INTRODUCTION

When considering the ability of this nation’s highest court to control its docket, the first procedure to leap to mind is most likely the Writ of Certiorari. By denying certiorari review, the Court promptly removes a case from its docket without ever speaking on the issues it presents. However, while it might be the most familiar, denying cert is not the only method available to the Court for prompt disposal of appeals. One of the less familiar, though prevalent methods[1] is the “GVR,” which is an acronym for a procedure whereby the Court grants certiorari, vacates the judgment below, and remands the case for further consideration in light of developments during the pendency of the appeal. The modern GVR is a remand without a finding of error by the Court,[2] and it commonly takes place before the merits are fully briefed to the Court.[3] As a result of these characteristics, even though the Court has spoken about the underlying case when it uses the GVR, exactly what has been said about the merits (if anything) is often unclear.

Because of its peculiar nature, the GVR has been the subject of both criticism and praise. Those who support the procedure note its capacity for conserving judicial resources, flagging issues for review on remand, procuring the insight of the lower court on an issue before it is ruled on definitively, and correcting error in a way that preserves fairness among similarly-situated litigants.[4] In some cases, the GVR helps to preserve the assumptions and principles attendant to federalism and the appellate review system.[5] However, critics note that the GVR
can create confusion and uncertainty on remand[6] and that it is susceptible to abuse[7]. The criticism has been especially strong with regard to GVR’s issued in response to a “confession of error” by the party prevailing below—most frequently the Solicitor General of the United States.[8] In such cases, the potential for manipulation seems especially pronounced. By accepting the Solicitor General’s confession without any inquiry into the merits, the Court risks blurring the separation of powers between the judiciary and executive, potentially abdicating its responsibilities to clarify the meaning of unclear laws. However, the Court continues to view this as an appropriate use of its GVR authority.

While it is fair to say that the GVR is a useful (and perhaps) necessary part of the Court’s docket management arsenal in most cases, its use in response to confessions of error by the Solicitor General should be reconsidered in cases where there is a circuit split as to the “error” confessed. In these cases, the Supreme Court’s use of the GVR mechanism, based on a change in legal position by the government, neither serves judicial efficiency nor assures consistent application and interpretation of the law. Instead, it leads to legal uncertainty, circuitous litigation, and an erosion of the traditional respect afforded to lower court decisions. Part I of this note will discuss the advent of the modern no-fault GVR, and by drawing distinctions among its different applications, will draw out the differences of opinion within the Court as to its proper use. These differences tend to focus on GVR’s for “confession of error,” which remains the most controversial application of the procedure. Part II will look at how the GVR is being employed by the modern Court and its impact on the legal landscape, with an emphasis on the error-correcting capacity of the GVR. Part III will turn to the other benefits commonly associated with the GVR: conservation of judicial resources and proper delegation of information-gathering responsibilities. Taken together, these benefits paint a positive portrait of
the GVR. However, Part IV describes how the “confession of error” GVR may lead to undesirable results where there is a circuit split regarding the error confessed. Therefore, Part V discusses the potential alternatives available to the Court for dealing with these cases.

I. THE NO-FAULT GVR: “INTERVENING EVENTS” AND “CONFESSIONS OF ERROR”

It is difficult to appreciate the unique difficulties posed by the Court’s piecemeal embrace of the no-fault, “confession of error” GVR without first understanding its relation to the GVR power more generally.

The modern court finds the authority for its GVR power at 28 U.S.C. § 2106, which provides that the Court “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 . . . require such further proceedings to be had as may be just under the circumstances.” Notwithstanding notable dissenting views among the justices, which will be discussed in greater detail below, a majority of the Court appears to recognize no limitation on its GVR authority beyond the broad phrasing of this statute. Thus, it is no surprise that the Court has used the GVR to remand in a variety of contexts. Indeed, the practice appears alive and well, and it shows little sign of ceasing in the future. As the Court quite accurately states, what is perhaps most striking about the Court’s GVR practice is the “substantial level of agreement shared by all Members of [the] Court” that it is a proper case management method in many instances.
However, this generally harmonious view can obscure important points of contention regarding the appropriateness of GVR orders in certain limited contexts. To understand this divide within the Court, it is helpful to categorize the potential GVR formulations available to the Court. One aspect of this division relates to whether the Court should issue a GVR without some investigation into the merits of the underlying case.[15] The other deals with whether a confession of error (especially without any investigation of the underlying merits) is an appropriate grounds for GVR, as opposed to the more common and less controversial application of the GVR to address intervening legal developments during the appeal.[16] Together, the use of the “no-fault” GVR mechanism to respond to confessions of error by the Solicitor General has been a topic of concern for some on the Court, as opposed to the more mundane “intervening events” GVR.[17]

A. The “Intervening Events” GVR

In the case of the “intervening events” GVR, some legal development occurs while the case is on appeal that casts doubt on the decision below.[18] This can happen in any number of ways, from a changed administrative interpretation[19] to the enactment of a new statute[20] during the pendency of the appeal. However, the typical case deals with intervening judicial precedent (often the Court’s own) that calls into question the result or reasoning below. This is clearly illustrated by the Court’s opinions in Henry v. City of Rock Hill.[21]

In Henry, which involved the rights of anti-segregation protesters, the South Carolina Supreme Court entered judgment against the protesters in December of 1962.[22] In response to the protesters’ Petition for certiorari review, the United States Supreme Court issued a GVR in October of 1963, returning the case to the South Carolina courts “for further consideration in
light of [the Court’s intervening opinion in] *Edwards v. South Carolina*.”[23] The Court decided *Edwards* two months after the state supreme court’s ruling in *Henry*. Thus, by using the GVR, the Court gave the South Carolina court system the first opportunity to determine the effect of the *Edwards* case on their decision in *Henry*.[24]

The Court widely employs the “intervening events” GVR in cases like *Henry*, where an intervening legal development calls into question the decision below, and such GVR’s are rarely the subject of controversy. From 2001 to 2003, the Court issued over 160 GVR’s, and all but three of these were based on intervening Supreme Court precedent.[25] The prevalence of such GVR’s can be explained in part by the Court’s practice of “hold[ing] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted” for a large-scale GVR once the Court has decided the analogous case.[26] While this practice sometimes yields surprising results, both in terms of the Court’s disposition of the held cases and in terms of the result on remand,[27] a relatively liberal standard for granting GVR’s in this context virtually assures that the procedure will continue.[28]

**B. The “Confession of Error” GVR and the Lack of Fault**

The less common form of GVR[29] is based upon a confession of error by the Solicitor General[30] in cases where the government prevailed below.[31] It is this form of GVR that has sparked much of the recent debate within the Court.

1. Mechanics of the “Confession of Error” GVR

Because the “confession of error” GVR tends to arise in highly technical and fact-specific contexts, there is no single, prototypical case that can be used as an example. Instead, the
following explanation outlines the general process by which the “confession of error” GVR comes to the Court’s attention.

In general, this type of GVR arises where the government has prevailed below on a particular legal theory (A), leading to a particular outcome (X). The losing party files its Petition for Writ of Certiorari with the Supreme Court, and the Solicitor General’s office begins a response to the Petition. It is during this process, presumably, that the Solicitor concludes that the court below has erred in its decision. In such cases, the Solicitor can include a “confession of error” in the response that it submits to the Court, requesting either a GVR or a denial of the Petition. Commonly, GVR is requested if the error goes to the ultimate outcome of the case (i.e. the court should have come to outcome Y instead of X)[32], while the Solicitor will commonly request denial of certiorari if it believes that the error goes only to the theory used below, but not to the ultimate outcome (i.e. the court could have relied on theory B instead of theory A to get to outcome X).[33] The Supreme Court has issued GVR’s in response to both types of requests in the past; it is less clear, however, how frequently they have denied certiorari instead.[34]

2. The “Fault” Problem

Obviously, there is no inherent problem with the Solicitor General confessing error in cases where the government prevailed on a faulty legal theory—if anything, this seems like a practice that the Court would welcome. In fact, the controversy within the Court is less about the Solicitor’s practice of confessing error than it is about the Court’s practice of GVR’ing cases in response to such confessions with, at most, a cursory review of the underlying facts and without any determination on the underlying merits.[35]
It is relatively clear that the modern, no-fault GVR “does not amount to a final determination on the merits.”[36] Instead, it reflects the Court’s appraisal that there is a “reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.”[37] One way that this probability may come to the Court’s attention is through “plausible confessions of error.”[38] If the Court believes that reconsideration “may determine the ultimate outcome of the litigation,” and if “the equities of the case” do not weigh against it, then a GVR order is “potentially appropriate.”[39]

This unique precedential status (or, more accurately, lack thereof) is at the core of the modern debate over the Court’s GVR practice. The history of the GVR reveals that its “no-fault” nature was not recognized in the first half of the twentieth century.[40] Instead, such remand orders resulted from at least summary consideration of the merits,[41] which the justices felt compelled to undertake as part of their duties.[42] Even with the advent of the no-fault GVR, members of the Court expressed differing opinions about the precedential value of such dispositions.[43] Because this “no-fault” concept has not always been a part of the Court’s GVR practice, history does not provide a settled tradition for determining the appropriate use of the GVR or the appropriate response on remand.

