigned order was unanimous, even though there was no reported dissent, because '[i]t is not customary, but quite rare, to *record* dissents from grants of certiorari, including GVR's.'[50] Indeed, that is why an unsigned order like the one entered in *Sessoms*, even without a recorded dissent, does not necessarily mean that 'the vote to GVR was unanimous, or even close to unanimous.'[51] But there must have been at least five justices who agreed to take that action, or there would have been no majority in favor of that course.[52] Who could they have been?

"It is most unlikely that many (if any) of the four dissenters in *Salinas* would have regarded the controversial outcome in that case as a compelling reason to reverse an unrelated case for further proceedings. One is naturally tempted to suppose that the most likely votes for the GVR in light of *Salinas* would have been the five conservative justices who joined the judgment of the Court in that case, and at least one of them must have joined the decision to GVR in *Sessoms*, or there would not have been enough votes. But that would be hypocritical to the point of audacity, for they are the same five justices who protest most vociferously in the rare case when the shoe is on the other foot and the Court decides to GVR some habeas corpus case at the request of the *prisoner*. At least in that scenario, all five of those justices have dissented and protested that a GVR is not appropriate unless there has been, in Justice Alito's words, 'some recent authority or development [that] provides a basis for reconsideration' of the lower court's judgment.[53] And if Justice Scalia or Justice Thomas joined the decision

[50] Stutson v. United States, 516 U.S. 163, 189 (1996) (Scalia, J., dissenting).
[51] *Id*.
[52] Under the Supreme Court's unwritten "rule of four," only four votes are required when the Court grants a writ of certiorari and agrees to hear a case, but it is universally assumed that a fifth vote is required before the Court will grant the writ and summarily order a lower court to take certain action on remand, as in the case of a GVR. Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 567 & n.96 (2004); Ira Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four – or is it Five?*, 36 SUFFOLK U. L. REV. 1, 16 (2002). Here we are all engaging in a bit of educated speculation, because the Court has never publicly confirmed whether it would ever GVR a case at the request of only four justices. Obviously no more than five votes are required, however, in light of the Court's occasional willingness to GVR over the dissent of four justices. *E.g.*, Wellons v. Hall, 558 U.S. 220 (2010).
[53] *Wellons*, 558 U.S. at 229 (Alito, J., joined by Roberts, C.J., dissenting). This same sentiment has been expressed by all five of the justices who joined the judgment of the Court in *Salinas* – at least in habeas corpus cases where a GVR is granted in favor of

to GVR in *Sessoms*, they did so in violation of their vow to never do so unless there has been a genuine intervening factor 'that has a legal bearing upon the decision.'[54] That would be terribly ironic, because it was their refusal to join the plurality opinion in *Salinas* that deprived the Court of the opportunity to claim with a straight face that it was remanding *Sessoms* in light of some new opinion by the Court or any other genuine development in the law. So it is especially unsurprising that the GVR order in *Sessoms* was unsigned, as such orders almost always are; not one member of the Court would likely wish to be associated by name with that remarkable exercise in futility.

"Justice Scalia has been an especially vocal critic of using a GVR 'except where there has been an intervening legal development (such as a subsequently announced opinion of ours) that might alter the judgment below,'[55] and believes the Court has 'no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered.'[56] And he has naturally reserved his most emphatic criticism for a GVR when '[t]here has been no intervening change in law that might bear upon the judgment,'[57] or what he calls 'the GVR in light of nothing.'[58] But that is exactly what the Court did in *Sessoms*, where the judgment below was vacated and remanded because of *Salinas*, a case that produced no opinion for the Court, no change in the law, no new rule or ruling, and no binding legal authority of any kind. To order the Ninth Circuit (as the Supreme Court put it) to reconsider its en banc decision 'in light of *Salinas v. Texas*'[59] is to twist the word *light* beyond all recognition, and is as absurd as the suggestion to wait and look for a

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the *prisoner*. *See*, *e.g.*, Jefferson v. Upton, 560 U.S. 284 (2010) (Scalia, J., joined by Thomas, J., dissenting); *Wellons*, 558 U.S. 220 (Scalia, J., joined by Thomas, J., dissenting; Alito, J., joined by Roberts, C.J., dissenting); Webster v. Cooper, 558 U.S. 1039 (2009) (Scalia, J., dissenting); Youngblood v. West Virginia, 547 U.S. 867, 871, 875 (2006) (Scalia, J., joined by Thomas, J., dissenting; Kennedy, J., dissenting).

