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# WHY THE SUPREME COURT SHOULD STOP GVR'ING THE SOLICITOR GENERAL'S RATIONALE- CONFESSIONS-OF-ERROR

*"Once we accept a confession of error at face value and make it the controlling and decisive factor in our decision, we no longer administer a system of justice under a government of laws."*<sup>1</sup>

## INTRODUCTION

In 1988, Horacio Alvarado was sentenced to three years in prison for extortion and conspiracy to commit extortion.<sup>2</sup> Described as half black and half Puerto Rican, Alvarado appealed his conviction, claiming that the federal prosecutor discriminatorily exercised peremptory challenges during jury selection, violating *Batson v. Kentucky*.<sup>3</sup> *Batson* prohibits prosecutors from challenging potential jurors based exclusively on their race.<sup>4</sup> Without ruling on whether Alvarado had shown a *prima facie* *Batson* error, the United States Court of Appeals for the Second Circuit affirmed Alvarado's conviction.<sup>5</sup> The court instead held that as long as the jury constituted a "fair cross-section of the community," Alvarado had not been denied an impartial jury under the Sixth Amendment.<sup>6</sup>

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<sup>1</sup> *Casey v. United States*, 343 U.S. 808, 812 (1952) (Douglas, J., dissenting).

<sup>2</sup> *United States v. Alvarado*, 891 F.2d 439, 440 (2d Cir. 1989), *cert. granted, vacated and remanded*, 497 U.S. 543 (1990) (per curiam).

<sup>3</sup> *Alvarado*, 891 F.2d at 440 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

<sup>4</sup> *Batson*, 476 U.S. at 89.

<sup>5</sup> *Alvarado*, 891 F.2d at 444 ("In this case, we need not determine whether [the prosecutor's] minority challenges establishes a *prima facie* case of discriminatory peremptory challenges.").

<sup>6</sup> *Id.* at 445 (emphasis added) (quoting *Roman v. Abrams*, 822 F.2d 214, 229 (2d Cir. 1987)):

[O]ur task in assessing a claim of discriminatory use of peremptory challenges on appeal from a conviction is to determine whether the group alleged to have been impermissibly challenged is 'significantly underrepresented' in the jury that

Alvarado petitioned for certiorari to the Supreme Court, arguing that the Second Circuit should have analyzed his appeal under *Batson* rather than the Sixth Amendment's cross-section approach. Confessing error, the Solicitor General agreed. In spite of the conceded error, however, the Solicitor urged the Court to deny certiorari because the Second Circuit had reached the correct result.<sup>7</sup> The Solicitor General contended that because Alvarado failed to make a *prima facie* showing of intentional discrimination, even if the Second Circuit had properly applied *Batson*, the outcome would have been the same.<sup>8</sup> Thus, the Solicitor General believed that the final disposition of the case was correct despite an erroneous rationale.

The Supreme Court ignored the Solicitor General's recommendation and GVR'd (granted certiorari, vacated the judgment below, and remanded for further consideration)<sup>9</sup> the case to the Second Circuit "for further consideration in light of the position asserted by the Government."<sup>10</sup> This response by the Court was

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convicted the appellant. In the absence of such underrepresentation, the *Sixth Amendment* right to the unimpeded possibility that the jury will be a fair cross-section of the community has not been violated.

<sup>7</sup> See Brief for the United States in Opposition at 2, *Alvarado v. United States*, 497 U.S. 543 (1990) (per curiam) (No. 89-6985):

We agree with petitioner that the rationale on which the court below relied in affirming his conviction is inconsistent with the general approach to the issue of racial discrimination in the exercise of peremptory challenges that this Court employed in *Batson*. For the reasons set forth below, however, we do not agree that the judgment of the court of appeals in this case warrants review by this Court.

See also *Alvarado v. United States*, 497 U.S. 543, 544 (1990) (per curiam) (describing the government's confession of error and arguing that the Second Circuit's decision was erroneous, contrary to *Batson*, and discredited by the Court's decision in *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990) (stating that the cross-section concept of the Sixth Amendment was inapplicable to a petit jury, the type of jury which convicted Alvarado)).

<sup>8</sup> See Brief for the United States in Opposition, *supra* note 7, at 5-6:

[W]hile the Second Circuit's analysis was facially different from the analysis this Court prescribed in *Batson*, the factor that the court of appeals found dispositive in this case—the representative composition of the jury—would be an important factor under conventional *Batson* analysis in establishing that there was no *prima facie* case of discrimination in the prosecutor's exercise of peremptory challenges. As a result, few if any cases will come out differently under the two approaches. As we have indicated in our analysis of the case under the principles of *Batson*, this is certainly not a case that would be decided differently depending on which route the court took to its decision.

<sup>9</sup> While this Note focuses on a narrow aspect of the Court's GVR practice—GVR'ing where the Government believes that an inferior court used faulty analysis—an in-depth look at the Court's multifaceted GVR practice can be found in Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711 (2009).

<sup>10</sup> *Alvarado*, 497 U.S. at 545.

somewhat controversial. Four Justices dissented, expressing concern at the Court's use of a summary vacatur where the Solicitor defended the judgment of the lower court and only criticized its rationale.<sup>11</sup> While *Alvarado* is one of the clearest examples of the Court's GVR practice in the face of a confession of error only in a lower court's rationale, the Court has frequently followed this practice in the past several decades.<sup>12</sup>

Even though academic commentary on the merits of this "rationale-confession-of-error" practice is sparse, it certainly warrants critical review. The Court has asserted that GVR'ing the Solicitor General's rationale-confession-of-error has a few important benefits. Specifically, GVR'ing helps the Supreme Court control its docket.<sup>13</sup> It also gives both the Supreme Court and lower courts the benefit of fuller consideration of outcome-determinative issues.<sup>14</sup> In that vein, it also allows possible circuit splits to percolate before the Court applies its consideration.<sup>15</sup> And finally, it serves as a tool of equity and fairness to the petitioner.<sup>16</sup>

On the other hand, these benefits are countered by significant problems. GVR'ing without independently reviewing the merits of a rationale-confession-of-error assumes that an *actual error* has occurred.<sup>17</sup> This assumption essentially places the Solicitor General in a tenth seat on the Supreme Court, which offends separation of powers.<sup>18</sup> Moreover, when the Solicitor General confesses error in a lower court's rationale and asks the Court to GVR, the government may be motivated by litigation strategy rather than the fair and impartial administration of justice.<sup>19</sup> Strategic litigation tactics by the

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<sup>11</sup> *Id.* at 545 (Rehnquist, C.J., dissenting).

<sup>12</sup> *See, e.g.,* *Machado v. Holder*, 130 S. Ct. 1236 (2010); *Tapia-Acuna v. INS*, 449 U.S. 945 (1980).

<sup>13</sup> *See* *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration . . . and alleviates the '[p]otential for unequal treatment' that is inherent in our ability to grant plenary review of all pending cases raising similar issues.") (quoting *United States v. Johnson*, 457 U.S. 537, 556, n.16 (1982)).

<sup>14</sup> *See id.* ("[A] GVR order . . . assists the court below by flagging a particular issue that it does not appear to have fully considered . . .").

<sup>15</sup> *See* *Stutson v. United States*, 516 U.S. 193, 196 (1996) (claiming it will be useful for the Court to have the views of the court of appeals before making its decision).

<sup>16</sup> *See* *Lawrence*, 516 U.S. at 167.

<sup>17</sup> *See* *Price v. United States*, 537 U.S. 1152, 1157–58 (2003) (Scalia, J., dissenting) (arguing that a Fifth Circuit judgment should not be set aside because the government had not conceded error in the court of appeals' judgment, even if the reasoning may have been incorrect).

<sup>18</sup> *See infra* note 175 and accompanying text (describing the Solicitor General's role as a *de facto* Supreme Court Justice).

<sup>19</sup> *See infra* note 178 and accompanying text (discussing the Solicitor General's practice of confessing error to avoid a ruling adverse to the government's interests).

government may, in some circumstances, allow the government to control the development of the law, particularly in criminal law, where confession of error is most prevalent.<sup>20</sup> By granting the Solicitor's request, the Court encourages such abuse.

Finally, GVR'ing rationale-confessions-of-error has a negative impact on the lower courts that must reevaluate the remanded cases. Because of the summary nature of the GVR, lower courts may be confused as to what the Court expects of them.<sup>21</sup> And, although the Court directs the lower court to evaluate the Solicitor General's suggested error, in some instances the government has changed that position again after remand.<sup>22</sup> Therefore, the ultimate determination of such a case is as much in the prosecutor's hands as it is in the court's.

The central claim of this Note is that these problems outweigh the benefits of GVR'ing rationale-confessions-of-error. While controlling the docket, seeking fuller analysis of important issues from the lower court, and pursuing fairness for the litigants are important considerations, allowing the government to engage in manipulative litigation tactics, which, in turn, negatively affect the lower courts, has a much longer and devastating impact on the judicial system. This Note, therefore, analyzes both the benefits and problems with GVR'ing rationale-confessions-of-error, and proposes a solution to the imbalance.

Part I describes the background of the Solicitor General's confession-of-error practice, focusing on the various types of rationale-confession-of-error that have cropped up in the past two decades, and details the history of the Supreme Court's controversial response. Part II weighs the benefits and the problems with GVR'ing rationale-confessions-of-error described above. And Part III suggests a practical solution to the controversy: denying certiorari in all rationale-confession-of-error cases unless the Solicitor General can identify a controlling error of law. But, because this blanket rule may be unproductive in some cases, Part III further suggests an exception where (1) the petitioner claims that a constitutional right or standard was violated or ignored in a prior proceeding, or by some other government actor such as a police officer, (2) the lower court did not

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<sup>20</sup> See David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080–81 (1994) (noting that “[t]he vast majority of confessions of error occur in criminal cases”).

<sup>21</sup> See *infra* Part II.B.3 (discussing the negative impact of GVR'ing on lower courts).

<sup>22</sup> See, e.g., *United States v. Knox*, 32 F.3d 733, 746 (3d Cir. 1994) (“In its brief after remand, the government recedes somewhat from the view implied by its Supreme Court brief that the depiction must show the child subject to have some lascivious intent.”).

fully address or answer that claim, and (3) it is reasonably probable that the legal standard that the lower court did not consider, or ignored, would change the case's outcome. Only in these instances would a GVR in light of a rationale-confession-of-error be proper.

## I. BACKGROUND ON THE SOLICITOR GENERAL'S CONFESSION OF ERROR AND THE SUPREME COURT'S RESPONSE

### A. *Definition, Foundation, and Practice*

Attorneys for the federal government are charged with ensuring "fair and impartial administration of justice for all Americans."<sup>23</sup> Unlike private litigants, they are not to win cases at any cost. Instead, government attorneys must pursue the public interest in exercising their duties.<sup>24</sup> Under this obligation, the Solicitor General has developed the practice of confessing error: informing the Court that an error occurred in a proceeding below, which prejudiced the petitioner's case, despite a favorable outcome for the government.<sup>25</sup>

The Solicitor General's confession of error practice stands on two foundational pillars. First, the Solicitor General enjoys unique independence within the executive branch, and has broad autonomy in determining the government's position on cases coming before the Court.<sup>26</sup> Such independence is commonly understood as crucial to the relationship between the Supreme Court and the Solicitor General. The Court trusts that the Solicitor General will not make arguments that are overly influenced by the political leanings of the executive.<sup>27</sup>

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<sup>23</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., FISCAL YEAR 2010 PERFORMANCE AND ACCOUNTABILITY REPORT I-1 (Nov. 9, 2010), available at <http://www.justice.gov/ag/annualreports/pr2010/par2010.pdf>.

<sup>24</sup> See Hon. Archibald Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 223 (1963) ("The United States wins its point whenever justice is done its citizens in the courts.") (quoting Solicitor General Frederick W. Lehman).

<sup>25</sup> See *Young v. United States*, 315 U.S. 257, 258 (1942) ("The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.").

<sup>26</sup> See 28 C.F.R. § 0.20(a) (2010) (stating that the Solicitor General has general control over the government's cases coming before the Supreme Court); Rosenzweig, *supra* note 20, at 2083-85 (noting that while current statutes clearly make the Solicitor General a subordinate of the Attorney General, the Solicitor controls virtually all of the government's appellate litigation and makes all arguments before the Supreme Court with little interference from other officers of the executive branch); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1444 (1969) (stating the Solicitor General's independence creates conflict between the many roles of his office). On some occasions, the Solicitor General does confer with the Attorney General regarding the administration's position in cases that may have a greater political impact or in which the executive may have a great political interest. *Id.* at 1444.