This uncertainty leaves room for debate as to several ills that may arise from overuse of the GVR in response to confessions of error by the Solicitor General. In particular, this use of the GVR raises “separation of powers” concerns[44] as well as questions regarding the Court’s proper role in clarifying the law and correcting error.[45] There are some more pragmatic concerns as well, relating to the potential for abuse that inheres in the “confession of error” GVR, which may enable the Solicitor General to strategically manipulate the Court’s
That is, by confessing error and prompting the Court to employ its GVR power, the Solicitor General may postpone a potentially adverse and definitive statement of law on the matter, preserving the government’s freedom of action in future cases. Further still, where the Solicitor General confesses error but then insists that the result below can stand notwithstanding the error, the government might not only avoid a definitive ruling by the Court—it might preserve the favorable outcome below as well.

By looking at how the Court has employed this power, and how the lower courts have responded on remand, it is clear that the GVR frequently serves its purpose as a mechanism for judicial efficiency and error correction. However, several glaring exceptions nonetheless suggest that more should be done to limit the use of the practice in cases involving circuit splits.

II. THE ERROR-CORRECTING FUNCTION OF “CONFESSION OF ERROR” GVR’S

The aims of the GVR, drawn from the Court’s own pronouncements and from the arguments of commentators, include correcting error, conserving judicial resources, obtaining information from the lower courts, and assuring equal treatment of litigants. Unsurprisingly, where the Court GVR’s a case in response to a confession of error, correcting that error is likely the most important goal in the Court’s decision. As such, it is also the most important factor to consider in assessing whether such GVR’s are justified—that is, do “confession of error” GVR’s actually correct the lower court errors that they are intended to correct?

A. Defining Changes in the “Ultimate Outcome” on Remand

From its own statements, we know that the Court is expressing its opinion about the probability of a different result on remand when it exercises its GVR power. Under the
Court’s stated GVR standard, GVR’s are proper “where it appears that a . . . redetermination may determine the ultimate outcome of the litigation.”[52] Unfortunately, even this apparently simple measure requires further refinement to determine what types of changes qualify as changes in the “ultimate outcome” on remand.[53] To use the terminology from the preceding section, the Court’s concept of a change in the “ultimate outcome” could be limited to those situations where the lower court reaches outcome Y on remand instead of outcome X. This definition would exclude those situations where the lower court on remand reaches the same outcome (X) as it did in the vacated case, but does so by relying upon theory B instead of theory A.

A concrete example can help to clarify this definitional problem. In the 2005 case of Rosales v. Bureau of Immigration and Customs Enforcement,[54] the Solicitor General confessed error in the case below, but nevertheless defended the result.[55] Adrian Rosales, while serving a sentence in Texas on kidnapping charges, faced INS removal proceedings and ultimately a removal order. After some intervening proceedings, Rosales filed a petition for a writ of habeas corpus, claiming that his due process rights were violated by the Immigration Judge.[56] The district court dismissed Rosales’ petition for lack of jurisdiction, finding that he was not “in custody” as required for purposes of habeas relief—although he was serving a sentence for kidnapping, he was not jailed on the immigration charge that was the basis of his complaint.[57] The circuit court affirmed and Rosales petitioned for certiorari. In the United States’ Brief in Opposition, the Solicitor General took the position that the district court had erred in its conclusion that Rosales was not “in custody;” nevertheless, the Solicitor went on to note that the circuit court opinion was unpublished and non-precedential[58] and argued that Rosales was not entitled to habeas relief on his underlying claim. As such, the Solicitor asked
the Court to deny Rosales’ petition; instead, the Court GVR’ed the case. On remand, the proceedings played out essentially as the Solicitor General had predicted: the lower court agreed that the removal order placed Rosales “in custody” for habeas purposes but found that he could not make the requisite showing for habeas relief.[59]

On one common understanding of the phrase, “ultimate outcome,” the outcome seems to have remained unchanged in this case—Rosales still did not receive his writ and still faced removal, even after the GVR. That is, the lower court still reached “outcome X” on remand. As such, it is questionable whether Rosales can be tallied as an error-correction success. However, it seems unlikely as a practical matter that the Court expected anything other than this result on remand—surely the Justices were aware that Rosales’ chances of receiving his writ were minimal, even in the absence of the error.

Instead, this case suggests that the Court means something else by its GVR standard. Perhaps what the Court really means is that GVR is appropriate where correcting the error will open up new analyses on remand that will be properly outcome-determinative, even if it suspects that the practical outcome will remain unchanged. For example, correcting the error in Rosales allowed the lower court to proceed beyond the jurisdictional question and consider the merits of the habeas petition, which was outcome-determinative by definition. In this sense, the “redetermination” on remand technically did “determine the ultimate outcome of the litigation”—it just did so in a way that reached the same practical result as in the preceding case.

Given this lack of clarity as to when a GVR is outcome-determinative and when it is not, it is instructive to consider how GVR’ed cases fare under both measures.[60] The broad
measure, which seems to capture the Court’s intent in *Rosales*, will reflect solely whether the lower court in a GVR’ed case agreed that it had erred in the prior proceedings and conducted further review, while the narrower measure will look at whether the outcome on remand placed Petitioner in a substantively different position than she would have occupied absent a remand.[61]

B. Analyzing the Cases

Since 1990, the Supreme Court has GVR’ed in response to a position taken by the Solicitor General at least thirty times.[62] Of these cases, twelve effectively disappear on remand, disposed of in some manner that is not reflected in the major case-reporting services.[63] In another three cases, the lower courts spilled little ink on remand, disposing of the cases with brief orders—sometimes as little as a single word.[64] Another case represents something other than the traditional no-fault GVR, with the Court choosing to remand with instructions to vacate a portion of a damages award with prejudice[65]—because this method of disposition differs in important ways from the usual GVR, this case is excluded from the analysis.[66]

Out of the seventeen remaining cases where the result on remand is clear, the lower court agreed with the confession of error on remand and conducted or ordered further review on fifteen occasions.[67] This suggests that the Court is generally successful at estimating the probability that a lower court will adopt the Solicitor’s confession and conduct some further analysis of the case. Thus, if this is the appropriate metric for evaluating whether a “redetermination [will] determine the ultimate outcome of the litigation,”[68] then the GVR is serving its error-correcting function relatively well.
The numbers are slightly less impressive with regard to whether the “ultimate outcome” changed in any substantive fashion. In at least six of the seventeen cases, the practical result remained unchanged in any material way after the GVR.[69] Even if we improbably assume that all of the cases in which tracking is impossible resulted in a change in the practical result (increasing the sample back to 29 cases), this would still indicate a roughly twenty percent likelihood that a GVR ended with the exact same practical result on remand (and the real percentage is likely higher). Thus, if a change in the practical outcome is the appropriate means of evaluating the GVR’s error-correcting success rate, there is likely some room for improvement.

C. Placing the Results in Context

Even a critic of GVR’s has to admit that these numbers demonstrate an impressive track record for the GVR as an error-correction mechanism. However, GVR’s cannot be evaluated fairly without considering the alternatives available to the Court in managing its docket. For example, if the Court ruled on the purported error itself or otherwise made the GVR binding on the lower court, it would eliminate those cases where the lower court refuses to recognize the error on remand. Thus, such a procedure would be 100% effective at removing those errors from the record. On the opposite side, if the error is not of a type that would affect the outcome below, the Court’s resources might be preserved more effectively by simply denying certiorari rather than employing a GVR. This would eliminate those relatively common cases where the Court GVR’s a case, but the practical outcome below remains unchanged. While this would fail to correct perceived errors in lower court opinions, this is not unfamiliar territory for the legal community—it has long been accepted that a denial of certiorari does not carry precedential
value, and it therefore it would not place the Court’s imprimatur on the alleged error.[70] Thus, while it is true that the GVR seems to function as intended in many cases, this does not necessarily mean that it is the best possible alternative in all cases.