[54] Stutson v. United States, 516 U.S. 163, 191-92 (1996) (Scalia, J., joined by Thomas, J., dissenting). They also said they would agree to GVR in two other situations: when clarification of the opinion below is needed to assure the Court's jurisdiction, and when the respondent confesses error in the judgment below. *Id*. But neither of those conditions had anything to do with the reasons for the GVR in *Sessoms*.

[55] *Jefferson*, 560 U.S. at 304 (Scalia, J., joined by Thomas, J., dissenting).

[56] *Webster*, 558 U.S. at 1039 (Scalia, J., dissenting).

[57] *Youngblood*, 547 U.S. at 871 (Scalia, J., joined by Thomas, J., dissenting).

[58] Wellons v. Hall, 558 U.S. 220, 227-28 (2010); (Scalia, J., joined by Thomas, J., dissenting); *see also Youngblood*, 547 U.S. at 872.

[59] Grounds v. Sessoms, 133 S. Ct. 2886, 2886 (2013) (unintended irony in original).

lost watch 'by the light of the new moon.'

"One cannot help but be reminded of the late Chief Justice Rehnquist, who once sensibly protested that the Court should not GVR a case if the intended significance of the Court's order would be 'muddled and cryptic.'[60] He complained in that case that '[s]urely the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given.'[61] Justice Breyer, who at that time had only recently arrived in Washington after fourteen years on the Court of Appeals, naturally joined this expression of solicitude for the judges on the lower courts.[62] The Chief Justice's remarks were a reflection of an era when the Court regularly exhibited greater concern for its colleagues on the lower federal courts – a time, for example, when the Court once refused to approve a proposed course of action because it would have made extra work for the lower courts and would have resulted in 'nothing but delay,' complaining that '[w]heels would spin for no practical purpose.'[63] One can only imagine what Chief Justice Rehnquist – or the young Justice Breyer – would have said about the Court's unprecedented remand in *Sessoms* in light of the hopelessly splintered and inconsistent farrago of opinions in *Salinas*."

Holmes leaned back and we were silent for a few moments, while he gave me time to reflect on what he had demonstrated.

"But now I am a bit confused," I confessed. "I understand and of course agree that the Supreme Court has plainly decided to reverse the Ninth Circuit when *Sessoms* comes back up next term, if need be, and to do so by way of a summary order. But if they have already reached such a decision, why wait until next term? Why did they not just do it this time when they had the chance?"

Holmes brightened as he exclaimed, "Oh, but they nearly did, Watson! Indeed, it is nearly certain that at least one or two members of

[60] Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co., 520 U.S. 893, 898 (1997) (Rehnquist, C.J., joined by Breyer, J., dissenting).
[61] *Id.*
[62] The Honorable Stephen Breyer served as a judge on the United States Court of Appeals for the First Circuit from 1980 to 1990, and as its Chief Judge from 1990 until 1994. U.S. SUPREME COURT, BIOGRAPHIES OF CURRENT JUSTICES OF THE SUPREME COURT, http://www.supremecourt.gov/about/biographies.aspx. At the time of the Court's GVR in *Lords Landing*, Justice Breyer had been on the Supreme Court a little less than three years. Of all the justices at that time, he was the most recent arrival on the Court, and presumably had the most vivid and detailed memories about the workload and responsibilities of the Court's colleagues on the lower federal courts.
[63] Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978).

the Court already finished work on a draft of that opinion before the Court went into its summer recess, and at least some of the justices had hoped that the Court would do just that."

"How on Earth could you know such a thing?"

"Because there is no other explanation for the Court's unnatural, virtually unprecedented, delay in deciding to GVR that case."

"Look over here, Watson," he exclaimed, as he spun his chair around with rising excitement and directed my attention to the computer screen. "The Supreme Court's website reveals that the *Sessoms* petition was first distributed for discussion by the justices at their conference on May 9, 2013.[64] At that meeting, which took place three weeks after the Court heard oral argument in *Salinas*, it decided to postpone consideration of *Sessoms* until some point later in the term, and agreed to wait until after *Salinas* was decided, which meant another month of delay.[65] The Court's only possible motive for such delay was the hope on the part of at least some members of the Court that perhaps it could put together a majority opinion in *Salinas*, presumably along the lines of Justice Alito's views. But consider the extraordinary sequence of events that followed.

"When the justices reconvened to reconsider *Sessoms* on Thursday, June 20, *three days after Salinas had been decided*, they did not vote to remand the case in light of *Salinas*, but instead scheduled it for further discussion at a third conference nearly one full week later, on June 26, which they knew would be their last conference of the term.