<sup>27</sup> See Rosenzweig, *supra* note 20, at 2088-92 (discussing the problems created by Rex Lee, Charles Fried, and the Reagan Administration when the executive branch took a much

Similarly, the Attorney General trusts that the Solicitor will represent the government beneficially before the Court.<sup>28</sup> Thus, when the Solicitor General confesses error, both the Attorney General and the Court trust that the confession is well thought out and supportable. The Court has greater reason to trust the Solicitor General in confessions of error, however, because in confessing error the Solicitor is generally “arguing against [the government’s] own interests.”<sup>29</sup> Independence and autonomy from the executive, as well as the Court’s trust, allow the Solicitor General to admit the shortcomings of a lower court’s decision, even though the government was the prevailing party in that lower court’s decision.<sup>30</sup>

Second, the practice of confessing error springs from the Solicitor General’s function as a filter for the Court.<sup>31</sup> Because the Solicitor General participates in a large percentage of cases that come before the Court, he has a unique ability to advise the Court on which cases warrant plenary review and which do not. One prominent commentator stated that “[a] principal chore of the Solicitor’s office is to help the Supreme Court set its docket by screening petitions for

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more active and politicized role in the Solicitor General’s work in an effort to shape constitutional law).

<sup>28</sup> See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 24 (1987) (“The SG’s office serves as a buffer between the Judiciary and the Executive Branch.”). Because such trust is crucial for both the Court and the executive, intellectual prowess and peerless advocacy are requirements of the Solicitor General. See Note, *supra* note 26, at 1444 (noting that the Solicitor General’s autonomy is in part “a function of the stature of the men occupying the position”); see also Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35, 36–37 (2010) (noting that when appointing a new Solicitor General, the President uses the same criteria used for nominating a Supreme Court Justice).

<sup>29</sup> See Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477, 483–84 (2009) (stating that courts “almost always agree with the reason the government gives for its confession . . . in part because a court is probably more inclined to trust the government when the government is arguing against its own interests”); see also Note, *supra* note 26, at 1443 (“If the Solicitor General believes that the government’s position is legally untenable, he may confess error, an action which is generally dispositive.”).

<sup>30</sup> See Note, *supra* note 26, at 1444 (commenting that a major component of the Solicitor General’s role, which allows him to confess error “is the degree of independence which the Solicitor General enjoys”).

<sup>31</sup> See *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994) (“[T]he traditional specialization of [the Solicitor General’s] office has led it to be keenly attuned to [the Supreme] Court’s practice with respect to the granting or denying of petitions for certiorari.”); Note, *supra* note 26, at 1453–54 (describing the important function the Solicitor General plays in the Court’s certiorari process as that of a filter, particularly in cases where the government is the petitioner). The “filtering function” of the Solicitor General can also be extended to cases where the government is respondent because he submits Briefs in Opposition to Certiorari which suggest to the Court reasons why certiorari should or should not be granted. See *supra* note 7 and accompanying text.

writs of certiorari.”<sup>32</sup> By conceding to the Court that a judgment or an analysis in its favor below is erroneous, instead of zealously pushing for the government’s interests at all costs, the Solicitor General helps the Court summarily dispose of those cases and focus its time and energy on cases which are more deserving of its review.<sup>33</sup> Therefore, where the Solicitor General believes that a ruling below in the government’s favor is wrong, he serves as a filter for the Court and validates the Court’s trust in him by confessing error.

Confessions of error are made for a variety of reasons. The Solicitor General may believe that a lower court made a legal, factual, or procedural error in its ruling.<sup>34</sup> A government attorney at trial or on appeal may have violated a discretionary Department of Justice policy which, if followed, would have barred prosecution.<sup>35</sup> Finally, as shown in *Alvarado*, the Solicitor General may believe that a lower court’s analysis of a case is erroneous without saying that the judgment is wrong. This last form of confession of error has been used with greater frequency in recent years,<sup>36</sup> including two cases decided during the October 2009 Term.<sup>37</sup> In this rationale-confession-of-error, the Solicitor General will sometimes argue that the *judgment*

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<sup>32</sup> CAPLAN, *supra* note 28, at 257.

<sup>33</sup> See Rosenzweig, *supra* note 20, at 2107 (“[C]onfessions of error . . . [are] a desirable extension of the Solicitor General’s gatekeeping function at the certiorari stage . . . [and] assist the Court by identifying the few cases in which clear error has been committed.”).

<sup>34</sup> *Id.* at 2082; see also, e.g., *Gordon v. United States*, 347 U.S. 909, 910 (1954) (per curiam) (remanding to the district court after the government confessed that the convicting jury was improperly instructed).

<sup>35</sup> See Rosenzweig, *supra* note 20, at 2094 (“Since the middle of this century, one of the most common grounds for confessions of error has been that a conviction was obtained in violation of a discretionary Justice Department policy, which, if properly applied, would have precluded the prosecution.”); Note, *supra* note 26, at 1471 (“Confessions of error demonstrate to the Court and the staff of the Justice Department that deviations from policy will not be permitted to succeed, and thus act as an internal control device.”); see also, e.g., *Watts v. United States*, 422 U.S. 1032, 1033 (1975) (accepting the Solicitor General’s confession of error that the federal prosecution “did not conform to the Department of Justice policy of not prosecuting individuals previously tried in a state court for offenses involving the same acts,” and remanding the case to the district court to allow the government to dismiss its charges against the petitioner) (internal quotation marks omitted).

<sup>36</sup> See Rosenzweig, *supra* note 20, at 2101 (noting that cases where the Court ignored the recommendation of the Solicitor General and summarily reversed the judgment below, despite the Solicitor General’s position that error was harmless or that the cases should not be granted certiorari review, have been particularly noticeable in recent history).

<sup>37</sup> See *Machado v. Holder*, 130 S. Ct. 1236, 1236 (2010) (Roberts, C.J., dissenting) (dissenting because the government had not conceded an error in judgment by the court of appeals, and the Court had not independently reviewed the merits of the judgment below, so there were insufficient grounds to vacate and remand) (citing *Nunez v. United States*, 128 S. Ct. 2990, 2990 (2008) (Scalia, J., dissenting) (mem.)); *Williamson v. United States*, 130 S. Ct. 3461 (2010) (Roberts, C.J., dissenting) (dissenting for the same reasons as in *Machado*) (citing *Nunez*, 128 S. Ct. at 2990 (Scalia, J., dissenting)).



is correct despite the erroneous rationale.<sup>38</sup> In other instances, the Solicitor may take no position on the judgment at all.<sup>39</sup>

Depending on how erroneous a lower court's rationale is believed to be, the Solicitor General generally suggests either that the Court deny certiorari because the judgment was correct and any error was inconsequential,<sup>40</sup> or that the Court should vacate the judgment and remand the case for further consideration by the lower court despite a possibly correct judgment.<sup>41</sup> Where the Solicitor General suggests that review is not warranted in light of a correct judgment, he will often also argue that some other additional reason exists for denying review, such as the limited precedential value of the lower court's decision. For example, in *Alvarado*, the government cited *Holland v. Illinois* as an additional reason why granting *Alvarado* review was unnecessary.<sup>42</sup> *Holland* held that the Sixth Amendment was inapplicable to peremptory challenges of venire members, therefore discrediting the Second Circuit's "fair cross-section" analysis in *Alvarado* and the line of earlier cases on which it relied.<sup>43</sup> By citing to *Holland*, the Solicitor implied that since *Holland* did the heavy lifting of removing any precedential value of the erroneous *Alvarado* rationale, and the judgment itself was otherwise correct, the Court had no other reason to grant review.<sup>44</sup>

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<sup>38</sup> See, e.g., *Alvarado v. United States*, 497 U.S. 543, 544 (1990) (per curiam):

The United States agrees that the Court of Appeals erred . . . [but] the Government urges [the Court] to deny certiorari . . . because petitioner failed to make out a prima facie case of intentional discrimination and because the reasons given for the challenges were race-neutral grounds for decision that the Court of Appeals did not reach.

<sup>39</sup> See, e.g., Brief for the Respondent at 22–23, *Machado v. Holder*, 130 S. Ct. 1236 (2010) (No. 08–7721), 2009 WL 369341 (recommending that the Court grant certiorari, vacate the judgment below, and remand the case without ever taking a position that the judgment itself was in error); *Price v. United States*, 537 U.S. 1152, 1156–57 (2003) (Scalia, J., dissenting) (noting that the Solicitor General had not conceded that the judgment was in error).

<sup>40</sup> See *supra* note 8 and accompanying text.

<sup>41</sup> *Machado*, 130 S. Ct. at 1236 (Roberts, C.J., dissenting) (noting that in this case the government did not take the position that the court of appeals' judgment was incorrect but still requested a GVR). I say "possibly" because where the government suggests that the case should be remanded, it generally does not take a position on whether the judgment is correct, but also does not assert that the judgment is incorrect.

<sup>42</sup> *Alvarado*, 497 U.S. at 544 (citing *Holland v. Illinois*, 493 U.S. 474 (1990)).

<sup>43</sup> Brief for the United States in Opposition at 5–6, *Alvarado v. United States*, 497 U.S. 543 (1990) (No. 89–6985).

<sup>44</sup> See, e.g., *Rosales v. Bureau of Immigration & Customs Enforcement*, 545 U.S. 1101 (2005) (mem.). In *Rosales*, Solicitor General Paul Clement argued that the Court had no reason to grant review of a Fifth Circuit decision denying habeas relief to petitioner, although the Fifth Circuit's analysis was incorrect, because the judgment itself was correct. Thus, Clement argued that the court of appeals' unpublished *per curiam* opinion did not establish binding precedent under the Fifth Circuit's rules. Brief for the Respondent in Opposition at 4–5, 9, *Rosales v. Bureau of Immigration & Customs Enforcement*, 545 U.S. 1101 (2005) (No. 04–8465), 2005

Where, on the other hand, the Solicitor General has suggested that an erroneous rationale warrants remand, he has done so for several reasons. The Solicitor General may ask the Court to remand in light of a different interpretation of an applicable statute or other binding document,<sup>45</sup> or because the lower court failed to give any analysis to an important legal issue.<sup>46</sup> The Solicitor General contended the latter in the October 2009 Term in *Machado v. Holder*.<sup>47</sup> Solicitor General Elena Kagan argued that a Fourth Circuit decision denying two illegal aliens the right to effective assistance of counsel in removal proceedings should be vacated and remanded because the court of appeals did not review whether the aliens had a nonconstitutional right to effective counsel; she did not, however, argue that the Fourth Circuit's judgment was incorrect.<sup>48</sup> The Court followed her guidance, with four justices dissenting.<sup>49</sup>

The Solicitor General may also ask the Court to remand in order to advance important government interests, such as avoiding the invalidation of a significant statute,<sup>50</sup> protecting executive discretion,<sup>51</sup> or slowing the development of the law.<sup>52</sup> *Knox v. United States*,<sup>53</sup> discussed fully in Part II.B.2, demonstrates a situation in

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WL 1330298, at \*4–\*5, \*9.

<sup>45</sup> See *Nunez v. United States*, 128 S. Ct. 2990, 2990 (2008) (Scalia, J., dissenting) (noting that the remand in this case was based on differing interpretation of scope of collateral-review waiver).

<sup>46</sup> See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (“[GVR’ing] assists the court below by flagging a particular issue that it does not appear to have fully considered.”).

<sup>47</sup> *Machado v. Holder*, 130 S. Ct. 1236, 1236 (2010).

<sup>48</sup> See Brief for the Respondent at 12–13, *Machado v. Holder*, 130 S. Ct. 1236 (2010) (per curiam) (No. 08–7721) (arguing that the Court should GVR because the court of appeals failed to consider whether the petitioners’ “legal representatives’ performance was deficient for purposes of a nonconstitutional remedy”). The Fourth Circuit limited its holding only to appellants’ lack of a constitutional right to effective assistance of counsel. *Machado v. Mukasey*, 293 Fed. App’x 217, 219 (4th Cir. 2008).

<sup>49</sup> *Machado*, 130 S. Ct. at 1236.

<sup>50</sup> See *Drew S. Days, III, When the President Says ‘No’: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 515 (2001) (admitting that he confessed error in *Knox v. United States*, 510 U.S. 939 (1993), in order to avoid the possibility that the Court may have issued a ruling that would “jeopardize later child pornography prosecutions . . .”).

<sup>51</sup> Note, *supra* note 26, at 1469 (“By confessing error, the Solicitor General often attempts to prevent premature or unguided decisions by the Court and to protect the executive’s freedom of action from intervention by the Court.”).

<sup>52</sup> *Id.* at 1470–71 (citing the Solicitor General’s statement to the Court in several electronic eavesdropping cases that the Justice Department was analyzing its uses of electronic devices to prevent tainted evidence from being introduced at trial as a tactic to stall the introduction of tighter judicial standards on electronic eavesdropping).

<sup>53</sup> 510 U.S. 939 (1993).

which the Solicitor General confessed error and asked for a remand to avoid the Court's invalidation of a federal child pornography law.<sup>54</sup>

### *B. History of The Supreme Court's Response*

In the beginning, the Court deferred to the Solicitor's confession and remanded, much like it does today, without independently reviewing the confession's merit.<sup>55</sup> In 1942, however, the Court introduced a policy of independently reviewing each confession of error and making its own determination of whether an error occurred, no matter the reason for the confessed error. In *Young v. United States*,<sup>56</sup> the Court stated, "a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed."<sup>57</sup>

Shortly after the *Young* opinion, Congress codified the Court's dispositional power, giving the Court broad discretion in disposing cases properly before it:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.<sup>58</sup>

Perhaps due in part to the broad language of 28 U.S.C. § 2106, the Court, over time, moved away from the *Young* standard and settled back into the practice of GVR'ing cases in which the Solicitor General confessed error.<sup>59</sup> Today, the Court commonly responds to confessions of error by GVR'ing them without independent review and shifting the necessary review to one of the courts below where the alleged error occurred.<sup>60</sup>

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<sup>54</sup> See *infra* notes 182–90 and accompanying text.