III. ADDITIONAL FUNCTIONS: RESOURCE-CONSERVATION AND INFORMATION GATHERING

As the preceding section demonstrates, the error-correcting virtues of the GVR, while impressive, are not so great by comparison to the available alternatives that the process would exist without the influence of other considerations. Chief among these considerations is the conservation of the Court’s limited time and resources. Indeed, this resource conserving function of the GVR was the listed first by the Court in its enumeration of the GVR’s “virtues” in Lawrence.[71] However, while it is undoubtedly true that the Court can conserve its own resources by using the GVR, the Supreme Court does not exist in a vacuum. Instead, by using the GVR, the Court pushes the “delay and further cost entailed in a remand” onto its lower court brethren.[72] As such, it is important to consider how GVR’s in the confession of error context impact the docket of both the Supreme Court and of lower federal courts on remand.

A. Comparative Caseloads

The nine-member Supreme Court today faces a docket of approximately 7,000 cases per term.[73] However, only about 100 of these cases will be granted plenary review and oral argument, while another 50 to 60 are disposed of using other mechanisms (presumably including, and perhaps primarily comprised of, the GVR).[74] While the Supreme Court does not divide its work among smaller panels, giving each Justice some responsibility for the entire
caseload, the Justices are not asked to write separate opinions in every case. Thus, excluding their individual dissents and concurrences, each justice’s chambers would be responsible for drafting an average of 11 opinions per term in cases granted plenary review, if the responsibilities were equally distributed.

Compare this to the other federal courts. Excluding the Federal Circuit, there are 167 authorized judgeships on the United States Circuit Courts of Appeals. In 2004, these judges received almost 63,000 appeals, or 1,127 appeals per three-judge panel.[75] They terminated 27,438 cases on the merits after either an oral hearing or submission on briefs; of these, 9,250 resulted in signed, written opinions and about another 17,000 resulted in written and reasoned, though unsigned opinions.[76] This means that if these appeals were evenly distributed among the judges, each chambers would have produced at least 157 written and reasoned opinions in 2004. This number would not include any additional dissenting or concurring opinions that the judges might prepare. The almost 680 federal district court judges perform a variety of tasks, including conducting trials, that are less readily comparable to the appellate courts. Even so, the sheer volume of their caseload can provide some portrait of their time constraints: in 2004, over 352,000 cases were filed and over 317,000 were terminated—or about 518 and 466, respectively, per district court judge.[77]

While numbers do not say everything about the differences between the federal courts, they at least demonstrate that resources are scarce at all levels, and quite probably that resources are scarcer in the lower federal courts than in the Supreme Court. This makes the Court’s resource conservation rationale somewhat less palatable. While GVR’s permit the Court to lighten its caseload, they also throw cases back to the lower courts, which are already awash in
their own docket troubles. If the resource conservation rationale is sensible, then, it must also take into account additional the different resources and constraints at the different levels of appellate review—the numbers alone cannot justify it.

B. Capacity for Review

Shifting focus to the different information-gathering capacities of the various federal courts makes the resource conservation rationale more convincing. As noted above,[78] most of the Court’s “confession of error” GVR’s result in the lower court recognizing the error and either conducting some further inquiry or summarily disposing of the case. Because these GVR’s tend to open up new inquiries that the lower court may not have considered in the original case,[79] it may be more efficient to allow the lower courts to conduct those inquiries in the first instance. For example, if the case would require additional fact-finding as a result of the confessed error, then it would make more sense for the appellate courts to send the case back to the appropriate fact-finder.[80] Even though that fact-finder may carry a heavier workload than the higher courts, it is nonetheless better-equipped to handle the additional fact-finding necessary to correct the error.[81] The procedure also allows the Court, whose review is limited by rule to the questions presented in the petition for certiorari,[82] to seek review on questions that it might be practically equipped to, but nonetheless procedurally barred from answering.[83]

While neither the error-correction nor the resource-conservation rationale is wholly convincing standing alone, when combined they make the GVR appear more acceptable as an alternative to summary merits review or outright denial of certiorari in many cases where the Solicitor General has confessed error.
IV. POTENTIAL FOR ABUSE: THE ERROR-PRESERVING CAPACITY OF GVR’S

Given the relative success of GVR’s in correcting lower court error on remand and properly allocating judicial resources, the process may seem entirely innocuous. Indeed, this conclusion is likely warranted in the mine run of cases, where errors that are clear and/or of limited applicability are confessed and easily corrected on remand.[84]

Unfortunately, the Court has occasionally used the GVR in cases that do not present such limited questions, and in these cases, the results below have sometimes created or perpetuated legal confusion that would have been better resolved by the Court in the first instance.

A. The “Sneaky” Circuit Split: Munoz-Romo and Richardson

One of the most questionable uses of the “confession of error” GVR arises where there is a circuit split on the “error” confessed by the Solicitor General. In such situations, the potential for the Solicitor to “game the system” by admitting error is perhaps at its most pronounced. Unlike most litigants, whose stake in the outcome is limited to its effect on their particular interests at the time of the case, the government is the quintessential “repeat player” in the court system. Thus, if the Solicitor General (and the government it represents) is calculating in its litigation strategies,[85] it can afford to be so in a manner that employs longer time-horizons and wider geographic boundaries than virtually any other litigant.[86]

While the political philosophies guiding the Solicitor General may change as presidential administrations change, [87] which could limit the Solicitor’s ability to pursue a long-term political agenda, there is at least one goal that Solicitors General of all political stripes would be
likely to pursue: namely, the preservation of their own discretion. The confession of error can serve as a tool for protecting that discretion by avoiding a definitive statement of law by the Supreme Court, even at the cost of an unfavorable result in a particular case. Specifically, although a “confession of error” GVR might limit the government’s available options in one circuit, a decision by the Supreme Court would limit its options in all circuits. Thus, the “confession of error” can operate as a sort of “damage control,” keeping the Court from broadly constraining the government’s discretion in all circuits at once. Whether the Solicitor General consciously uses the confession of error in this way or not, it is clear that the GVR has sometimes operated to preserve the government’s prosecutorial discretion, as it did in *United States v. Munoz-Romo.*

1. *Munoz-Romo*

The *Munoz-Romo* cases revolved around the availability of multiple sentences for federal firearms violations. Francisco Munoz-Romo received two sentences under the applicable statute: one for being a felon in possession and another for being an illegal alien in possession. He appealed his conviction and ultimately filed for certiorari review before the U.S. Supreme Court. In its response, the Solicitor General “confessed” its belief that Congress did not intend to authorize multiple prosecutions under the statute, creating a double jeopardy error in Munoz-Romo’s multiple prosecutions. The Supreme Court GVR’ed the case “for further consideration in light of the position asserted by the Solicitor General in his brief.” On remand, the circuit court accepted the Solicitor’s confession of error and directed the district court to vacate Munoz-Romo’s sentence on one of the duplicative counts.
However, at the same time that 
Munoz-Romo was awaiting review by the Supreme Court, there was an active circuit split on the underlying issue. The Fifth Circuit, where Munoz-Romo was prosecuted, had taken the same position as the Eighth Circuit[95] in holding that multiple prosecutions were available for different offender statuses under the firearm statute. However, the Eleventh Circuit, which the Solicitor General quoted in its brief to the Supreme Court, disagreed and held that multiple prosecutions were not available.[96] Given the Court’s concern with addressing circuit splits on “important matter[s],”[97] its decision not to conduct merits review in this case is striking.[98] As a result, even though the government could no longer seek multiple sentences in the Fifth Circuit after 
Munoz-Romo, it remained free to do so in other circuits—in this sense, 
Munoz-Romo demonstrates the potential for “confession of error” GVR’s to preserve prosecutorial discretion for the federal government.

In the years to follow, there were at least two additional instances of similar multiple prosecutions, one in the Fourth Circuit[99] and one in the Eighth Circuit, discussed in greater detail below.

2. 