"The following Monday, June 24, the next time the Court issued any orders, it announced that it had decided to GVR *fourteen other cases* for further consideration in light of two cases that had been decided *the same day as Salinas* – because such decisions almost never require any extended reflection or discussion.[66] But still no word on *Sessoms*.

[64] Docket, Grounds v. Sessoms, 133 S. Ct. 2886 (2013), *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-804.htm.

[65] After the *Sessoms* case was discussed at conference on May 9, it was not distributed again for further consideration until June 17, the very same day that the Court decided *Salinas*, the same (and only) case the Court ultimately cited as the basis for its GVR. That timing could not have been a coincidence.

[66] *See* Order List, 570 U.S. __ (June 24, 2013), *available at* http://www.supremecourt.gov/orders/courtorders/062413zor_n7ip.pdf. That list contains fourteen cases remanded in light of *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), both of which were decided the same day as *Salinas*. Likewise, the only two other cases that were summarily vacated on the same day as *Sessoms* without a dissent were both remanded

"It was not until the June 26 meeting, the Court's final conference of the term, that the justices finally voted to GVR the *Sessoms* case in light of a case that had been decided, by that time, nine days earlier, as the Court announced the very next day immediately before recessing for the summer.

"Why did the Court not agree to GVR the *Sessoms* case on June 20, the first time the justices reconvened to discuss that case after *Salinas* was decided? Why would it take the Court nine days to agree on such a course and prepare a one-sentence order to that effect? What could have accounted for such an unprecedented delay? There is only one conceivable explanation. By the time the justices met to discuss *Sessoms* on June 20, the first time they did so after the decision in *Salinas*, they knew that their hopes for a majority opinion in *Salinas* had been dashed, so they could not in good faith remand the former case in light of any 'new development,' as some of them had once hoped. And so at least one or two of the justices must have persuaded the others to give them one week to try their hand at finishing a short *per curiam* opinion that would have simply reversed the Ninth Circuit entirely, in the sort of unanimous summary smackdown which the Court now turns out with relative ease in habeas corpus cases.[67] But when June 26 came around, that draft opinion – which was almost certainly devoid of any gratuitous citation to *Salinas* – was not yet finished in a form that was satisfactory to all the other members of the Court. At least one justice balked at joining the opinion as it was drafted, or announced an intention to prepare a dissent, which would have prevented the Court from wrapping up its term the next day as it had planned. That was when, and why, the Court reluctantly decided as a last resort to go back to its initial plan for *Sessoms*, and agreed to buy itself some more time by sending the case back to the Ninth Circuit. It made that choice with no legitimate basis for doing so, in violation of its own precedents governing the requirements for the valid exercise of its GVR powers, and knowing that its utterly pointless remand would serve no purpose but to allow the Court the luxury of being able to postpone its resolution of the case until after its summer break, while falsely pretending that it was not really ignoring the *Sessoms* case altogether.

"How ironic that this happened on the watch of a Chief Justice

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in light of a case that had been decided only *two days* earlier. Texas v. United States, 133 S. Ct. 2885 (2013); Texas v. Holder, 133 S. Ct. 2886 (2013).

[67] *See* cases cited *supra* note 43.

who once complained as a young lawyer about the Supreme Court's willingness to insist upon the sort of summer recess that lower federal judges cannot presume to expect. During his 1982 to 1986 tenure as an associate counsel to President Reagan, in response to a complaint by Chief Justice Warren Burger about the Court's caseload, the young John G. Roberts Jr. suggested in a memo that 'While some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court Justices and school children are expected to and do take the entire summer off.'[68] That mildly sarcastic note sounds strangely hollow decades later, coming from the man who now has more power than anyone on Earth to shorten the Supreme Court's summer vacation, if need be, to dispose of any pressing unfinished judicial business, but whose court has now directed an en banc Court of Appeals to spin its wheels on the *Sessoms* case for no practical purpose, rather than postpone the Supreme Court's summer recess for one week and wrap that case up itself once and for all.