<sup>55</sup> See, e.g., *Overton v. United States*, 239 U.S. 658 (1915) (providing an example where the Court deferred to the confession of error and the Solicitor General's motion).

<sup>56</sup> 315 U.S. 257 (1942).

<sup>57</sup> *Id.* at 258–59.

<sup>58</sup> 28 U.S.C. § 2106 (2006).

<sup>59</sup> See *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the GVR order has become "an integral part" of the Court's practice over the past half century).

<sup>60</sup> Compare *Levine v. United States*, 383 U.S. 265, 266 (1966) (per curiam) (emphasis added) ("On the basis of [the Solicitor General's] concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals . . ."), with *Machado v. Holder*,

This general response to all forms of the government's confession of error has generated controversy.<sup>61</sup> However, automatically GVR'ing rationale-confessions-of-error without independently reviewing their merits is especially controversial.<sup>62</sup> First, because the Solicitor does not propose that a *judgment* is incorrect, there is a question of whether any error existed in the lower court's decision. In *Machado*, Chief Justice Roberts argued that deference to the Solicitor General's rationale-confession-of-error was "especially inappropriate" because the petitioners "disclaimed any nonconstitutional basis for relief."<sup>63</sup> Therefore, because petitioners never asked for a nonconstitutional remedy from the court of appeals or from the Supreme Court, there was no error in denying them such relief.<sup>64</sup> Chief Justice Roberts concluded that denying certiorari was, therefore, a more appropriate disposition than GVR'ing.<sup>65</sup> Similarly, in *Stutson v. United States*,<sup>66</sup> Justice Scalia argued in dissent that an actual error is only speculative where (1) the Solicitor General repudiated the position asserted by the federal prosecutor in prior proceedings; (2) there is no evidence that the court of appeals relied on the prosecutor's theory of the case in forming its ultimate judgment; and (3) the Solicitor did not suggest that a lower court's judgment was at all incorrect.<sup>67</sup>

Second, granting the government's GVR request without independent review encourages manipulative and strategic litigation

130 S. Ct. 1236, 1236 (2010) (emphasis added) ("The judgment is vacated, and the case is remanded . . . for further consideration *in light of the position asserted by the Solicitor General* in her brief for the respondent.").

<sup>61</sup> See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 346 (9th ed. 2007) (noting that there is a substantial disagreement over the propriety of the Court's GVR practice when the Solicitor General confesses error).

<sup>62</sup> See Bruhl, *supra* note 9, at 732 (footnote omitted):

All members of the Court now appear comfortable with, or at least resigned to the practice of, GVR'ing when the government concedes error in the bottom-line judgment. More controversial is the more recent practice of the Court deciding to GVR in cases where the government does not admit error in the *judgment* but instead only in the *reasoning* below. . . .

<sup>63</sup> *Machado*, 130 S.Ct. at 1236 (Roberts, C.J., dissenting).

<sup>64</sup> See *id.* (stating that remanding the case back to the Fourth Circuit for consideration upon a theory never proposed by the petitioner is inappropriate).

<sup>65</sup> *Id.*

<sup>66</sup> 516 U.S. 193 (1996).

<sup>67</sup> See *Lawrence*, 516 U.S. at 184–85 (Scalia, J., dissenting) (stating that the government made "no suggestion that the Court of Appeals' judgment was incorrect" and there is no way to know whether the court of appeals even relied on the government's theory of the case). Note that *Stutson* is a companion case to *Lawrence v. Chater*, 516 U.S. 163 (1994). Justice Scalia's dissent in *Lawrence* also applies to *Stutson*. See *Lawrence*, 516 U.S. at 163; *Stutson*, 516 U.S. at 198.

practices by the Court's most frequent litigant. In every confession of error, the government potentially sacrifices victory. Ideally this sacrifice achieves a greater degree of fairness and impartiality in the "administration of justice."<sup>68</sup> But, the Solicitor General has also used confession of error to avoid dispositions unfavorable to the executive or to otherwise further the executive's interests.<sup>69</sup> In cases where the Solicitor General asks for a GVR, automatic and uncritical deference to the Solicitor virtually gives him a seat on the bench.<sup>70</sup> The Court's trust in the Solicitor when he confesses error has given him almost dispositive control over such cases.<sup>71</sup> Furthermore, several cases suggest that the Solicitor General has confessed error strategically rather than out of a sense of fairness or justice.<sup>72</sup> By taking a longer view of issues presented in a case and evaluating the need to preserve or slow the development of laws that are important to the government's political interests, the Solicitor General may abuse the Court's trust in his office by confessing error strategically.<sup>73</sup>

Finally, GVR'ing rationale-confessions-of-error also has a negative impact on lower courts. The summary nature of a GVR gives the lower court who receive the remanded case little help in determining the proper course of action.<sup>74</sup> Guidance comes only from

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<sup>68</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., FISCAL YEAR 2010 PERFORMANCE AND ACCOUNTABILITY REPORT I-1 (Nov. 9, 2010), available at <http://www.justice.gov/ag/annualreports/pr2010/par2010.pdf>.

<sup>69</sup> See Note, *supra* note 26, at 1469 (noting that the Solicitor General may confess error in order to "prevent premature or unguided decisions by the [Supreme] Court and to protect the executive's freedom of action from intervention by the Court"); see also Judy Sarasohn, *SG's Switch Breathes Life Into Bias Suit*, LEGAL TIMES, Mar. 29, 1993, at 22 (suggesting that the Solicitor General's confession of error on a procedural issue in a Title VII suit was to avoid an exploitation of the complexities of Title VII and the need to defend such suits as strenuously as previous administrations).

<sup>70</sup> *Mariscal v. United States*, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting) ("I harbor serious doubt that our adversary system of justice is well served by this Court's practice of routinely vacating judgments which the Solicitor General questions without any independent investigation . . .").

<sup>71</sup> *Id.* at 407 ("Congress has given us discretionary jurisdiction to deny certiorari if we do not wish to grant plenary consideration to a particular case . . . but it has not to my knowledge moved the Office of the Solicitor General from the executive Branch . . . to the Judicial Branch.").

<sup>72</sup> See *infra* Part II.B.2 (discussing situations in which it has been alleged that the Solicitor General has confessed error strategically).

<sup>73</sup> See Rosenzweig, *supra* note 20, at 2095-2101 (discussing several instances where the Solicitor General confessed error out of likely strategic and improper motivation).

<sup>74</sup> Almost every GVR order from a Solicitor General's confession of error states, "Petition for writ of certiorari granted. Judgment vacated, and case remanded . . . for further consideration in light of the position asserted by the Solicitor General in his brief for the United States. . . ." See, e.g., *Nunez v. United States*, 128 S. Ct. 2290, 2290 (2008). One commentator has asked, "[W]hat guidance could anyone find in an order at once so cryptic and so inconclusive?" Arthur D. Hellman, *Granted, Vacated, and Remanded'—Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 391 (1984).

the Solicitor General's brief in opposition to certiorari and the government's appellee brief on remand. But these documents are not always consistent with one another and are certainly not as neutral as a judicial opinion.<sup>75</sup> Furthermore, the lower court may not agree with the Solicitor General's confession of error, but feels compelled to spend its scarce judicial resources re-evaluating the case merely to reassert its original opinion.<sup>76</sup> Justice Scalia framed this problem accurately in his dissenting opinion in *Lawrence v. Chater*<sup>77</sup> when he said, "In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again."<sup>78</sup>

While its problems are significant, GVR'ing the Solicitor General's rationale-confessions-of-error is not without support or benefit. First, the Court has interpreted 28 U.S.C. § 2106 as giving the Court broad discretion to GVR.<sup>79</sup> In *Lawrence*, the companion case to *Stutson*, the Court rejected any limitation on the plain language of that statute and interpreted section 2106 simply: to grant the Court "the power to remand to a lower federal court any case raising a federal issue that is properly before [the Court] in [its] appellate capacity."<sup>80</sup> Second, the general practice of GVR'ing confessions of error helps the Court prune its growing docket. With certiorari petitions increasing over the years, the Court must be diligent and efficacious in eliminating those cases that are not ready or appropriate for plenary review.<sup>81</sup> Thus, the GVR has become a valuable tool in eliminating cases that are not ready for plenary review, yet arguably need some further consideration.<sup>82</sup>

Furthermore, GVR'ing rationale-confessions-of-error assists lower courts in observing their judicial duty by "flagging" important issues that they either failed to consider or did not have the opportunity to

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<sup>75</sup> See, e.g., *Stutson v. United States*, 516 U.S. 193, 195 (1996) (per curiam) (noting that the Solicitor General, in response to the petition for certiorari, reversed the government's original theory of the case); *Nunez v. United States*, 546 F.3d 450, 452 (7th Cir. 2008) (noting a contradiction between the Solicitor General and the United States Attorney in whether a confession of error occurred).

<sup>76</sup> *Nunez*, 546 F.3d at 453 ("We do not think that the judgment is in error. Instead of sending readers to our first opinion, we will repeat much of what was said there. Recapitulation is better than leaving our reasoning scattered across volumes of the Federal Reporter.").

<sup>77</sup> 516 U.S. 163 (1996) (per curiam).

<sup>78</sup> *Id.* at 185–86 (Scalia, J., dissenting).

<sup>79</sup> See *id.* at 166 (per curiam) ("Title 28 U.S.C. § 2106 appears on its face to confer upon this Court a broad power to GVR . . .").

<sup>80</sup> *Id.* at 166.

<sup>81</sup> Compare *The Supreme Court 1995 Term—The Statistics*, 110 HARV. L. REV. 367, 371 tbl.II (1996) (noting that the Court disposed of 6611 cases from its docket), with *The Supreme Court 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 418 tbl.II(A) (2010) (noting that the Court disposed of 8,087 cases from its docket).

<sup>82</sup> See generally, Hellman, *supra* note 74, at 391–92 (discussing the various considerations the court makes in GVR'ing a case, particularly focusing on its docket).

consider.<sup>83</sup> Lower courts benefit by having a second chance to ensure their precedent is correct. Simultaneously, the Supreme Court benefits by avoiding error correction—a task that is not central to its purpose.<sup>84</sup> The Court further profits when it GVR's cases that raise issues upon which the circuit courts are possibly split. As one commentator put it, "Justices like the smell of well-percolated cases."<sup>85</sup> While it seems strange that the Court might *hunt* for circuit splits by GVR'ing potential splits, rather than allowing the splits to occur organically, the Court has explicitly GVR'd a rationale-confession-of-error for this reason in at least one case.<sup>86</sup>

Finally, GVR'ing rationale-confessions-of-error promotes equity and fairness to the litigants, most obviously the petitioner. Further review of a case "in light of" a new position asserted by the Solicitor General, or the Solicitor's suggestion that the lower court missed some important analysis, benefits the petitioner because it gives her a second chance to prove her theory of the case.<sup>87</sup> This justification fits nicely into the Justice Department's charge to ensure the "fair and impartial administration of justice for all Americans."<sup>88</sup>

## II. ANALYZING THE POTENTIAL PROBLEMS AND BENEFITS OF GVR'ING RATIONALE-CONFESSIONS-OF-ERROR

### A. Benefits of GVR'ing Rationale-Confessions-of-Error

#### 1. Relieving the Burden of the Court's Case Load

The Court has stated that its general GVR practice helps conserve the Court's limited resources and manage its docket.<sup>89</sup> In the 2009

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<sup>83</sup> *Lawrence*, 516 U.S. at 167.

<sup>84</sup> See *infra* note 106 and accompanying text (noting that the Supreme Court's role is generally not that of error correction).

<sup>85</sup> H. W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 230 (1991).

<sup>86</sup> See *Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam) ("If [the court of appeals] continues to conclude that [an intervening precedent] does not apply [to the present case], it will be useful for us to have the benefit of its views so that we may resolve the resulting conflict between the Circuits.").

<sup>87</sup> See, e.g., *State v. Youngblood*, 650 S.E.2d 119, 128–33 (W. Va. 2007) (reconsidering defendant's *Brady* claim after remand from the Supreme Court; finding for the defendant and reversing his sexual assault conviction).

<sup>88</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., FISCAL YEAR 2010 PERFORMANCE AND ACCOUNTABILITY REPORT I-1 (Nov. 9, 2010) available at <http://www.justice.gov/ag/annualreports/pr2010/par2010.pdf>.

<sup>89</sup> See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) ("In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration. . . and alleviates the '[p]otential for unequal treatment' that

term, the most recent year for which statistics are available, the Court received 8,159 certiorari petitions.<sup>90</sup> The Court makes every effort to sift and separate those petitions into cases which warrant plenary review and those that can either be denied or granted but summarily disposed.<sup>91</sup> Furthermore, the past few decades have seen an increase in petitions for certiorari.<sup>92</sup> Thus, by expanding its GVR practice to rationale-confessions-of-error, the Court is able to remove more cases from its docket that are not appropriate for full consideration.