Richardson

In 2003, when Earnest Richardson was indicted and subsequently prosecuted for being both a felon and a drug user in possession of a firearm, the same circuit split that was at issue in 
Munoz-Romo remained active (though substantially weakened).[100] In fact, when Richardson appealed his conviction to the circuit court, the panel concluded that it was bound to affirm his convictions under its holding in 
United States v. Peterson,[101] a 1989 case that had been cited in the 
Munoz-Romo court’s post-GVR opinion.[102]
Two of the judges in Richardson wrote a concurring opinion to express their disagreement both with the ultimate result and with “the government’s inconsistent approach” to firearms prosecutions.\[103\] Citing the Solicitor General’s confession before the Supreme Court in Munoz-Romo, these judges stated that it was “inappropriate for the government to advance diametrically opposed theories as to the interpretation of a single criminal statute.”\[104\] They were particularly concerned that the confession of error had “effectively caused the Supreme Court to forgo the opportunity to review a circuit split on an issue of constitutional significance.”\[105\]

Ultimately the court decided to rehear the case \emph{en banc}, at which time it overruled its prior holding in Peterson and remanded Richardson’s case for resentencing.\[106\] As the court noted, this finally ended a circuit split that had persisted for over fifteen years,\[107\] and which the Supreme Court had had the opportunity to settle over a decade earlier in Munoz-Romo.\[108\] During that time, at least one other Eighth Circuit defendant fell victim to its position on multiple firearms prosecutions.\[109\] The profound effect of the no-fault, “confession of error” GVR on these defendants (and perhaps others like them) raises serious questions about its use in this line of cases.

3. Conclusions

It is important not to overstate the conclusions that can be drawn from the Munoz-Romo/Richardson scenario. First, the fact that federal prosecutors occasionally prosecuted multiple counts under § 922 even after the Solicitor General’s confession of error does not necessarily mean that either the Solicitor or the prosecutors acted in bad faith. While there are some occasional troubling signs,\[110\] these prosecutions might simply have been the result of
incidental oversights within a large federal bureaucracy.\footnote{111} The Solicitor General’s office is primarily involved in government litigation at the appellate level, and as a result, it likely played little or no role in these prosecutions.\footnote{112} In addition, despite the staying power of this circuit split within the Eighth Circuit, it seems that even at the time of the Solicitor’s confession, many other circuits had already rejected the imposition of multiple sentences under similar circumstances, and in the aftermath of the Solicitor’s confession, many more did the same.\footnote{113} Thus, while the GVR represented a “missed opportunity” to remedy a circuit split, that split eventually cured itself.

Even so, the fact remains that defendants were prosecuted in the meantime without the benefit of a definitive Supreme Court ruling on the constitutionality of their punishments. Knowing this, the lauded ability of the GVR to conserve judicial resources is of little comfort.

**B. The Persistent Circuit Split: Judicial Futility**

While the *Munoz-Romo/Richardson* line represents the most troubling potential for affirmative abuse of the no-fault GVR, it does not represent the only way that the “confession of error” GVR might prove counterproductive in practice. A more mundane scenario (which, in fact, also plagued the *Richardson* court) arises where the circuit court is bound by a prior panel opinion, and, as a result, cannot reach a different result after a GVR without a rehearing *en banc*.\footnote{114} Although, as the *Richardson* decision demonstrates,\footnote{115} these courts may ultimately undertake such a rehearing in response the Court’s GVR, the “no-fault” nature of the GVR means that they need not, and frequently will not do so.\footnote{116} As a result, these GVR’s become little more than an “exercise of futility” for the lower court,\footnote{117} strongly implicating
the Court’s stated belief that GVR’s are “inappropriate” where “the delay and further cost
entailed in a remand are not justified by the potential benefits of further consideration by the
lower court.”[118] Two cases, neither of which resulted in a rehearing en banc, illustrate the
peculiar situation created by GVR’s under these circumstances.

1. **Brown**

In *United States v. Brown*, the error cited by the Solicitor General was also the basis of a
circuit split, but one of a less compelling character than that in *Munoz-Romo*. Here, the narrow
issue on remand was whether the circuit court had the authority to review a magistrate judge’s
pre-trial ruling, which had denied a motion to withdraw by Brown’s trial counsel.[119] When the
circuit court first considered Brown’s appeal, it concluded that it lacked jurisdiction to review the
magistrate judge’s order because Brown had not first appealed that order to the district
court.[120] Brown subsequently filed a Petition for certiorari review, and in response,[121] the
Solicitor General noted a circuit split as to the “authority of Courts of Appeals to review a
magistrate judge’s ruling” and argued that the courts should have that authority.[122] The
Supreme Court GVR’ed the case “for further consideration in light of the position taken by the
Solicitor General” and sent the case back to the Eleventh Circuit.[123]

In short, the Eleventh Circuit was unimpressed by the remand. Perhaps unsurprisingly,
the panel concluded that it remained bound by its prior precedent and therefore lacked the
jurisdiction to review the magistrate judge’s ruling.[124] What was more surprising was the
displeasure expressed by the judges in disposing of the remand. In a concurring opinion, Judge
Carnes called the decision on remand a “no-brainer” and sharply questioned the “fickleness” of
the government’s positions in criminal cases:
After all, [the government] argued to us at oral argument and in a supplemental authority letter that we ought to apply Renfro and conclude that we lacked jurisdiction to review the denial of the motion to withdraw. Having convinced us to do that, the government then told the Supreme Court that we were wrong to do so. Any other litigant might be embarrassed, but in litigation the government never blushes.[125]

Judge Carnes also concluded that a rehearing en banc “would not be a prudent use of this Court’s scarcest resource, which is the time of its judges.”[126] In a separate special concurrence, Judge Hill called the GVR remand an “exercise of futility,” but urged a rehearing en banc.[127] Brown filed another cert petition, but the Supreme Court denied certiorari; the case was effectively at an end, leaving the issue exactly as the Court had found it.[128]

2. Williams

If Brown represents the hostility that may accompany a futile GVR, United States v. Williams represents a peculiarly conciliatory approach. Terrance Williams was convicted of possession of cocaine base with intent to distribute and sentenced to ten years in prison.[129] On appeal, one of Williams’ arguments was that his arrest lacked probable cause.[130] The appellate court stated that although it “view[ed] the issue as a close one,” Williams had not shown that the district court’s finding of probable cause was “clearly erroneous.”[131] Williams then filed a Petition for certiorari review with the Supreme Court. In its response, the Solicitor General noted that there was a circuit split regarding whether appellate courts should consider probable cause challenges like Williams’ under a de novo standard or under the “clearly erroneous” standard used in Williams.[132] Though the Solicitor General favored the de novo standard, which it recognized as the majority rule, it also urged denial of certiorari because it believed that the result would remain the same under either standard.[133] The Court instead granted a GVR and the case returned to the Sixth Circuit.[134]
The Sixth Circuit’s response on remand was curious in a number of respects. First, the court concluded that it was bound by its earlier precedent and stood by the “clearly erroneous” standard, leaving the circuit split unresolved.[135] However, in an interesting approach, the court then proceeded to “indicate what [its] result would be if [it] examined the probable cause determination de novo.”[136] Surprisingly, even though the court had previously acknowledged that its “clearly erroneous” evaluation had been a “close” case,[137] the court on remand concluded that the result would remain the same under de novo review.[138] This apparent lack of continuity did not go unnoticed—Judge Jones noted in dissent that notwithstanding the court’s earlier difficulty with the decision, “[t]he majority now concludes, somewhat inexplicably, that we would have reached the same conclusion had our initial review been plenary.”[139]

“[D]eeply troubled” by the “undeniably significant racial component underlying [the probable cause] determination,” Judge Jones disagreed with the panel’s conclusion that the probable cause determination should stand.[140]

Afterwards, Williams again petitioned the Supreme Court for certiorari review, but the Court denied his petition,[141] leaving the confusing Williams precedent on the books.[142]

3. Conclusions

These two cases say very different things about what can happen when the Court overuses its “confession of error” GVR power. In cases like Brown, the obvious concern is that the Court may overstep the traditional deference afforded to lower court opinions and create the impression that the Court “may reject and send back” their work “at [its] own pleasure.”[143] As a result, issuing a GVR in these cases may foster the kind of hostility and waste of judicial resources experienced in Brown. Therefore, where the error confessed is a
relatively minor and infrequently litigated point, the GVR may not be the best method to address it, particularly if the lower court is bound to its position by prior precedent.[144]

The *Williams* case raises concerns both about the Supreme Court’s unwillingness to resolve a relatively important procedural point (namely, the correct standard for evaluating “probable cause” determinations on appeal) and about the potential for lower courts to be overly deferential on remand. When the case returned on GVR, the majority seemed all too willing to accept the Solicitor General’s conclusion that the underlying result was sound, even though it had previously expressed serious doubts on that point. The court even went so far as conducting a mock “*de novo*” review to shore up this conclusion—however, as Judge Jones noted in dissent, this outcome was difficult to reconcile with the court’s earlier skepticism.