"If I am correct in these deductions, Watson, and I fear the evidence permits no other conclusion, the Supreme Court appears to have lost all sight of its assurances that its GVR power over the lower courts would be exercised only 'sparingly'[69] and never for the 'mere convenience'[70] of that Court. Justice Scalia in particular has insisted that the indiscriminate use of the GVR procedure shows insufficient respect to the judges of the Court of Appeals when a case is remanded 'as though we were schoolmasters grading their homework,'[71] or when the reversal resembles a 'tutelary remand, as to a schoolboy made to do his homework again.'[72] But that pales in comparison to the indignity inflicted on the Ninth Circuit by 'the GVR in light of nothing' in *Sessoms*. That order was the functional equivalent of a teacher who cannot finish all of her grading before summer recess and does not wish to change her vacation plans, and so she orders young Bart to remain at the schoolhouse through the vacation while writing five thousand times on the chalkboard 'I will not grant any more writs of habeas corpus' – and to add insult to injury, arbitrarily uses the delay of that spiteful

[68] Jo Becker, R. Jeffrey Smith, & Sonya Geis, *In 1980s, Roberts Criticized the Court He Hopes to Join*, WASHINGTON POST, Aug. 20, 2005, *available at* 2005 WLNR 27755260.
[69] Lawrence v. Chater, 516 U.S. 163, 173 (1996).
[70] Stutson v. United States, 516 U.S. 193, 197 (1996) (citation omitted).
[71] Wellons v. Hall, 558 U.S. 220, 227-28 (Scalia, J., dissenting).
[72] Youngblood v. West Virginia, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) (citation omitted).

exercise in futility as her excuse to start grading his exam after her summer vacation. It is hard to imagine a more ideal occasion for an appeals court to accept Justice Scalia's suggestion that an 'appropriately self-respecting response to [such a] summary vacatur would be summary reissuance of the same opinion,'[73] perhaps after adding a brief footnote noting the sheer irrelevance of the Court's painfully fragmented handiwork in *Salinas*.

"And so," Holmes concluded, "although the Court surely had no intention of doing so, it has unwittingly made its plans for the *Sessoms* case unmistakably plain to the discerning eye, and has done so in extraordinary detail."

"How absurdly simple!" I cried.

"Quite so!" said he, a little nettled. "Every problem becomes very childish when once it is explained to you."

"But this does not mean you have won our little wager," I added.

"Why not?" Holmes seemed stunned.

"I am well aware that I uttered the very exclamation you had predicted," I conceded with a smile, "and noted your private satisfaction at your seeming vindication. But you had prophesied that you could make me say such a thing within *five* minutes, Holmes, and although you have spoken with remarkable sagacity and celerity, you made that prediction almost six minutes ago."

Holmes's eyes widened in disbelief as he fumbled for his pocket watch and verified that I was correct, and he muttered under his breath, almost too quiet for me to hear.

"*Blast* those footnotes."

We sat in silence for about a minute, until I cautiously raised my voice and dared to inquire: "I have one last question for you, Holmes. Are these the shadows of the things that will be, or are they shadows of things that may be, only? Men's courses will foreshadow certain ends, to which, if persevered in, they must lead. But if the courses be departed

[73] *Wellons*, 558 U.S. at 227-28 (Scalia, J., dissenting); *see also Youngblood*, 547 U.S. at 875 (Scalia, J., dissenting) ("I suppose it would be available to the West Virginia Supreme Court of Appeals, on remand, simply to reaffirm its judgment without further elaboration."). This would be the most appropriate disposition of the *Sessoms* case on remand, of course, if Judge Fletcher's replacement agrees with the majority of the en banc court that originally voted to grant the writ of habeas corpus. In that event, there would be no need for anyone on the Court of Appeals to add anything to Judge Fletcher's opinion to explain why *Salinas* does not support, much less compel, any different result. That explanation has been supplied here in full.

from, the ends will change. Say it is thus with what you show me! Why tell me all these things, if poor Tio Sessoms is past all hope?"

"All I can do, Watson, is decipher the writing on the wall, and tell you with certainty what a majority of the Court is already planning to do with the *Sessoms* case when it comes back after the Ninth Circuit has completed its busy work on remand. But no man can know whether the Court will abide by those plans.

"Perhaps," Holmes added with a wink, "the Court will be moved to depart from those plans if you were to publish some account of this conversation, and if that account were to come to the attention of the Court. Surely no majority of the current members of this Court would ever *affirm* the Ninth Circuit's grant of habeas corpus in a case like *Sessoms*. But perhaps the Court might be persuaded instead, although with considerable reluctance, to simply deny certiorari and let the Ninth Circuit's ultimate judgment in favor of Sessoms stand. As much as they evidently detest the thought of any state prisoner receiving a retrial ordered by a federal court, the more conservative members of the Supreme Court might regard one small trial – allowed on their watch but not with their blessing – as a modest price to pay, if need be, to avoid giving me the satisfaction of proving me right in these predictions."