Being effective, however, is far from being appropriate. In his dissenting opinion in *Mariscal v. United States*,<sup>93</sup> then Associate Justice Rehnquist stated:

With the increasing caseloads of all federal courts, there is a natural temptation to “pass the buck” to some other court if that is possible. Congress has given [the Court] discretionary jurisdiction to deny certiorari if we do not wish to grant plenary consideration to a particular case, a benefit that other federal courts do not share . . . .<sup>94</sup>

Thus, Justice Rehnquist’s preference would have been to simply deny certiorari in those cases in which the government suggests that a lower court’s rationale is incorrect *if* there is otherwise no reason to grant plenary review. Justice Scalia shares this view.<sup>95</sup>

Yet, even if there is no reason to grant plenary review, the Court has stated that there may still be a reason that a case should undergo some further inspection by a tribunal in order to correct a possible error and satisfy justice. For example, in *Lawrence*, a new interpretation of the Social Security Act adopted by the Social

is inherent in our ability to grant plenary review of all pending cases raising similar issues.”) (citations omitted).

<sup>90</sup> JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (Dec. 31, 2010), available at <http://www.supremecourt.gov/publicinfo/year%2Dend/2010year-endreport.pdf>.

<sup>91</sup> See PERRY, *supra* note 85, at 41–51 (detailing the Court’s process in reviewing certiorari petitions and determining whether they should be granted, denied, or handled in some other way).

<sup>92</sup> Compare *The Supreme Court 1989 Term—The Statistics*, 104 HARV. L. REV. 359, 367 tbl.I (1990) (showing 4,280 petitions for certiorari in 1980), with ROBERTS, *supra* note 90, at 9 (stating that the Court received 8,159 certiorari petitions in 2009).

<sup>93</sup> 449 U.S. 405 (1981) (per curiam).

<sup>94</sup> *Id.* at 407 (Rehnquist, J., dissenting).

<sup>95</sup> See *Price v. United States*, 537 U.S. 1152, 1157–58 (2003) (Scalia, J., dissenting) (concluding that because the Court has no grounds on which to vacate the court of appeals’ judgment, he would deny the petition for certiorari rather than GVR); *Lawrence v. Chater*, 516 U.S. 163, 192 (1996) (Scalia, J., dissenting) (concluding that the Court’s GVR was an “improper extension[] of [its] limited power to vacate without first finding error below,” and that he would instead deny the certiorari petitions for both *Lawrence* and *Stutson*).



Security Administration with respect to paternity tests *could* have been outcome determinative.<sup>96</sup> The uncertainty was in fact the fundamental reason why the majority, and even Chief Justice Rehnquist in dissent,<sup>97</sup> felt that a GVR was most appropriate.<sup>98</sup> The Court used a “reasonably probable” touchstone in determining whether a remand was befitting: GVR’ing is proper where there is a “reasonable probability” that a lower court will alter its position if given a second opportunity to consider some new development announced by the Solicitor General.<sup>99</sup> Therefore, by implication, GVR’ing rationale-confessions-of-error as a way to manage the Court’s docket is appropriate only if other good reasons exist to remand the case; however, it cannot itself be a good reason.

In fact, if docket management were the Court’s main concern, it would do better to simply deny certiorari. GVR’d cases have occasionally returned to the Court for a second time.<sup>100</sup> Removing cases from the Court’s docket today only to hear those cases tomorrow is ineffective management. Also, by GVR’ing solely to shrink its docket, the Court relieves its own burden at the expense of the circuit courts or state courts. In his dissenting opinion in *Lawrence v. Chater*, Justice Scalia took exception to this effect, stating that the courts of appeals are neither agents of the Supreme Court nor truly “inferior” entities, but are bodies separately authorized in the Constitution and created by Congress.<sup>101</sup> Similarly, federalism prohibits the Court from treating state courts as its agents.<sup>102</sup> So, while GVR’ing to lighten the Court’s load may be

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<sup>96</sup> *Lawrence*, 516 U.S. at 174:

Here . . . our summary review leads us to the conclusion that there is a reasonable probability that the Court of Appeals would conclude that the timing of the agency’s interpretation does not preclude the deference that it would otherwise receive, and that it may be outcome determinative in this case.

<sup>97</sup> *See id.* at 177 (Rehnquist, C.J., dissenting) (citations omitted):

I agree with the decision announced in the *per curiam* to vacate the judgment of the Court of Appeals for the Fourth Circuit in . . . *Lawrence v. Chater*. Whether or not the change of position by the Social Security Administration is ‘cognizable,’ in the words of Justice Scalia, it is perfectly reasonable to request the Court of Appeals to answer that question in the first instance.

<sup>98</sup> *See id.* at 172 (*per curiam*) (“It is precisely because of uncertainty that we GVR.”).

<sup>99</sup> *See id.* at 167.

<sup>100</sup> *See Stutson v. United States*, 522 U.S. 1135 (1998) (denying certiorari for two separate judgments of the Eleventh Circuit Court of Appeals).

<sup>101</sup> *See Lawrence*, 516 U.S. at 178–79 (Scalia, J., dissenting) (“The inferior federal courts . . . are not the creatures and agents of this body . . . . Inferior courts are separately authorized in the Constitution, created by Acts of Congress, and staffed by judges whose manner of appointment and tenure of office are the same as our own . . . .”) (citations omitted).

<sup>102</sup> *Id.*

effective, it is greatly problematic. Therefore, expanding the Court's GVR practice to rationale-confessions-of-error must therefore be grounded in more fundamental benefits.

## 2. *Benefiting from a Lower Court's Full Consideration of Petitioner's Claims*

### *a. Avoiding Error Correction and Giving Lower Courts a Redo*

In some cases, the Court has claimed that GVR'ing rationale-confessions-of-error may benefit both the lower courts from which the appeals come and the Supreme Court. For example, if a lower court fails to adequately address a key issue which *may* be outcome determinative, a Supreme Court's GVR will benefit the lower court by having that particular issue flagged for further consideration.<sup>103</sup> By having an issue reconsidered, the Supreme Court will benefit from the wisdom of the lower court before the Court rules on the merits.<sup>104</sup> As part of the Court's practice in deciding which cases to grant review and which to deny, the Justices "often prefer to review reasoned opinions that facilitate [their] consideration."<sup>105</sup>

Although the Court's jurisdiction is generally not one of error correction,<sup>106</sup> where the error may be outcome determinative GVR'ing seems a happy middle ground between granting review to correct the error and simply denying certiorari.<sup>107</sup> Thus, the task of error correction is relegated to the proper institutions: the courts of appeals or the appropriate state courts.<sup>108</sup> The uncertainty of the effect of the error on the outcome seems to be the central factor supporting such a GVR. As in *Lawrence*, if a lower court fails to consider an important issue and consideration *may* in fact change the outcome, then superficially, a remand seems quite appropriate. Furthermore, because the Supreme Court's jurisdiction has been limited with regard

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<sup>103</sup> *Id.* at 167 (per curiam).

<sup>104</sup> *Id.*

<sup>105</sup> *Youngblood v. West Virginia*, 547 U.S. 867, 872 (2006) (Scalia, J., dissenting).

<sup>106</sup> *See* GRESSMAN, *supra* note 61, at 276 ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction in lower court decisions."); William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 *YALE L.J.* 1, 2 (1925) ("The function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court.")

<sup>107</sup> *See* Bruhl, *supra* note 9, at 713 (noting that a GVR is a form of error correction).

<sup>108</sup> *See* ROBERT A. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 3 (1976) ("[T]he task to the appellate court is to determine if prejudicial errors were committed at the trial level and to correct them if they were.")

to error correction, allowing the courts of appeals or other lower courts the first instance to consider the confessed error is in keeping with the practices of our judicial system.

Yet, even where a second consideration by a lower court of a previously unconsidered issue may be outcome determinative, serious barriers to GVR'ing rationale-confessions-of-error still exist. For instance, GVR'ing seems inappropriate where the petitioner never raised the unconsidered issue before the lower court or in his or her petition for certiorari. Such was the case in *Machado v. Holder*.<sup>109</sup> Machado, an illegal alien, sought reversal of an Immigration Judge's order of removal on the grounds of ineffective assistance of counsel.<sup>110</sup> Solicitor General Elena Kagan conceded that the United States Court of Appeals for the Fourth Circuit correctly held that the Sixth Amendment does not guarantee effective assistance of private counsel to an alien in removal proceedings.<sup>111</sup> However, she confessed error that the Fourth Circuit failed to "review the [Board of Immigration Appeal's ("BIA")] finding" that Machado had not established nonconstitutional grounds for ineffective assistance relief.<sup>112</sup> The government recommended that the Court GVR Machado's case to the Fourth Circuit for consideration of whether Machado had established grounds for a nonconstitutional remedy and whether the BIA's denial of such remedy was in error.<sup>113</sup>

The Court followed the government's recommendation without any opinion,<sup>114</sup> presumably because it was reasonably probable that the outcome of Machado's appeal would change if the nonconstitutional claim were considered, in keeping with *Lawrence's* "reasonably probably" touchstone. However, Machado never raised the BIA's denial of nonconstitutional relief for review either before the Fourth Circuit or the Supreme Court in his petition for certiorari.<sup>115</sup> In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, argued that petitioner had in fact

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<sup>109</sup> 130 S. Ct. 1236 (2010).

<sup>110</sup> Petition for Writ of Certiorari at 2, *Machado v. Holder*, 130 S. Ct. 1236 (2010) (No. 08-7721).

<sup>111</sup> See Brief for the Respondent at 12, *Machado v. Holder*, 130 S. Ct. 1236 (2010) (No. 08-7721) ("[T]he court of appeals also correctly held that there is no constitutional right to effective assistance . . .").

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 12-13. In *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), the Board of Immigration Appeals created a "framework for an administrative remedy that can give relief for ineffective assistance of counsel even though there is no constitutional right." *Id.* at 20.

<sup>114</sup> *Machado*, 130 U.S. at 1236.

<sup>115</sup> See *id.* at 1236 (Roberts, C.J., dissenting) ("[The Court's GVR] is especially inappropriate in this case, as petitioners do not appear to have raised—in the Court of Appeals or in their petition for certiorari—the claim that the Government asserts was ignored by the Court of Appeals.")

“disclaimed” any nonconstitutional remedy when they asserted that the Fourth Circuit’s decision left them remediless against deficient immigration practitioners.<sup>116</sup> Generally, issues not raised in the lower courts are not reviewed by the Supreme Court absent extraordinary circumstances.<sup>117</sup> Therefore, there is a strong argument that the Fourth Circuit did not err by failing to review the BIA’s denial of Machado’s nonconstitutional remedies because it was not asked to do so by Machado. Therefore, although the Court did in fact GVR the *Machado* case, it did so anomalously. The Court’s “reasonably probable” rule should have yielded to the long-standing forfeiture rule.

Perhaps the Court GVR’d *Machado* for its own benefit rather than the petitioner’s. The Court has, at times, GVR’d cases to benefit from a fuller analysis of the pertinent issues before it considers granting review. For example, in *Youngblood v. West Virginia*,<sup>118</sup> a defendant was convicted of two counts of sexual assault, two counts of brandishing a firearm, wanton endangerment involving a firearm, and indecent exposure.<sup>119</sup> After conviction, Youngblood moved to set aside the verdict, contending that “an investigator working on his case had uncovered new and exculpatory evidence, in the form of a graphically explicit note that both squarely contradicted the State’s account of the incidents and directly supported Youngblood’s consensual-sex defense.”<sup>120</sup> The note had been shown to a state trooper who told the investigator to destroy it.<sup>121</sup> Youngblood argued on appeal that the suppression of this evidence violated West Virginia’s federal constitutional obligation to present discovered evidence favorable to the defense, and its failure to do so was contrary to *Brady v. Maryland*.<sup>122</sup> The West Virginia Supreme Court

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<sup>116</sup> *Id.* Bolstering his dissent, the Chief Justice argued that such an assertion “would make no sense if petitioners were advancing both constitutional and nonconstitutional grounds for relief on their claim.” *Id.*

<sup>117</sup> *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

<sup>118</sup> 547 U.S. 867 (2006) (per curiam). *Youngblood* is not a confession of error case since West Virginia never confessed error in the judgment below. *Id.* at 871–72 (Scalia, J., dissenting). But, it is part of the Court’s broader GVR practice, and Justice Scalia’s dissent parallels his dissent in *Lawrence*. See *id.* at 874–75 (arguing that the majority’s decision rested on a finding that the state court’s decision was “‘incomplete and unworkmanlike,’—which all Members of the Court in *Lawrence* agreed was an illegitimate basis for a GVR.”) (quoting *Lawrence v. Chater*, 516 U.S. 163, 189 (1996) (Scalia, J., dissenting)). Therefore, the *Youngblood* opinion is very similar to a rationale-confession-of-error case, and may shed some light on why the Court may GVR in such cases.

<sup>119</sup> *Id.* at 868 (per curiam).