Together, these cases show that the GVR is not always a viable error-correction and resource-conservation tool. Instead, where there is a circuit split that the lower court either cannot or will not remedy, the GVR simply prolongs the litigation and creates additional work for the lower courts.

**V. DEFINING ALTERNATIVES**

As the preceding analysis suggests, the GVR itself is frequently a helpful tool in the Supreme Court’s arsenal, often leading to the correction of error without the substantial investment of resources entailed by full plenary review. However, this note has also addressed at least two circumstances where the Court’s no-fault, “confession of error” GVR has proven ineffective, either because the correction of error in one court leaves an active circuit split unresolved in others, as in *Munoz-Romo*, or because the lower court is unable or unwilling to
address the “error” that prompted the remand, as in *Brown* and *Williams*. In such cases, the Court should consider the other avenues available for resolving the issue.

In a case like *Munoz-Romo*, where there is an active circuit split on an important issue that cannot be resolved by GVR[145] and that is likely to recur, plenary review seems advisable.[146] While this poses some difficulty, as it could force the Solicitor General to defend a position which it has already conceded was reached in error, this is not an insurmountable difficulty. As Rosenzweig points out, the Solicitor General’s office would likely be capable of arguing a position that it does not “whole-heartedly support . . ., including . . . confessed error.”[147] In addition, in cases where the Solicitor’s office refuses to proceed, the Court could instead appoint counsel to argue the case on the government’s behalf.[148] While plenary review obviously entails a substantially greater investment of resources than a GVR, it seems entirely reasonable in these extreme cases, in order to avoid perpetuating a circuit split that may lead to disparate punishments.[149]

In contrast, in cases like *Brown* and *Williams*, the issue is whether the circuit court will even be able to correct its own “error” without a rehearing *en banc*, and if not, whether they will be willing to convene such a rehearing. While a GVR might still be a viable response if the Court has little concern with the ultimate result on remand (as may be the case in cases like *Brown*, which raise narrow issues that will recur infrequently), such GVR’s nonetheless create a resource “drag” on the lower courts without an offsetting gain in error-correction. If an issue is not important enough to warrant plenary review, and if the GVR is unlikely to correct the error on remand, then the only other options available to the Court are summary merits review or denial of certiorari. The choice between these options requires consideration both of the
CONCLUSION

The GVR mechanism provides some needed flexibility in the Supreme Court’s management of its docket. Particularly in the “intervening events” scenario, where an intervening legal development calls into question the outcome in an appealed case, the GVR is relatively uncontroversial and immeasurably useful in conserving resources and protecting litigants from disparate treatment. However, the Court has also regularly employed the GVR to remand cases where the Solicitor General confesses error after prevailing below. While this process has been more controversial, it also has a number of commendable features. In most cases, it serves to correct error and to conserve judicial resources, while at the same time giving the litigant who was disadvantaged by the error a better result than he or she would have received had the Court simply denied certiorari.

But because a GVR does not constitute a ruling on the merits, it leaves open the potential for surprising results and unintended consequences on remand. In cases where an important circuit split is presented to the Court, the use of a “confession of error” GVR may needlessly prolong the split by postponing a definitive pronouncement on the state of the law. It may also
needlessly burden the already-strapped resources of lower federal courts in cases where those courts lack either the power or the interest to change the ultimate outcome. GVR’s in such cases may do little more than raise the ire of the Court’s judicial brethren.

As a result of these problems, the Court should reconsider its use of the no-fault, “confession of error” GVR to address circuit splits, favoring plenary review where the issue is of substantial importance; summary review, where available, for less important, but nonetheless significant procedural errors; and denial of certiorari for minor issues that are both unlikely to recur and unlikely to be corrected if remanded by GVR. By limiting its use of the GVR in this way, the Court may be able to placate some critics of the procedure and achieve a proper balance between its role as a law-giver and its role as a forum for error-correction.

[1] See Arthur D. Hellman, “Granted, Vacated, and Remanded”—Shedding Light on a Dark Corner of Supreme Court Practice, 67 JUDICATURE 389, 390 (1984). As Hellman’s title suggests, this practice is somewhat obscure, and its legal significance is “a mystery to most of the legal profession.” See also Shaun P. Martin, Gaming the GVR, 36 ARIZ. ST. L.J. 551, 552 (2004) (“Even Court-savvy academics are often unaware of the existence or prevalence of this procedure . . . .”).

[2] See, e.g., Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964 (per curiam) (noting that the lower court “correctly concluded” that an earlier GVR “did not amount to a final determination on the merits”).

[3] See David M. Rosenzweig, Note, Confession of Error in the Supreme Court by the Solicitor General, 82 GEO. L.J.2079, 2080 (1994) (noting that confessions of error by the Solicitor General, which are one type of development that may prompt a GVR, are usually made in the government’s reply to a petition for certiorari); Martin, supra note 1, at 557 (noting that “virtually every modern GVR is issued contemporaneously with the grant of certiorari”).

Id. at 613-14 (Scalia, J., dissenting). For example, where an intervening state law development casts doubt on a state court opinion, the GVR allows the state court “to decide the effect of the intervening event,” consistent with the principles of federalism. In addition, the GVR can serve as a “soft reversal” (“to avoid the unseemliness of holding judgments in error on the basis of law that did not exist when the judgments were rendered”), and where the intervening development would open up new factual inquiries, a GVR preserves the presumption that lower courts “will have the first opportunity to apply the governing law to the facts.”

Hellman, supra note 1, at 390.

Rosenzweig, supra note 3, at 2111-17.

E.g. Lawrence, 516 U.S. at 182-92 (Scalia, J., dissenting).


Lawrence, 516 U.S. at 166. In response to Justice Scalia’s contention, in dissent, that the statute’s reach was limited by “the implicit limitations imposed by traditional practice and by the nature of the appellate system,” 516 U.S. 163, 178, the Court’s per curiam opinion found “no textual basis for such limitations.” Id. at 166. Thomas joined Scalia in dissent, as did Chief Justice Rehnquist. Thus, even taking into account recent personnel changes, it appears that a majority of the Court recognizes only minimal limitations upon the GVR power.

Justice Scalia’s dissent provides something of a classification system for the Court’s various applications of the GVR power. See id. at 179-85. For present purposes, it is sufficient to note that the main substantive distinction is between an intervening change in law (that is, a decision or statute issued while the case is on appeal that draws into question the outcome below) and a “confession of error” by one of the litigants (which will be the primary focus of this paper).

Martin, supra note 1, at 551 & n.2 (2004). Martin finds that the Court currently GVR’s at a rate of over 85 GVR’s per term, which is “very near the highest historical rate.” Even as the frequency of GVR’s increases, their composition may be changing as well: Martin also notes that during the 2000’s, almost all GVR’s relate to intervening changes in law. Id. at n.43 (noting that from 2001 to 2003, only one GVR per year stemmed from any other cause).

Lawrence, 516 U.S. at 173. Scalia’s dissent approved of the Court’s “intervening event” GVR practice, id. at 180-81, which, as was previously noted, now accounts for almost all of the Court’s GVR’s. Martin, supra note 1, at n.43. Thus, one expects that the GVR is relatively uncontroversial in the vast majority of cases in which it is employed. But see Thomas v. Am. Home Prods., Inc., 519 U.S. 913 (1996) (Rehnquist, C.J. & Breyer, J., dissenting) (dissenting from decision to GVR in a diversity case where intervening state precedent altered the state law background for the claim).
[15] See id. at 182-83 (Scalia, J., dissenting) (noting that “[m]any of the early GVR’s based upon
the Government’s confession of error appear not to have been no-fault V & R’s at all, but rather
summary decisions on the merits, with remand for further proceedings”).

[16] This division may be an oversimplification in some cases. In the “intervening events”
context, the Court has sometimes used the GVR where the intervening decision “preceded the
judgment in question, but by so little time that the lower court might have been unaware of
it.” Lawrence, 516 U.S. at 181 (Scalia, J., dissenting) (citing Grier v. United States, 419 U.S.
989 (1974) (granting, vacating, and remanding in light of a June 26 Supreme Court opinion,
where the circuit court rendered its decision on July 1)). As for “confession of error” cases,
“error” may refer to an error in the outcome below, an error in the lower court’s stated reasoning
(but not necessarily in the outcome), or even a purported error in the arguments presented below
(without a clear indication that they were even influential in the outcome). See id. at 182-85
(Scalia, J., dissenting) (categorizing the variety of such confessions by the Solicitor
General). An even more attenuated type of “error” can be found in those cases where the
Solicitor General has requested a GVR to allow the government to comply with internal,
discretionary policies (most commonly the “Petite” policy regarding multiple prosecutions) that
were not followed below. Rosenzweig, supra note 3, at 2094-95.


Thomas, 519 U.S. 913 (1996) (using GVR to remand to circuit court for consideration of
intervening state supreme court decisions in federal diversity cases); Edmond v. United States,
516 U.S. 802 (1995) (using GVR to remand to circuit court for consideration of intervening U.S.
Supreme Court decision); Henry v. City of Rock Hill, 375 U.S. 6 (1963) (using GVR to remand
to state supreme court for consideration of intervening U.S. Supreme Court decision). Cf.
remanding to state supreme court for consideration of intervening state statute).

[19] See Lawrence, 516 U.S. 163 (1996). Although it is true that Justice Scalia dissented from
the GVR in Lawrence, questioning whether the change in position of the Social Security
Administration was judicially cognizable at that stage in the litigation, much of his more scathing
criticism related to the Court’s decision in Stutson v. United States, which was included as part of
a combined dissenting opinion. Thus, while the particular use of the GVR to address
administrative changes in position is not uncontroversial, it nonetheless is a technical
subcategory of the “intervening events” GVR, which is, as a whole, relatively uncontroversial.


[21] 375 U.S. 6 (1963) (issuing GVR); 376 U.S. 776 (taking appeal from lower court’s decision
on remand).

[23] Henry v. City of Rock Hill, 375 U.S. 6 (1963). In Edwards, the Court addressed the constitutional rights of other anti-segregation demonstrators, finding in their favor.

[24] Ironically, while this is a prototypical “intervening events” GVR, it also shows the weaknesses of the practice. On remand, the South Carolina court stood by its initial decision, finding that Edwards was not precedential as to the outcome in Henry. 135 S.E.2d 718 (1963). This led to another appeal, in which the Supreme Court finally overruled the decision below and found in favor of the protesters. 376 U.S. 776 (1964). Even then, however, the Court agreed that the lower court was correct in its conclusion that the “earlier remand did not amount to a final determination on the merits.” Id. at 777.

[25] Rosenzweig, supra note 3, at n.43.

[26] See Lawrence, 516 U.S. at 181 (Scalia, J., dissenting) (describing this practice).

[27] See Hellman, supra note 1, at 393-96. Hellman conducted an empirical study of 289 cases in which the court issued “reconsideration orders” between the 1975 and 1979 terms. In his analysis, this group of cases included 50 where the Court would have been justified in summarily reversing, rather than GVR’ing, and he noted an additional 90 “in which the judgment of the court below was only slightly less vulnerable.” Id. at 393. More surprisingly, Hellman notes “about a dozen cases” that were GVR’ed, notwithstanding substantial harmony with the intervening precedent. Id. at 394. In terms of the result on remand, among the cases containing “at least a surface inconsistency” with the intervening precedent, the lower court adhered to its original result in more than 60 cases, either by deciding that the “intervening decision did not apply” or by using “some other ground” to uphold the prior outcome. Id. at 394-95.

[28] See infra note 37 and accompanying text (discussing the standard the Court utilizes in determining whether to grant a GVR).

[29] See Rosenzweig, supra note 3, at 2080 (estimating that the Solicitor General has averaged two such confessions per Supreme Court term since the creation of the Solicitor position).

[30] Technically, it would seem that any litigant could confess error; however, it appears that the Solicitor General is the primary recipient of this brand of GVR. See Lawrence, 516 U.S. at 182 (Scalia, J., dissenting) (singling out “suggestions or representations made by the Solicitor General” as an increasingly common category of GVR); see also Rosenzweig, supra note 3, at 2083-87 (noting the unique relationship (and reliance) that exists between the Court and the Solicitor General). In some cases, the party confessing error is a state official analogous to the U.S. Solicitor General. E.g. Saldano v. Texas, 530 U.S. 1212 (2000) (GVR’ing in light of a “confession of error by the Solicitor General of Texas”).

See Goffer v. West, 519 U.S. 1052 (1997) (mem.). See also infra, notes 60-61 and accompanying text, for a discussion of the problem of defining what constitutes a “different” outcome on remand.


Because the Solicitor’s confessions are generally part of the response to the cert petition, rather than part of a merits brief, they are not as widely-available as other types of filings. In addition, while it is possible to locate GVR’s and then work backwards to the filings, finding confessions of error that resulted in denials of cert would necessitate a review of the filings for every denial of cert, which is well beyond the scope of this note. See also Rosenzweig, supra note 3, at n.11 (stating that “[p]ersonnel at the Solicitor General’s office and the libraries at the Department of Justice and the Supreme Court indicated that none of those offices maintains records on confessions of error). However, Rosenzweig also quotes from a 1993 Legal Times article, in which then-Acting Solicitor General William Bryson stated that his office confessed error in “at most, two or three” cases a year, id. (citing Judy Sarasohn, SG’s Switch Breaths Life Into Bias Suit, LEGAL TIMES, Mar. 29, 1993, at 22). As this number roughly comports with the number of “confession of error” GVR’s granted by the Court each year, it seems likely that most such confessions result in GVR rather than denial of certiorari. See infra Part III.B.

See, e.g., Mariscal v. United States, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting) (doubting that the “adversary system of justice is well served by . . . routinely vacating judgment which the Solicitor General questions without any independent examination of the merits on our own”).

Martin, supra note 1, at 564. The Court stated this conclusion in Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964) (per curiam).

Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam). The Court appears to have articulated this standard for the first time in Lawrence, which was itself a per curiam opinion granting a GVR. Given that the Court did not recognize any of Scalia’s suggested limitations upon GVR practice, id. at 166, it seems likely that this test is in the nature of a prudential, internal operating procedure rather than a hard-and-fast principle of law.

Id. at 167, 171. This discussion reveals another interesting distinction between “intervening event” and “confession of error” GVR’s. In the former, the Court should know the rule of law set down by the intervening event; as such, the “reasonable probability” inquiry relates solely to whether the intervening event is sufficiently analogous or applicable to change the outcome below. In contrast, reasonable probability in the “confession of error” scenario relates not only to whether the confessed error would change the outcome, but indeed to whether there was any error in the first instance. That is, the Court does not decide that the Solicitor General’s confession is a correct interpretation of law on its merits. Id.at 171

Id. at 167-68. The analysis of the “equities” looks at whether the intervening changes were “part of an unfair or manipulative strategy,” as well as whether the administrative costs of further proceedings are justified by the potential benefit.
See Martin, supra note 1, at 557-58 ("Prior to 1950, the overwhelming majority of remands based on intervening events occurred after plenary consideration of the merits.").

See, e.g., Fogel v. United States, 335 U.S. 865 (1948), Chiarella v. United States, 341 U.S. 946 (1951), Cates v. Haderlein, 342 U.S. 804 (1951), Bellaskus v. Crossman, 335 U.S. 840 (1948) (all making reference to "consideration of the record" as part of the grounds for remand). While the skeptic might question whether this seemingly innocuous phrase really carried any meaning, the dissenting justices in Casey v. United States expressly pointed to its absence in the Court's opinion as a change in practice. 343 U.S. 808, 810 (1952) (Douglas & Reed, JJ., and Vinson, C.J., dissenting) ("Unlike today's per curiam, our recent per curiam orders and opinions have been careful to note that our reversal . . . is based upon consideration of the record, not blind acceptance of a confession of error.").

See Young v. United States, 315 U.S. 257 (1942) ("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."). All participating justices accepted this opinion.

Compare e.g. Casey, 343 U.S. at 808 (per curiam) ("To accept in this case [the Solicitor General's] confession of error would not involve the establishment of any precedent) with 343 U.S. at 811 (Douglas & Reed, JJ., and Vinson, C.J., dissenting) ("Whatever action we take is a precedent."). See Stutson v. United States, 516 U.S. 193, 176 (1996) (Rehnquist, C.J., dissenting) ("Vacating a judgment without explanation when the alternative is simply to deny certiorari involves at best the correction of perceived error made by the lower courts."); Bd. of Trustees v. Sweeney, 439 U.S. 24, 25-26 (1978) (Stevens, Brennan, Stewart, & Marshall, JJ., dissenting) ("Whenever this Court grants certiorari and vacates a court of appeals judgment . . . in the light of an intervening decision of this Court, the Court is acting on the merits."). See generally Hellman, supra note 1, at 392 ("The conclusion that follows from all of this is that some of the reconsideration orders may be tantamount to reversals, but it cannot be assumed that all of them are. History thus gives no clear answer . . . . Nor has the Court itself given much guidance.").