<sup>120</sup> *Id.* at 868.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 868–69 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

of Appeals affirmed the conviction without fully addressing defendant's constitutional or *Brady* claim.<sup>123</sup>

On certiorari, the Supreme Court GVR'd Youngblood's case to the state court, holding that "[i]f this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue."<sup>124</sup> Taking *Youngblood* as a broad justification, the Court may feel that rationale-confessions-of-error warrant remand where an important issue was not considered by the lower court but should be considered before they grant review.

Alternatively, the subsequent events of the *Youngblood* case suggest a different interpretation of the Court's actions. On remand, the Supreme Court of Appeals of West Virginia reversed Youngblood's conviction and ordered a new trial, finding that the suppressed evidence did in fact violate *Brady*.<sup>125</sup> Instead of GVR'ing to elicit some possible future benefit, it seems more reasonable that the Court plainly disagreed with the state supreme court and subtly instructed it to revise its analysis of the *Brady* issue. In so doing, the Court corrected error in the most appropriate fashion: suggesting that the lower court correct it.<sup>126</sup>

Justice Scalia's observations in dissent bolster this interpretation of the Court's GVR. Justice Scalia stated that he did not understand why the Court would benefit from full consideration of the *Brady* claim by the state court majority when the dissenting judges below considered Youngblood's *Brady* claim in detail and the Court has often reviewed lower court opinions that address only one side of an issue.<sup>127</sup> Justice Scalia further stated:

[T]here is only one obvious sense in which it might be "better" to have the West Virginia court revisit the *Brady* issue: If the majority suspects that the court below erred, there is a chance that the GVR-in-light-of-nothing will induce it to change its mind on remand, sparing us the trouble of correcting the suspected error."<sup>128</sup>

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<sup>123</sup> *State v. Youngblood*, 618 S.E.2d 544, 557 (W. Va. 2005) (per curiam), cert. granted, vacated and remanded, 547 U.S. 867 (2006) (per curiam).

<sup>124</sup> *Youngblood*, 547 U.S. at 870 (Scalia, J., dissenting).

<sup>125</sup> *State v. Youngblood*, 650 S.E.2d 119, 132-33 (W. Va. 2007).

<sup>126</sup> See Taft, *supra* note 106, at 10 (discussing the appellate jurisdiction of the Supreme Court and review of cases).

<sup>127</sup> See *Youngblood*, 547 U.S. at 872 (Scalia, J., dissenting) ("The Court thus purports to conscript the judges of the Supreme Court of Appeals of West Virginia to write what is essentially an *amicus* brief on the merits of an issue they have already decided . . .").

<sup>128</sup> *Id.* at 872-73.

GVR'ing a rationale-confession-of-error may therefore be a polite way for the Court to ask the lower court to "redo" its work because it is "reasonably probable" that it got the case wrong in some outcome-determinative way. We have yet to see how the Fourth Circuit has responded to the Court's GVR in *Machado*, but one may speculate that the Court is GVR'ing rationale-confessions-of-error for this very reason.<sup>129</sup>

*b. Hunting for Circuit Splits*

There is also another, less common benefit that accrues to the Supreme Court in GVR'ing some rationale-confession-of-error cases. GVR'ing rationale-confessions-of-error allows the Court to test whether the circuit courts are split on an issue where a petition for certiorari presents a possible but unclear split. In general, the Court prefers to let important issues and possible circuit splits percolate in the courts of appeals before it steps into the discussion.<sup>130</sup> In cases where there is no clear circuit split, the Court may GVR to postpone its own role in resolving an important legal question. By GVR'ing in this situation, the Court is still taking an active role in prodding and testing whether a circuit split actually exists, or may be subtly asking a court of appeals to clarify whether it is in fact disagreeing with other circuit courts on a particular issue. As one commentator has noted:

The Supreme Court exists primarily to clarify the law. Once it speaks, however, its interpretation is final, so justices want to make sure that when they do speak, they can do so as intelligently as possible. It is good jurisprudence and makes good sense to put off rendering an interpretation as long as possible—or more precisely, as long as the benefits of avoidance outweigh the problems—so that the Court can benefit from analysis by others.<sup>131</sup>

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<sup>129</sup> For an example of a court opting to "redo" its work on remand following a GVR, see *Rosales v. Bureau of Immigration and Customs Enforcement*, 426 F.3d 733, 734 (5th Cir. 2005) (per curiam) (citation omitted):

The Supreme Court vacated the opinion after the government conceded in its brief to the Court that *Rosales* should be considered "in custody" according to the prevailing view in our sister circuits. Reconsidering the case in light of the government's concession, we join the Second, Sixth, Ninth, and Tenth Circuits and hold that an alien who is subject to a final order of deportation . . . is "in custody" under [28 U.S.C.] § 2241.

<sup>130</sup> See PERRY, *supra* note 85, at 230–31 (noting that "Justices like the smell of well-percolated cases. . .").

<sup>131</sup> *Id.*

Furthermore, one unnamed Justice succinctly described the importance of percolation in the context of possible circuit splits:

If . . . [a court of appeals] has a ruling that seems to create a conflict, we will let it percolate to see if the conflict will work itself out. Conflicts often work themselves out . . . . But we are better informed if the issue has been considered by several courts of appeals.<sup>132</sup>

The Supreme Court applied this justification in *Stutson v. United States*.<sup>133</sup> Stutson was convicted for cocaine possession by the United States District Court for the Northern District of Alabama.<sup>134</sup> His lawyer filed a notice of appeal one day late and with the court of appeals rather than the district court.<sup>135</sup> The district court subsequently denied Stutson's appeal, reasoning that his lawyer's error was not "'excusable neglect' within the meaning of Rule 4(b) of the Federal Rules of Appellate Procedure . . . ."<sup>136</sup> One day before Stutson's notice of appeal was due, the Supreme Court handed down its decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*,<sup>137</sup> which held that, under the bankruptcy rules, "excusable neglect" may encompass an attorney's inadvertent failure to timely file a notice of appeal.<sup>138</sup> But, without mentioning *Pioneer*, The United States Court of Appeals for the Eleventh Circuit summarily affirmed the district court's decision.<sup>139</sup>

Therefore, on certiorari, the Court did not know whether the court of appeals had applied *Pioneer*. Furthermore, the Eleventh Circuit's affirmance ran counter to the "unanimous view of the six Courts of Appeals that . . . ha[d] expressly addressed this new and important issue, and . . . held that the *Pioneer* standard applie[d] in Rule 4 cases."<sup>140</sup> The Solicitor General confessed error, repudiating the government's earlier position before the Eleventh Circuit and agreeing with the six circuits that applied *Pioneer* to Rule 4 cases.<sup>141</sup> The Supreme Court GVR'd, in part, explicitly to see whether the Eleventh Circuit was in fact splitting from the other circuits and

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<sup>132</sup> *Id.* at 233.

<sup>133</sup> 516 U.S. 193 (1996).

<sup>134</sup> *Id.* at 194.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 507 U.S. 380 (1993).

<sup>138</sup> *Id.* at 387–97.

<sup>139</sup> *Stutson*, 516 U.S. at 194–95.

<sup>140</sup> *Id.* at 195.

<sup>141</sup> *Id.*

holding that *Pioneer* did not apply.<sup>142</sup> Thus, *Stutson* demonstrates the Court's use of GVR in rationale-confession-of-error cases to explore possible circuit splits.

### 3. As a Matter of Fairness to the Petitioner

Finally, the Court's GVR practice in rationale-confessions-of-error serves as a tool of equity or fairness to the litigants, most particularly the petitioner.<sup>143</sup> In some cases, the Court may believe that a second consideration of a case or issue by the lower court in light of the Solicitor General's confession may change the case's outcome. In these situations, the Court may believe that a GVR would be the fairest disposition for the case. For example, in *Lawrence*, the Social Security Administration ("Administration") reinterpreted the Social Security Act to require courts to determine the constitutionality of applicable state intestacy laws before applying those laws in determining entitlement to benefits under the federal statutory scheme.<sup>144</sup> The Administration also stated that the government would be applying that new interpretation in future cases.<sup>145</sup> The Supreme Court held that treating *Lawrence* like other future beneficiaries of the new interpretation "further[ed] fairness."<sup>146</sup>

However, the *Lawrence* court hinted at other considerations that the Court must make before claiming that fairness can support a GVR. First, the Court must consider whether a GVR would be fair to the government as respondent. Second, the Court must consider whether the government's confession of error is "the product of unfair or manipulative Government litigating strategies."<sup>147</sup>

GVR'ing a case where a consideration of the Solicitor General's confessed error may be outcome determinative is obviously fair to the petitioner. However, such action may not be fair to the government. In *Lawrence*, the Court concluded that a GVR *would* be fair to the

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<sup>142</sup> See *id.* at 196 ("If it continues to conclude that *Pioneer* does not apply, it will be useful for us to have the benefit of its views so that we may resolve the resulting conflict between the Circuits.").

<sup>143</sup> See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (citing *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982) (asserting that a GVR order, in appropriate cases, removes the "[p]otential for unequal treatment" that is inherent in [the Court's] inability to grant plenary review of all pending cases raising similar issues").

<sup>144</sup> See *id.* at 165 (discussing the Social Security Act's requirement that, in cases where a dependent claims entitlement to a decedent's Social Security benefits, the reviewing court determine paternity according to state law).

<sup>145</sup> *Id.* at 175

<sup>146</sup> *Id.*; see also *Hellman*, *supra* note 74, at 398 (stating that to treat one litigant differently than other litigants in similar cases "solely by reason of an accident of timing" would be "inconsistent with the obligation . . . to do justice in the case before [the Court]").

<sup>147</sup> *Lawrence*, 516 U.S. at 174-75.



government because “[t]hat disposition [had] the Government’s express support . . . .”<sup>148</sup> Therefore, the case where fairness is most easily used to justify a rationale-confession-of-error-GVR is where the Solicitor General recommends a GVR in light of his confession.

There are, however, many cases where the Solicitor General confesses error in the lower court’s rationale, but does not think reconsideration by the lower court is necessary and therefore does not suggest a GVR.<sup>149</sup> While the Solicitor General certainly cannot control how the Court responds to his position in any case, the Court may take the Solicitor General by surprise and GVR where the Solicitor General does not confess error in the judgment, but only the rationale, and does not suggest a GVR.<sup>150</sup> A GVR may be unfair to the government, therefore, where the government confessed error due to its special candor with the Court, and not because it believed the case should be remanded.<sup>151</sup> The Solicitor General may not feel personally slighted. Still, because his confession was likely motivated primarily out of honesty, and it resulted in an outcome creating more work for the government attorneys trying the case in the courts below, he may feel that the Court dealt with his honesty unfairly and created tension between his office and the office of the United States Attorney.<sup>152</sup> Such a disposition could have a chilling effect on the special candor that exists between the Solicitor General and the Court. One commentator rightly pointed out that “the Court must not abuse the Solicitor General’s candor in bringing errors to its attention, for the Solicitor General might respond by submitting less candid briefs, to the detriment of both institutions.”<sup>153</sup>

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<sup>148</sup> *Id.* at 174.

<sup>149</sup> *See, e.g.*, Brief for the Respondent in Opposition at 4–5, *Rosales v. Bureau of Immigration and Customs Enforcement*, 545 U.S. 1101 (2005) (No. 04–8465), 2005 WL 1330298 at \*4–\*5 (arguing that although the district court erred in finding that petitioner was not “in custody” for jurisdictional purposes in his habeas corpus petition, certiorari should be denied because petitioner could not prove his underlying habeas claim and the circuit court’s opinion was not binding precedent).

<sup>150</sup> *See Bruhl, supra* note 9, at 734 (emphasis in original) (“Given that the Court can GVR even when the Solicitor General, in the course of *opposing* a grant of certiorari, admits that there was some mistake in (only) the *rationale* below, the Solicitor General might sometimes be surprised indeed to learn that, against his will, he ‘confessed’ error.”); *see also* *Price v. United States*, 537 U.S. 1152, 1156–57 (2003) (Scalia, J., dissenting) (noting that the Court GVR’d even though the government insisted judgment was correct).

<sup>151</sup> *See, e.g.*, *Alvarado v. United States*, 497 U.S. 543, 544–45 (1990) (per curiam) (GVR’ing despite the Solicitor General’s argument that the Second Circuit’s error was harmless); *Rosenzweig, supra* note 20, at 2101 (noting that several members of the Court have admonished that GVR’ing in situations where the Solicitor has argued that the confessed errors are harmless risks cooling the relationship between the Solicitor General and the Court).

<sup>152</sup> *See Cox, supra* note 24, at 225 (stating that the United States Attorney may feel that “the rug [was] pulled out from under him”).

<sup>153</sup> *Rosenzweig, supra* note 20, at 2082.

Furthermore, as a matter of common sense, if the Court does not believe that the rationale below will likely change in light of the government's new position, then it clearly would not be "fair" to the petitioner to have the lower court reanalyze an inconsequential argument. In fact, it would generally be unfair to all involved. The lower court would have to spend its similarly scarce resources analyzing an issue that is ultimately not outcome determinative, and both litigants would have to spend time, effort, and money submitting briefs and arguing their positions a second time before the lower court.

### *B. Problems with GVR'ing Rationale-Confessions-of-Error*

#### *1. Actual Error?*

Significantly, the first problem with GVR'ing a rationale-confession-of-error is that there may be no error at all. In *Mariscal*, then Associate Justice Rehnquist advised that the best interest of the Court was not served by deferring to the Solicitor General's "suggestion that a Court of Appeals *may* have been in error after another representative of the executive branch and the Justice Department has persuaded the Court of Appeals to reach the result which it did."<sup>154</sup> That an error is *suggested* led the Court in *Young v. United States*<sup>155</sup> to require independent review of the merits of such suggestion rather than simply defer to the government attorney.<sup>156</sup>

Justice Scalia agreed with Justice Rehnquist's admonition in *Price v. United States*.<sup>157</sup> In *Price*, a grand jury indicted James Price for possession of cocaine base with intent to distribute and carrying a firearm in relation to a drug-trafficking crime.<sup>158</sup> Price was subsequently convicted for the lesser-included offense of simple possession of cocaine base, but also convicted on the firearm charge, and sentenced to 123 months in prison.<sup>159</sup> This sentence was longer than normal under the sentencing guidelines because the court used Price's misdemeanor conviction as a predicate offense for the firearm conviction, under 18 U.S.C. § 924(c)(1)(a)-(2).<sup>160</sup> Price appealed his

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<sup>154</sup> *Mariscal v. United States*, 449 U.S. 405, 406–07 (1981) (Rehnquist, J., dissenting) (emphasis added).

<sup>155</sup> 315 U.S. 257 (1942).

<sup>156</sup> *Id.* at 258–59.

<sup>157</sup> 537 U.S. 1152, 1152–53 (2003) (Scalia, J., dissenting).

<sup>158</sup> Brief for the United States of America at 2, *United States v. Price*, 31 F. App'x 158 (5th Cir. 2003) (No. 00–51078).

<sup>159</sup> *Id.* at 3.

<sup>160</sup> *See United States v. Price*, No. 00–51078, 2003 WL 25558524, at \*1 (5th Cir. Apr. 23,

sentence, claiming that his trial and appellate counsel rendered ineffective assistance of counsel by failing to challenge his sentence.<sup>161</sup>

The United States Court of Appeals for the Fifth Circuit held that Price's claim concerning his simple possession sentence was meritorious, but his claim concerning his firearm sentence was not.<sup>162</sup> Price subsequently petitioned the Supreme Court for a writ of certiorari.<sup>163</sup> The Solicitor General asserted that the federal prosecutor erred by failing to notify the trial court and Price that the government would seek a longer sentence using Price's simple possession conviction as a predicate for the firearm conviction.<sup>164</sup> The Solicitor General interpreted the sentencing statute to imply that a predicate offense supporting a longer sentence on a firearm conviction must be a felony, and Price's predicate offense was merely a misdemeanor.<sup>165</sup>

The Court, in a *per curiam* opinion, followed the government's characterization of the case and GVR'd the Fifth Circuit's denial of habeas relief.<sup>166</sup> In dissent, Justice Scalia argued that despite the Solicitor General's arguments to the contrary in his brief, the Fifth Circuit's judgment was "quite obviously correct."<sup>167</sup> Scalia pointed out that simple possession of more than five grams of cocaine is a felony under 18 U.S.C. § 924(c)(2) and 21 U.S.C. § 844(a).<sup>168</sup> And because Price stipulated that the police seized 6.7 grams of cocaine from him, he could subsequently be convicted of a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and 18 U.S.C. 801.<sup>169</sup> Therefore, Price's conviction was not in error, and the Court had no grounds to vacate a judgment that is not in error.<sup>170</sup>

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2003) (*per curiam*) (holding that acquittal of the predicate offense does not preclude conviction under § 924(c)(1)). Under 18 U.S.C. § 924(c), a defendant convicted for a "drug trafficking crime" who also uses or carries a firearm during the crime should be sentenced to no less than five years. 18 U.S.C. § 924(c)(1)(A) (2006).

<sup>161</sup> Brief for the United States of America at 3, *United States v. Price*, 31 F. App'x 158 (5th Cir. 2003) (No. 00-51078).

<sup>162</sup> *Price*, 2003 WL 25558524 at \*1.

<sup>163</sup> *Id.*

<sup>164</sup> See *Price v. United States*, 537 U.S. 1152, 1156 (2003) (Scalia, J., dissenting) (discussing petitioner's argument that "the maximum punishment for his . . . offense was one year because the Government did not file a notice . . . that it would seek to rely on petitioner's prior drug convictions to obtain an increased punishment").

<sup>165</sup> See *id.* at 1156-57 (noting petitioner's claim that his prior conviction was only a misdemeanor and could not be used to support his conviction under 18 U.S.C. § 924(c)).

<sup>166</sup> *Id.* at 1152 (*per curiam*).

<sup>167</sup> *Id.* at 1153 (Scalia, J., dissenting).

<sup>168</sup> *Id.* at 1157.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1153 (arguing that the Court has "no power to vacate a judgment that has not been shown to be (or been conceded to be) in error") (emphasis omitted).

The failure to identify an actual error displays the weakness of the Court's "reasonable probability" test for GVR'ing rationale-confessions-of-error. While it makes sense to remand a case in which the Solicitor General confesses error in the *judgment* under the rationale that it is "reasonably probable" that the Solicitor General is correct and the case's outcome will change on remand, determining the "reasonable probability" of a changed outcome in a rationale-confession-of-error seems much more speculative. In *Price*, the Fifth Circuit affirmed its original judgment on remand in a short, unpublished opinion that essentially agreed with Justice Scalia that its original judgment was correct.<sup>171</sup> Had the Court given greater review, it would likely have come to the same conclusion because the correct analysis was quite clear.<sup>172</sup>

Alternatively, had the Court shown less deference to the Solicitor General and denied certiorari in the absence of a conceded error in the *judgment*, much wasted time and resources could have been avoided. If the Court in fact understood the case to present a more complex solution than what both Justice Scalia and the Fifth Circuit thought, then granting plenary review would have been the more appropriate disposition. That the Court finally denied certiorari *after* the Fifth Circuit affirmed its original judgment and analysis on remand suggests that the case did not present such a complex legal question.<sup>173</sup>

## 2. Encouraging Manipulative and Strategic Litigation Practices by the Government

The Court's practice in GVR'ing rationale-confessions-of-error risks encouraging the government to act manipulatively when coming before it. When Simon Sobeloff was Chief Judge of the United States Court of Appeals for the Fourth Circuit, he once said, "[w]hen I was

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<sup>171</sup> *United States v. Price*, No. 00–51078, 2003 WL 25558524, at \*1 (5th Cir. Apr. 23, 2003) (per curiam). *petition for cert. denied* (U.S. Oct. 14, 2003) (No. 00–51078).

<sup>172</sup> I am assuming that the Court did not independently review the merits of the Solicitor General's confession of error in *Price* because of the language that it used in its opinion remanding the case compared to language used in the past when it has taken independent review. Compare *Price*, 537 U.S. at 1152 ("[C]ase remanded for further consideration in light of *United States v. LaBonte* and the Solicitor General's acknowledgment that the Court of Appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony . . .") (internal quotations and citation omitted), with *Levine v. United States*, 383 U.S. 265, 266–67 (1966) (per curiam) ("On the basis of [the Solicitor General's] concession, and upon consideration of the entire record, we vacate the judgment . . . [and] remand the case . . .") (emphasis added).

<sup>173</sup> See PERRY, *supra* note 85, at 253 (detailing the multifarious criteria that a case must meet in order to warrant plenary review and noting that issue-importance is one of the first criteria that must be met).

Solicitor General . . . I thought that confessing error was the noblest function of the office. Now that I am a Circuit Judge, I know it is the lowest trick one lawyer can play upon another.”<sup>174</sup>

The Solicitor General’s close relationship with the Court can obscure the boundary between the Solicitor General’s role as an advocate before the Court and a *de facto* justice.<sup>175</sup> As mentioned above, the Court has relied heavily, over the years, on the Solicitor General’s role as a “‘traffic cop,’ acting to control the flow of cases to the Court.”<sup>176</sup> This reliance has granted the Solicitor General significant power to shape the development of the law.<sup>177</sup> Because the Court is more likely to remand when the Solicitor confesses error, he may confess error merely to avoid a ruling adverse to the government’s interests.<sup>178</sup> Moreover, GVR’ing rationale-confessions-of-error gives the Solicitor the greatest opportunity to confess error strategically because he does not need to prove that the error was *controlling*, but merely that it existed.<sup>179</sup> This is essentially a blank check, which the Solicitor General can use to steer the law according to his own whim, or, perhaps, the executive’s.

The claim that the government may confess error manipulatively is, in most cases, only speculative. The Solicitor General’s motive

<sup>174</sup> Cox, *supra* note 24, at 225.

<sup>175</sup> See CAPLAN, *supra* note 28, at 6:

By screening cases that they believe are not ready for hearing by the Courts of Appeals or the Supreme Court, the Solicitor General and his aides help assure that judges rule on those the SG . . . consider[s] ripe for appeal. The SG’s influence at the Supreme Court is even more striking than his authority within the Executive Branch. He does not sit beside the Justices on the bench, but he stands in place of them when he decides which cases should be taken to the Court.

<sup>176</sup> *Id.* (quoting Justice Stewart).

<sup>177</sup> See *Casey v. United States*, 343 U.S. 808, 812 (1952) (Douglas, J., dissenting) (stating that the Solicitor General may confess error “to save one case at the expense of another”); Rosenzweig, *supra* note 20, at 2111 (“The need to consider and advance such long-term interests may lead the Solicitor General to confess error, even at the cost of sacrificing a victory in a particular case, in order to avoid an adverse ruling with potentially far-reaching effects.”).

<sup>178</sup> *Lawrence v. Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting) (stating that because the government is the Court’s most frequent litigant, “we can expect the Government to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its position ‘right’ in the courts of appeals”). An example of the government failing to “focus its energy upon getting its position right” in the courts below can be seen in *Knox v. United States*, 510 U.S. 939 (1993). In a 2001 article written for THE JOURNAL OF APPELLATE PRACTICE AND PROCESS, former Solicitor General Drew Days, III disclosed that the prosecutor trying the *Knox* case in the district court intentionally left out highly incriminating evidence of hard-core child pornography because the prosecutor wanted *Knox* to be “a test case” for the limits of the federal child-pornography laws. Days, *supra* note 50, at 515.

<sup>179</sup> See, e.g., Brief for the Respondent in Opposition at 4–5, *Rosales v. Bureau of Immigration & Customs Enforcement*, 545 U.S. 1101 (2005) (No. 04–8465), 2005 WL 1330298 at \*4–\*5 (failing to show that a controlling error existed).

behind confessing error in any particular case is not easily discerned.<sup>180</sup> However, there is at least one example of the Solicitor General using a rationale-confessing-of-error strategically. In *Knox v. United States*,<sup>181</sup> Solicitor General Drew Days confessed error in a case reviewing the scope of a federal child-pornography statute.<sup>182</sup> The statute prohibited knowingly receiving through the mail depictions of minors engaged in “sexually explicit conduct,”<sup>183</sup> which was further defined as any “lascivious exhibition of the genitals or pubic area.”<sup>184</sup> The United States Court of Appeals for the Third Circuit held that up-close depictions of underage girls’ pubic areas covered by underwear, bikinis, and leotards fell within the statute’s definition of sexually explicit conduct.<sup>185</sup>

Fearing that the Third Circuit’s expansive construction of the statute might render the statute unconstitutionally overbroad, and concerned that an adverse response by the Court might “jeopardize later child-pornography prosecutions,” Solicitor Days felt “that it was important to get the *Knox* case out of the Supreme Court as quickly as possible.”<sup>186</sup> Days therefore confessed error in the Third Circuit’s rationale, arguing that a construction of the statute different than the Third Circuit’s construction should control, and, without stating that his construction would change the case’s outcome, asked the Court to remand.<sup>187</sup> The Supreme Court granted Days’ request without

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<sup>180</sup> *Casey*, 343 U.S. at 809 (Douglas, J., dissenting); see also *id.* at 811–12:

A confession of error . . . may disclose an intervening decision on a question of law that undermines the lower court’s conclusion; it may disclose perjury by an important witness or newly discovered evidence; it may disclose other factors which weaken the conclusion of the lower court. Or it may disclose a maneuver to save one case at the expense of another.

<sup>181</sup> 510 U.S. 939 (1993).

<sup>182</sup> *United States v. Knox*, 977 F.2d 815, 817 (3rd Cir. 1992), cert. granted, vacated and remanded 510 U.S. 939 (1993) (analyzing the scope of 18 U.S.C. § 2252 (1994), a child pornography statute).

<sup>183</sup> 18 U.S.C. § 2252(a)(2)(A) (1994).

<sup>184</sup> 18 U.S.C. § 2256(2)(E) (1994).

<sup>185</sup> *Knox*, 977 F.2d at 817, 825.

<sup>186</sup> Days, *supra* note 50, at 515.