See id. (Rehnquist, J., dissenting) (noting that the Office of the Solicitor General is a part of the Executive Branch and stating that unless it became a part of the Judicial Branch, the Court should either independently examine the merits or deny certiorari instead of utilizing the GVR to address confessions of error).

See Rosenzweig, supra note 3, at 2106. Rosenzweig discusses a distinction between those who see the Court as primarily an error-correcting body and those who see it as primarily a law-giving body. The difficulty with the GVR is that the Court may ultimately fail in both functions when it uses that procedure. First, as Hellman notes, lower courts will sometimes simply reinstate their prior holding after a GVR, in which case there either was no error to be corrected or it simply went uncorrected in those cases. Supra note 1, at 394. Second, by failing to clarify its position on the underlying legal question, the Court may neglect opportunities to develop the law as part of its law-giving function. See Munoz-Romo v. United States, 506 U.S. 802 (1992) (granting GVR in light of the change in position by the Solicitor General regarding the availability of multiple prosecutions under certain federal gun laws). This, in turn, may
compound the error in future cases. See United States v. Richardson, 2005 WL 2898645 (8th Cir., Nov. 4, 2005) (noting the existence of a circuit split precipitated by the resolution of Munoz-Romo and the further change in position by the government regarding the availability of multiple punishments under the same statutes at issue in that case). These cases will be discussed in greater detail in Part IV.A.

[46] See Rosenzweig, supra note 3, at 2111-14; see also Casey v. United States, 343 U.S. 808, 808-09 (Douglas, J., dissenting) (“The reasons why the Department of Justice confesses error in a case may be wholly honorable. . . . . But I also know that litigants usually have selfish purposes. What the motivation behind a particular confession of error may be will seldom be known. We cannot become a party to it without serving the unknown cause of the litigant.”). Some of the Justices have expressed additional concerns that the Court itself might abuse the candor and quality of analysis traditionally displayed by the Solicitor General by overusing the GVR. Id. at 2114-17. Their argument is that the Solicitor General may think twice about confessing error in those cases where it argues that the result below is defensible and that denial of certiorari is the appropriate response, if those confessions of error may lead instead to GVR. See Alvarado, 497 U.S. at 545 (Rehnquist, O’Connor, Scalia, and Kennedy, JJ., dissenting) (noting that the Court “may find the Government’s future briefs in opposition much less explicit and frank than they have been in the past” as a result of GVR’ing for confessed errors where the Solicitor General still defends the result below).

[47] See, e.g., Richardson, 2005 WL 2898645 and discussion in Part IV.A. In short, through its confession of error in Munoz-Romo, 506 U.S. 802, the Solicitor General made it possible for the government to subsequently act in a manner that was inconsistent with that earlier confession because the Supreme Court had never spoken on the issue.

[48] E.g. Alvarado v. United States, 497 U.S. 543 (1990) (per curiam). In Alvarado, the Solicitor General confessed error as to the legal standard applied in the circuit court, but simultaneously argued that the Court should deny certiorari. The Solicitor reasoned that the Petitioner could not make out its prima facie case on the merits, even though the circuit court had never reached the merits as a result of the alleged error.

[49] See Rosenzweig, supra note 3, at 2111-12, for an explanation of this phenomenon. Rosenzweig argues that because a grant of certiorari and decision to hear full arguments would require the support of at least four Justices, all of whom would have to reject the Solicitor’s claim, a GVR or denial of certiorari is the most likely outcome of a confession of error in this situation.

[50] See Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167-68 (identifying the “virtues” of the GVR and setting out a standard for their use that focuses on the probability of a changed outcome on remand).

[51] Lawrence, 516 U.S. at 167 (stating that whether or not “a redetermination may determine the ultimate outcome” is an element in deciding whether GVR is appropriate).

[52] See id.
[53] *Id.*

[54] 125 S.Ct. 2541.


[56] *Id.* at *3-4. Specifically, Rosales claimed that the Immigration Judge failed to inform him of his right to contact his consulate under the Vienna Convention on Consular Relations.

[57] *Id.* at *4.

[58] The significance of this observation is that the Court technically would not have been leaving “bad” precedent in place had it simply denied certiorari instead of using the GVR. Of course, this raises questions about the role of “non-precedential” opinions in the federal court system that are beyond the scope of this note.


[60] This distinction will also allow a second level of analysis. While error-correction is likely the primary goal of “confession of error” GVR’s, it is not the only consideration. The Court’s test also calls for a balancing of the equities, including whether “the delay and further cost entailed in a remand are not justified by the benefits of further consideration.” *Id.* at 168. Thus, tracking cases where the practical result remains the same will enable appraisal of whether the Court’s GVR’s are justified as a matter of judicial efficiency.

[61] It is difficult to state this standard more precisely, given the wide factual variation within the Court’s GVR cases. Obviously, this would include such changes as a sentence reduction, a grant of desired relief in place of a prior denial, and other similar outcomes. It would likely also include ordering a new trial in criminal matters, as that enables the Petitioner to present its case anew. However, it would likely exclude cases like *Rosales*, where the Petitioner was not raising a novel argument, but was simply given another opportunity to present it, due to jurisdictional/procedural defaults.

[62] This number excludes instances where the Solicitor General served merely as *amicus curiae*—the Court has sometimes GVR’ed in response to a position taken by the S.G. in an *amicus* brief. Rael v. Educ. Mgmt. Corp., 531 U.S. 952 (2000). However, it includes cases where the S.G.’s position was rooted in a change in administrative policy. See *Lawrence*, 516 U.S. 163 (1996) (GVR’ing in response to S.G.’s statements that the Social Security Administration had adopted a new policy regarding the issue below). In a sense, this second category blurs the line between “intervening events” and “confession of error” GVR’s. While an administrative policy shift does not constitute “error” below and will ostensibly bind future litigants, as would an intervening judicial decision, a shift in administrative policy is also
susceptible to strategic manipulation, like a confession of error. Since these cases raise these concerns, they have been included with other confessions of error.

[63] E.g. Diaz-Albertini v. United States, 498 U.S. 1061 (1991). While it may be reasonable to draw assumptions as to how these cases were handled on remand, I do not do so here.

[64] United States v. Stutson, 89 F.3d 853 (11th Cir. 1996) (“REVERSED IN PART, VACATED IN PART.”); Stephens v. Bentsen, 81 F.3d 175 (11th Cir. 1996) (“VACATED AND REMANDED”); United States v. Green, 20 F.3d 1169 (table) (5th Cir. 1994) (“VACATED”). It should be noted that all of these resulted in vacating or reversing the prior opinion. In this sense, they are counted as correcting error under both the Court’s understanding and the Solicitor General’s understanding of a changed result on remand.

[65] Bailes v. United States, 503 U.S. 1001 (1992). This case represents how the Solicitor General may change positions to avoid a legal issue. Here, the Government had received an award of double damages under a retroactive application of a federal housing statute. Petitioner challenged this application of the statute and the Solicitor withdrew its claim for double damages, electing to receive only standard compensatory damages. The Court GVR’ed with instructions to vacate the “doubled” portion of the damages. Of course, this left unresolved the issue of whether the retroactive application of the statute was permissible.

[66] In fact, it represents an alternative to the modern no-fault GVR; it more closely approximates the earlier practice of GVR’ing after considering the merits, which gave the lower court more guidance as to the appropriate outcome on remand.

[67] The lower court did not do so in United States v. Brown, 342 F.3d 1245 (11th Cir. 2003) or United States v. Williams, 949 F.2d 220 (6th Cir. 1991). In Brown, the lower court had previously held that circuit court precedent barred it from reviewing magistrate judge rulings that were not contested before the district court first. The Solicitor General noted that disagreement existed among the circuits on this point and advised that the court should have been able to conduct the review, even if it was not first brought up before the district court. On remand, the circuit court reiterated its position that it was bound by its own precedent, which it could not overturn except by en banc rehearing (which it did not grant). In Williams, circuit court precedent established that probable cause determinations were subject only to “clearly erroneous” review on appeal, rather than “de novo” review. The Solicitor General noted a split among the circuits on the issue, but found that the majority employed de novo review. The Solicitor claimed that de novo was the proper standard, but went on to state that the circuit result would stand even under de novo review. The Court GVR’ed and the circuit court reaffirmed that “clearly erroneous” was the practice in the Sixth Circuit. Interestingly, the circuit court then walked through a hypothetical de novo review, finding that its result would not change under that standard.