<sup>187</sup> Brief for the United States at 9–10, *Knox v. United States*, 510 U.S. 939 (1993), (No. 92–1183), 1993 WL 723366 at \*9–\*10. Solicitor Days’ narrower construction of 18 U.S.C. § 2256(2)(E) required an exhibition of a minor’s genitals or pubic area to contain two elements before it was prohibited as “lascivious”: (1) that the material include a visual depiction of the genital area, as opposed to depictions of the clothing covering those areas, and (2) that the material depict a minor “lasciviously engaging in sexual conduct” rather than lascivious conduct by the photographer, producer, or consumer of the material. *Id.* at 9. This construction of the statute was quickly rejected by the Senate in a unanimous resolution following the Court’s remand of the *Knox* case, which was ultimately joined by the House in a separate resolution. Days, *supra* note 50, at 516.

reviewing the statute or its legislative history.<sup>188</sup> Days' maneuver was therefore successful, and the Court never addressed *Knox*'s novel question.<sup>189</sup>

By taking a "longer view" of the law, and confessing error in the rationale of the Third Circuit's decision, Solicitor Days was able to control the future of the child-pornography statute in question.<sup>190</sup> The Court GVR'd despite the absence of any argument that the Third Circuit's strained interpretation of the statute led to an incorrect outcome. And, on remand, the Third Circuit affirmed its earlier decision, essentially concluding that under either Days' construction or its own, *Knox* could not escape conviction.<sup>191</sup>

As *Knox* shows, confessing error in a lower court's rationale without asserting that it was outcome determinative gives the Solicitor a great opportunity to control the evolution of the law. If Justice Scalia's prediction in *Stutson* proves true—that mechanically GVR'ing confessions of error will encourage the government to "wash out, on certiorari, disadvantageous positions it has embraced below"<sup>192</sup>—then we can expect future manipulation by the Solicitor General. The adverse effect of the government's efforts to manipulate the development of the law in the Supreme Court is also shown in the impact GVR'ing rationale-confession-of-error has on lower courts.

### 3. Negative Impact on the Lower Courts

GVR'ing rationale-confessions-of-error treats unfairly lower courts that allegedly made the error. As Judge Learned Hand said, "It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General."<sup>193</sup> Judge Hand's comment goes to several frustrations that the lower courts experience in being reversed and asked to reconsider their original

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<sup>188</sup> See *Knox v. United States*, 510 U.S. 939 (1993) (GVR'ing the case without further explanation).

<sup>189</sup> On remand, the Third Circuit affirmed its earlier decision unspectacularly, holding that under either its or the Solicitor's construction of the statute, *Knox*'s conviction could stand. *United States v. Knox*, 32 F.3d 733, 754 (3rd Cir. 1994). The Supreme Court denied *Knox*'s second petition for certiorari. *Knox v. United States*, 513 U.S. 1109 (1995).

<sup>190</sup> See Rosenzweig, *supra* note 20, at 2111 (describing the reasoning behind the government's tendency to take "a longer view" than other private litigants as being based in the fact that "a ruling in one case will often affect numerous other pending and future Government cases").

<sup>191</sup> *Knox*, 32 F.3d at 754. See also, Days, *supra* note 50, at 516 (stating that the Third Circuit affirmed *Knox*'s conviction on remand "irrespective of whether its reading of the statute or [Days'] controlled").

<sup>192</sup> *Lawrence v. Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting).

<sup>193</sup> Cox, *supra* note 24, at 224–25 (quoting Judge Learned Hand).

decision based exclusively on a suggested error by the Solicitor General.<sup>194</sup>

There may be confusion as to what the Supreme Court is asking lower courts to do. Rarely has the Court given any statement as to why they are GVR'ing in light of a confession of error, but instead robotically state, "The judgment is vacated, and the case is remanded . . . for further consideration in light of the position asserted by the Solicitor General . . . ." <sup>195</sup> Some have asked whether this disposition is a "polite form of reversal," inviting the lower court to reverse itself and save itself the embarrassment of future reversal.<sup>196</sup> However, many lower courts have felt free to affirm their earlier decision.<sup>197</sup>

Perhaps the more complicated problem is not in discerning what the Supreme Court is asking the lower court to do, but in determining what the lower court should look to for guidance in reevaluating a remanded case. At first, it seems obvious that the court should look to the Solicitor General's brief, since that is where the "position asserted" lies. But, in several cases the government, after remand, has not followed the Solicitor's theory of the case, but has instead asserted a third theory of the case. In *Knox*, for example, after the Supreme Court remanded the case in light of the Solicitor General's confession of error, the government retreated from the Solicitor's interpretation of the child-pornography statute in question and proposed an interpretation that was a compromise between the Third Circuit's earlier position and the Solicitor's position.<sup>198</sup>

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<sup>194</sup> See *Mariscal v. United States*, 449 U.S. 405, 406 (1981) (Rehnquist, J., dissenting) (questioning whether the "Court should mechanically accept any suggestion from the Solicitor General" that an error has occurred in a lower court).

<sup>195</sup> *Machado v. Holder*, 130 S. Ct. 1236, 1236 (2010).

<sup>196</sup> See Hellman, *supra* note 74, at 392 (suggesting that a GVR is a reversal changed in form but not in substance).

<sup>197</sup> See, e.g., *Nunez v. United States*, 546 F.3d 450, 453 (7th Cir. 2008) ("We do not think that the judgment is in error. Instead of sending readers to our first opinion, we will repeat much of what was said there. Recapitulation is better than leaving our reasoning scattered across volumes of the Federal Reporter."); *United States v. Knox*, 32 F.3d 733, 747, 754 (3d Cir. 1994) (rejecting the government's interpretation of 18 U.S.C. § 2252(a)(2)(A) and reaffirming its original position that a "lascivious exhibition of the genitals or pubic area . . . encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing and are not discernible.").

<sup>198</sup> See *Knox*, 32 F.3d at 746:

In its brief after remand, the government recedes somewhat from the view implied by its Supreme Court brief that the depiction must show the child subject to have some lascivious intent. The government now argues only that the material must depict some conduct by the child subject, which includes a "lascivious exhibition of the genitals or pubic area," and which appeals to the lascivious interest of some potential audience.



Similarly, in *Nunez v. United States*,<sup>199</sup> the Solicitor General suggested that the United States Court of Appeals for the Seventh Circuit erred in construing petitioner's waiver of appeal and collateral review.<sup>200</sup> Armando Nunez was charged with several federal narcotics charges and subsequently entered into a plea agreement.<sup>201</sup> As part of the agreement, Nunez waived his right to appeal or collaterally attack his sentence.<sup>202</sup> Yet, after receiving a 160 month sentence, Nunez asked his lawyer to file an appeal.<sup>203</sup> After his attorney refused, Nunez filed a collateral attack, arguing that his counsel provided ineffective assistance.<sup>204</sup> Both the district court and the court of appeals denied Nunez relief, "finding that petitioner had waived his right to raise even the ineffective-assistance claim on collateral review."<sup>205</sup>

Nunez filed a petition for certiorari, and the Solicitor General argued that the Seventh Circuit erred by denying petitioner relief upon petitioner's collateral-review waiver.<sup>206</sup> The Supreme Court agreed and GVR'd.<sup>207</sup> Yet, when the case came before the Seventh Circuit on remand, the government took still another position and "made the confession of error that the Solicitor General did not": that the collateral waiver did not bar an ineffective assistance of counsel claim.<sup>208</sup> The Seventh Circuit interpreted this new position as the government giving up its right to be protected from appeal following the plea agreement. Because of this change in position, the Seventh Circuit stated that it "would be inclined to conclude a second time that the waiver covers the conviction—but its scope no longer matters. For the United States, as the waiver's beneficiary, may freely give up its protection. And it has done so."<sup>209</sup> Therefore, in circumstances similar to *Knox* and *Nunez*, what the lower court is ultimately required to reevaluate is different from what the Supreme Court asked it to reevaluate. The lower court may feel as though it is being manipulated by the government and that the Court is condoning the government's turnabout litigation tactics,<sup>210</sup> affirming Simon

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<sup>199</sup> 128 S. Ct. 2990 (2008).

<sup>200</sup> Brief for the United States at 9, *Nunez v. United States*, 128 S. Ct. 2990 (2008) (No. 07–818), 2008 WL 2050805 at \*9.

<sup>201</sup> *Nunez v. United States*, 495 F.3d 544, 545 (7th Cir. 2007).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Nunez v. United States*, 128 S.Ct. 2990, 2990 (2008) (Scalia, J., dissenting).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (per curiam).

<sup>208</sup> *Nunez v. United States* 546 F.3d 450, 451–52 (7th Cir. 2008).

<sup>209</sup> *Id.* at 452.

<sup>210</sup> See Cox, *supra* note 24, at 225 (describing how a confession of error may lead the judge below to feel that the government has led her astray).

Sobeloff's remark that confession of error "is the lowest trick one lawyer can play upon another."<sup>211</sup>

Furthermore, Judge Hand's comment quoted above also highlights that the Court's mechanical acquiescence puts the power to control a case in the hands of the government.<sup>212</sup> The Court in *Young* held that the "public interest that a result be reached which promotes a well-ordered society is foremost . . . and the proper administration of the . . . law cannot be left merely to the stipulation of parties."<sup>213</sup> While neither the Supreme Court nor any lower court is completely handing their power to render decisions over to the government, mechanically rendering GVRs provides a significant opportunity for the government to control the development of the law. In some sense, therefore, the Court is abdicating its duty "to say what the law is."<sup>214</sup>

This problem is significant because, under the Constitution, the legislature and the judiciary, and not the executive, are empowered to create and develop the law.<sup>215</sup> Giving the executive branch the ability to develop law presents a substantial conflict among the co-equal branches of government.<sup>216</sup> A principal function of dividing governmental powers among three branches is to "protect individual liberties from government intrusion."<sup>217</sup> Where the executive branch is given power to shape the law, it is inclined to shape the law in its favor.<sup>218</sup> Furthermore, because private litigants are in court less frequently, they do not have the same opportunity to shape the law in the same way that the government does.<sup>219</sup> Therefore, government

<sup>211</sup> *Id.*

<sup>212</sup> *See id.* (quoting Murray Seasongood, a former Harvard law professor, as saying about defense lawyers, "You are not there to decide the case; the judge is to decide it. The system works best when each fellow performs his function and contributes to the result instead of trying to play God.").

<sup>213</sup> *Young v. United States*, 315 U.S. 257, 259 (1942); *see also* *Jean v. Nelson*, 472 U.S. 846, 867 (1985) ("[T]he proper interpretation of an important federal statute and regulation[ . . . cannot be left merely to the stipulation of parties."); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (holding that vacatur of a judgment under review cannot be justified by a mere agreement among the parties).

<sup>214</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See* Hessick, *supra* note 29, at 483–84 (arguing that the government uses confession of error to shape the development of the law by "steer[ing] an appellate court away from adopting an overly broad rule" that would injure future government litigation "and instead to issue a ruling based on narrow grounds").

<sup>215</sup> *See id.* at 491 ("[T]he creation and development of law are functions performed by the legislature and courts . . .").

<sup>216</sup> *See id.* ("[I]t is one of the basic principles of our government that the Executive should not perform legislative or judicial functions.").

<sup>217</sup> *Id.*

<sup>218</sup> *See id.* (arguing that "[a]llowing the [executive branch] to shape the criminal law poses a risk that the law will develop in ways that are less protective of defendants' rights and more likely to result in the imposition of criminal penalties").

<sup>219</sup> *See id.* (noting that private defendants "do not have the same opportunities or incentives [as the government] to use appellate strategies to develop the law in defendant-friendly ways").

attorneys and private litigants are on unequal footing in shaping the direction of the law inside the courtroom.<sup>220</sup> The Supreme Court's automatic GVR whenever the Solicitor General confesses error in a lower court's rationale only advances this unequal footing.

### III. A PROPOSAL: DENYING CERTIORARI INSTEAD OF GVR'ING WOULD SOLVE THE PROBLEMS WITHOUT ERODING THE BENEFITS.

Any solution to the problems created by the Solicitor General's rationale-confession-of-error must come by the Court's initiative. New statutes regulating the Solicitor General would likely undercut the flexibility and independence that is essential to the Solicitor General's office. As an extreme example, if a new statute prohibited confessions of error in general, the Court would suffer the most. The Court would be required to add to its already heavy workload the task of reviewing lower court decisions for error, a task that the Judiciary Act of 1925 essentially removed from the Court's responsibilities to free up its docket.<sup>221</sup> The public would also suffer because such a statute would essentially abrogate the Solicitor General's duty to seek fair and impartial justice and uphold the public's interest in those cases where a genuine, outcome-determinative error exists, or is reasonably believed to exist.

A more nuanced statute prohibiting all rationale-confessions-of-error would have the same effect. As described above, not every error is definitively outcome determinative or definitively harmless. Sometimes a genuine error occurs and the question that both the government and the Court must decide is whether that error *may have* affected the outcome.

An equally unworkable solution would be for the Court to return to its practice set out in *Young*: independently examining the Solicitor General's confessed errors. First, that the Court has not followed this standard in the past fifty years suggests its infeasibility. Second, the number of certiorari petitions has only increased since *Young*, and the Court has reacted by significantly changing the way it reviews petitions.<sup>222</sup> To ask the Court to return to a standard that was

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<sup>220</sup> See *id.* (concluding that “[a]ppellate strategy . . . is an unequal tool that may tend to push the criminal law in the government’s favor . . .”).

<sup>221</sup> See GRESSMAN, *supra* note 61, at 235 (describing the effect on the Court of the Judiciary Act of 1925, which reduced the Court’s mandatory docket and gave the Court much more discretion through the certiorari process).

<sup>222</sup> See PERRY, *supra* note 85, at 41–51 (describing the current process the Court goes through in vetting certiorari petitions, which was initiated by Chief Justice Burger in response to the increase in petitions).

established in a different time and under different circumstances would be fruitless.

Therefore, this Note proposes that the most pragmatic solution to the imbalance discussed above would be for the Court to simply deny certiorari where the Solicitor General cannot point to an outcome-determinative error of law in the court below.<sup>223</sup> In other words, Justice Scalia is correct that the Court should not GVR a case in which the Solicitor General confesses error unless the error is in the judgment.<sup>224</sup> Denying certiorari absent an error in the judgment would reduce the abuses that are present in the Court's current GVR practice, yet maintain many of its benefits.

As stated above,<sup>225</sup> if docket management is the Court's main concern, denying certiorari is a more direct solution because there is always a chance that the Court may see the same case in its certiorari pool again after it GVR's.<sup>226</sup> Moreover, if the Solicitor General understands that the Court is likely to deny certiorari unless he asserts a controlling error of law in the opinion below, the Solicitor will be much more definitive in confessing error. Therefore, cases like *Lawrence* and *Stutson* may still receive GVRs because in both cases a new and intervening legal standard raised doubts about the propriety of the decision below.<sup>227</sup>

Furthermore, any benefit that the lower court receives from "flagging a particular issue that it does not appear to have fully considered,"<sup>228</sup> is significantly outweighed by the detriments to the lower court from the government's turnabout litigation tactics, and

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<sup>223</sup> I do not intend to advocate the abolition of the other circumstances, outside of confession of error, where a GVR may be appropriate. See *Lawrence v. Chater*, 516 U.S. 163, 179–83 (1996) (Scalia, J., dissenting) (describing the various circumstances under which the Court has traditionally GVR'd); Bruhl, *supra* note 9, at 717–24 (analyzing the methods and frequency of the Court's GVR practice).

<sup>224</sup> See *Lawrence*, 516 U.S. at 191–92 (Scalia, J., dissenting) ("Henceforth, I shall vote for an order granting certiorari, vacating the judgment below without determination of the merits, and remanding for further consideration, only . . . where the respondent or appellee confesses error in the judgment below.").

<sup>225</sup> See *supra* Part II.A.1 (analyzing the argument that GVR practice helps to manage the Supreme Court's docket).

<sup>226</sup> See, e.g., *Stutson v. United States*, 522 U.S. 1135 (1998) (denying certiorari); *Knox v. United States*, 513 U.S. 1109 (1995) (denying certiorari). See also Bruhl, *supra* note 9, at 715 ("Each GVR represents a decision to devote a slice of the Court's limited capacity to attempting to do justice in an individual case . . .").

<sup>227</sup> In *Lawrence*, a new interpretation of the Social Security Act by the Social Security Administration after the Fourth Circuit denied petitioner survivors' Social Security benefits raised questions as to the correctness of that decision. *Lawrence v. Chater*, 516 U.S. 163, 165 (1996). In *Stutson*, an intervening Supreme Court precedent—*Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993)—called the Eleventh Circuit's opinion into question. *Lawrence*, 516 U.S. 163, 184–85 (1996) (Scalia, J., dissenting) (discussing the Eleventh Circuit's refusal to apply the *Pioneer* standard in *Stutson*, 516 U.S. 193 (1996)).

<sup>228</sup> *Lawrence*, 516 U.S. at 167.

the confusion as to what the Supreme Court expects on remand. Denying certiorari would also maintain the Court's adversity to merely correcting error, whereas regulating the Solicitor General's confession of error practice by statute or returning to the *Young* standard would force the Court to engage in much more error correction.<sup>229</sup>

Denying certiorari would also not debilitate the Court's interest in letting possible circuit splits percolate before they grant review. If a circuit split does in fact exist, the lower court will likely have a future opportunity to clarify its departure from other circuits on a particular issue in future cases.<sup>230</sup> Furthermore, in *Stutson*, where the court explicitly GVR'd to investigate a possible circuit split, its investigation was in vain because the Eleventh Circuit, on remand, vacated in part and reversed in part without a written opinion.<sup>231</sup> Thus, the Court's GVR was not helpful for that purpose.

Finally, while denying certiorari would not be as "fair" to the petitioner as GVR'ing, the Court's focus has generally not been so narrow as to remedy any one litigant's wrongs, but rather is to consider principles of law with wide public interest and impact.<sup>232</sup> Moreover, Chief Justice Taft succinctly encapsulated the scope of fairness to a litigant in the appellate process when he asserted that fairness to a litigant is ensured in "one appeal [to a circuit court], [and] not two."<sup>233</sup>

Denying certiorari in rationale-confession-of-error cases would significantly prevent government attorneys from engaging in manipulative litigation practices, decrease separation of power problems, and remove from the executive branch some of its ability to develop the law through controversial litigation tactics. It would also

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<sup>229</sup> See Bruhl, *supra* note 9, at 713 (noting that the GVR is really a kind of "error correction").

<sup>230</sup> See John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 182-83 (1982) (stating that while uniformity of law among the federal courts is good, judicial restraint in resolving conflicts among the courts of appeals may "produce the most desirable result").

<sup>231</sup> *United States v. Stutson*, 89 F.3d 853 (1996).

<sup>232</sup> See Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 798 (1983) (quoting Chief Justice Taft as saying, "[t]he function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are [sic] of wide public or governmental interest, and which should be authoritatively declared by the final court.") (citation omitted); see also GRESSMAN, *supra* note 61, at 64 (stating that a practitioner seeking the Supreme Court's review of his or her case should be aware that "the Court is not a tribunal of general errors and appeals, that it is a national tribunal that can afford to listen only to issues of national significance.") (quotation omitted).

<sup>233</sup> CAPLAN, *supra* note 28, at 6.

save lower courts the embarrassment of being both unnecessarily questioned and asked to redo work which was not truly erroneous.<sup>234</sup> If the government understands that the Court will not automatically GVR whenever it confesses error, it will focus much more energy on “getting its position ‘right’ in the courts of appeals.”<sup>235</sup> And, the Solicitor General would not be seen as a *de facto* justice, but as an advisor merely highlighting errors in the proceeding below. Thus, the Solicitor would remain as a valuable filtering tool in the Court’s certiorari evaluation process.

The Solicitor General or the Court, however, may not always be able to identify when an error in a lower court’s analysis was definitely outcome determinative. Yet, the analytical error may be so significant that there is a chance that it may have led to an error in the judgment. Therefore, some exceptions to this Note’s proposal are necessary. For example, the Court in *Youngblood* identified a significant error in the West Virginia Supreme Court’s analysis of petitioner’s conviction: they did not adequately evaluate *Youngblood*’s *Brady* claim.<sup>236</sup> From the Court’s perspective, this error may have resulted in an incorrect judgment or it may not have.<sup>237</sup> Denying certiorari would not have been appropriate in *Youngblood* because the error was so significant and the possibility that it was outcome determinative was so real.<sup>238</sup> Furthermore, *Youngblood* was a criminal case, in which an error in justice has much more serious and long-lasting effects, and the burden of ensuring a fair trial is much higher.<sup>239</sup>

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<sup>234</sup> See, e.g., *Price v. United States*, 537 U.S. 1152, 1157 (2003) (Scalia, J., dissenting) (“This Court has no grounds on which to set aside the Fifth Circuit’s judgment, since the Government has not conceded error in that judgment- and indeed insists that it is correct.”).

<sup>235</sup> *Lawrence v. Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting).

<sup>236</sup> *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) (per curiam).

<sup>237</sup> See *id.* at 870 (acknowledging that *Youngblood* presented a *Brady* claim and that it would be better for the Supreme Court of West Virginia to analyze the claim before the United States Supreme Court would reach the issue). Ultimately, it was decided that the error was outcome determinative because the Supreme Court of Appeals of West Virginia reversed itself on remand. *State v. Youngblood*, 650 S.E.2d 119, 122 (2007).

<sup>238</sup> For cases in which the error may not have been significant or outcome determinative, see *Machado v. Holder*, 130 S. Ct. 1236, 1236 (2010) (Roberts, C.J., dissenting) (noting petitioner never argued that they deserved a non-constitutional remedy to ineffective assistance of counsel, yet the Court GVR’d for the Fourth Circuit to consider this claim); *Price v. United States*, 537 U.S. 1152, 1157 (2003) (Scalia, J., dissenting) (noting that the petitioner could not be given the maximum sentence for carrying a weapon during a “drug trafficking crime” because he was only found guilty of simple possession and not drug trafficking, yet the applicable statute did not require petitioner to be convicted of committing a “drug trafficking crime” but only found beyond a reasonable doubt to have committed such a crime while carrying a gun).

<sup>239</sup> See *Cox*, *supra* note 24, at 223:

Thus, a bright-line requirement that the government must identify an error in the judgment would not be useful in a case like *Youngblood*. Rather, an exception should apply that maintains the Court's "reasonably probable" touchstone from *Lawrence*, yet applies additional criteria encouraging the Court to be more skeptical of the Solicitor's confessions. Such an exception may look like this: where (1) the petitioner claims that a constitutional right or standard was violated or ignored in a prior proceeding, or by some other government actor such as a police officer, (2) the lower court did not fully answer that claim, and (3) it is reasonably probable that the legal standard that the lower court did not consider, or ignored, would change the case's outcome, a GVR for fuller consideration is appropriate.

Such an exception would allow the Court to remand *Youngblood* but deny certiorari in, for example, *Machado*, *Price*, and *Alvarado*. In *Machado* and *Price*, the petitioner never asserted that a constitutional right was ignored or violated by the trial court or court of appeals.<sup>240</sup> In *Alvarado*, the petitioner did claim that his Sixth Amendment right to an impartial jury was violated, and the Second Circuit did not properly address this claim, but, as the Solicitor General pointed out, reconsideration would not have changed the case's outcome because the petitioner failed to prove a *prima facie* *Batson* violation.<sup>241</sup>

Furthermore, this three-prong proposal would leave non-constitutional errors, like in *Knox*, *Lawrence*, and *Stutson*, under the general proposal of denying rationale-confessions-of-error unless the Solicitor General can assert that the lower court's erroneous rationale was outcome determinative. In other words, where the error is non-constitutional, the error must control the judgment. This would limit

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It is in the criminal cases that the differences between the government's role, as we conceive it, and the role of the all-out advocate, become most apparent. In the criminal cases an extraordinary amount of time is spent in looking to see whether the accused really did have a fair trial, and whether the conviction really should stand.

<sup>240</sup> See *Machado*, 130 S.Ct. at 1236 (remanding for the Fourth Circuit to reconsider a *non-constitutional* remedy); *Price*, 537 U.S. at 1152 (remanding for the Fifth Circuit to reconsider its application of a federal statute).

<sup>241</sup> See Brief for the United States in Opposition at 14, *Alvarado v. United States*, 497 U.S. 543 (1990) (No. 89-6985):

[W]hile the Second Circuit's analysis was facially different from the analysis this Court prescribed in *Batson* . . . few if any cases will come out differently under the two approaches. As we have indicated in our analysis of the case under the principles of *Batson*, this is certainly not a case that would be decided differently depending on which route the court took to its decision.

the breadth of cases in which the government can behave strategically. While the Solicitor may still confess error strategically by pointing to an ignored or violated constitutional right or standard, GVR'ing is justified on the idea that constitutional rights or standards must be evaluated much more earnestly and thus should not require the Solicitor to prove that the constitutional error was definitely outcome determinative. The Solicitor, however, need only show that it *could have been* outcome determinative.

Therefore, this proposal would make the Court's response to the Solicitor General's confessions of error much more thoughtful and nuanced, and much less mechanical. It would ensure that lower courts properly reconsider only those cases where the possible error is serious enough to warrant reconsideration. And, it would ensure that the Supreme Court closes those cases whose errors are inconsequential, despite what the Solicitor's Office may believe.

#### CONCLUSION

The Supreme Court's mechanical deference to the Solicitor General whenever he confesses error in a lower court's rationale has created or exacerbated various problems. Principally, it allows the government greater opportunity to engage in manipulative and strategic litigation practices, gives the Solicitor General substantial control over the development of the law, and negatively impacts the relationship of the Supreme Court with lower courts. These problems overbalance the benefits of GVR'ing the Solicitor's rationale-confessions-of-error. Therefore, this Note proposes that instead of according the Solicitor so much deference, the Court deny certiorari in rationale-confession-of-error cases where the Solicitor cannot show that the error controlled the judgment, or cannot show that (1) the petitioner was denied a constitutional right or standard in a prior proceeding, or by some other government actor such as a police officer, (2) the lower court did not fully answer that claim, and (3) it is reasonably probable that the legal standard that the lower court did not consider, or ignored, would change the case's outcome.

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