[68] Lawrence, 516 U.S. at 167.

[69] E.g. Rosales v. Bd. of Imm. & Customs Enf., 2005 WL 1952867 (5th Cir. 2005). This number does not include cases such as Jackson v. Barnhart, 2002 WL 32909589 (5th Cir. 2002),
where the lower court remanded to an administrative agency for a determination of rights on grounds that were not previously presented. In *Jackson*, as an example, Jackson’s case was sent back to the Commissioner of Social Security, who had previously denied his claim for benefits, to determine whether his claim of hearing loss, which had not been considered in the prior proceeding, would warrant an award of SSI benefits. It is entirely possible that the Commissioner denied this claim as well, in which case Jackson’s practical outcome would remain unchanged. However, I have included it as a possible changed outcome, since Jackson was given the benefit of a new hearing on his claim. This also assumes that the three cases with brief orders on remand, either vacating or reversing the prior result, resulted in a change in the practical outcome—again, this may not have been the case, but because this paved the way for another hearing, it seems a fair assumption.


[71] 516 U.S. 163, 167 (“This practice [GVR] has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration.”).

[72] *Id.* at 168.


[74] *Id.*


[76] *Id.* at tbl.1.6.

[77] *Id.* at tbl.4.1. Of course, this number does not reflect the impact that magistrate judges have on lightening the per judge caseload.

[78] See *supra*, part II.B (noting that many GVR’ed “confession of error” cases result in further review).

[79] E.g. Chappell v. United States, 956 F.2d 272 (table), 1992 WL 42307 (7th Cir. 1992) (reviewing the merits of an inmate’s habeas petition, which the lower courts had previously held was procedurally defaulted).

[80] E.g. Jackson v. Barnhart, 2002 WL 32909589 (5th Cir. 2002) (remanding to Commissioner of Social Security for determination of benefits eligibility on a hearing loss claim that was not previously considered).
CITE (re: deferring to lower court findings of fact). The Court’s rules express its hesitance to reevaluate findings of fact. SUP. CT. R. 10 (“A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .”).

SUP. CT. R. 14(1)(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

See Rosales v. Bd. of Imm. & Customs Enf., 125 S. Ct. 2541 (mem.) (on remand at 426 F.3d 733 (5th Cir. 2005)). In Rosales, the Petitioner’s question presented in the petition for writ of certiorari was limited to whether the lower court had erred in its conclusion that he did not satisfy the “in custody” requirement for purposes of habeas jurisdiction. This was the error that the Solicitor General confessed in its brief (while maintaining that the result could stand on other grounds). Thus, even though the record in this case was complete enough that the circuit court could conclude on remand that the petition should be denied, without resorting to any further fact-finding, the Supreme Court theoretically would not have been able to reach that conclusion as the petition then stood before it.

Rosenzweig argues that “[w]here a case involves a fact-specific question that is unlikely to recur, summary reversal will more likely be appropriate.” Supra note 3, at 2116. While summary reversal would save lower courts the trouble of considering the case again and would assure error-correction, it would necessitate more of the Supreme Court’s time and might draw the Court into factual inquiries that it is ill-suited to pursue. Given this trade-off, the GVR seems to be at least as palatable as summary reversal as a mechanism for remedying such case-specific errors.

Justice Scalia called the federal government “the most frequent, and hence the most calculating, of [the Court’s] litigants.” Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 187 (Scalia, J., dissenting). Lower courts have also expressed their belief that the government, taken as a whole, is quite calculating in its litigation strategies. E.g. United States v. Brown, 342 F.3d 1245, 1247 (Carnes, J., concurring) (noting the “fickleness of the government’s positions in criminal cases”).

See Rosenzweig, supra note 3, at 2111 (The Government . . . must take a longer view than most private litigants . . . [which] may lead the Solicitor General to confess error, even at the cost of sacrificing a victory in a particular case, . . . to avoid an adverse ruling with potentially far-reaching effects.”)

Rosenzweig notes that the Solicitor General’s office has traditionally “enjoyed considerable independence from the political forces of the executive branch,” which may further limit the influence of short-term political goals on the Solicitor’s litigation strategies. Id. at 2081.

See id. at 2111-14 (discussing the Solicitor General’s ability to strategically confess error). The alternative would be to support the challenged position before the Court, with the risk that the Court will reject it. If this occurs, then the government would not be able to prevail on that theory in any federal court after the judgment. In contrast, if the confession of error results in a GVR, the lower court (a) might refuse to accept the confession, but more likely (b)
will accept the error, which will prevent the government from taking that position in *that particular court*. However, this would leave the position theoretically available for use in other jurisdictions.


[91] *Id.* at 758.

[92] *Id.* at 759.


[94] United States v. Munoz-Romo, 989 F.2d at 759-60.

[95] United States v. Peterson, 867 F2d 1110 (8th Cir. 1989).


[97] SUP. CT. R. 10(a) (listing that fact that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” as one of the considerations for granting certiorari).

[98] The Petition filed by Munoz-Romo squarely presented the question of whether the multiple prosecutions violated his Fifth Amendment rights. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Munoz-Romo v. United States, 506 U.S. 802 (1992) (No. 91-1593), at 1992 WL 12074674. Thus, the Supreme Court was not barred from considering the question. SUP. CT. R. 14(1)(a); see also Rosenzweig, *supra* note 3, at 2112-13 (noting that the Court “should be able to hear the merits of almost any case despite an attempt by the Solicitor General to avoid reversal through a confession of error”).

[99] United States v. Dunford, 148 F.3d 385, 388-89 (4th Cir. 1998) (rejecting multiple prosecutions where defendant was convicted on fourteen counts, comprised of the simultaneous possession of six firearms and ammunition, multiplied across two prohibited statuses).

[100] United States v. Richardson, No. 04-3472, 2005 WL 2898645, at *2 (8th Cir. Nov. 4, 2005) (per curiam). By this time, it seems that the Eighth Circuit was the last holdout, as the court noted on rehearing *en banc*. 439 F.3d 421 (2006). However, the facts under which the various circuits had rejected multiple prosecutions varied—for example, the Ninth Circuit had rejected multiple prosecutions for the possession of a firearm and ammunition, as opposed to the offender’s satisfaction of multiple statuses. United States v. Keen, 104 F.3d 1111 (1996).

[101] 867 F.2d 1110 (8th Cir. 1989).

[102] Munoz-Romo, 989 F.2d at 758.
Richardson, 2005 WL 2898645, at *5-*6 (Melloy and Heaney, JJ., concurring).

Id. at *6.

Id.


Id. at 422 (collecting cases from “all the other Circuits,” which had rejected multiple prosecutions under § 922).

See supra note 98 (discussing the questions presented in the Munoz-Romo Petition).

See United States v. Walker, 380 F.3d 391 (8th Cir. 2004) (relying upon Peterson to reverse the trial court’s refusal to permit multiple prosecution for possession of a firearm and possession of ammunition).

For example, Rosenzweig notes that the S.G.’s office “approves all appeals by government attorneys in cases the government has lost in the district courts.” Supra note 3, at 2083-84. This may mean that the Solicitor’s office reviewed the government’s appeal in Walker, which challenged the trial court’s conclusion that multiple prosecutions were not available under § 922. 380 F.3d 391. While Walker involved multiple prosecutions for the simultaneous possession of a firearm and ammunition, as opposed to the Munoz-Romo scenario of multiple offender statuses, it nonetheless implicated similar issues. E.g. United States v. Keen, 104 F.3d 1111 (9th Cir. 1996) (holding that multiple prosecutions were not available for possession of a firearm and ammunition).

A Department of Justice memo circulated shortly after the Solicitor General’s confession of error in Munoz-Romo may explain how such oversights could occur. In this memo, Assistant Attorney General Robert S. Mueller, III stated that it was still proper to “charge a defendant who has multiple disqualifying factors with a separate count of unlawful weapons possession . . . for each disqualifying status,” in part to “help assure a conviction even if there is a failure of proof on one of the status categories.” Memorandum from Robert S. Muller, III, Assistant Attorney General, to All Federal Prosecutors (Nov. 3, 1992) (available at http://www.usdoj.gov/usao/cousa/foia_reading_room/usam/title9/crm01431.htm). However, the memo went on to state that the defendant should not be separately punished for multiple statuses relating to a “single instance of unlawful weapons possession.” Instead, the prosecutor was directed to “urge the court to ‘merge’ or ‘combine’ the multiple . . . convictions based on different statuses into one conviction for sentencing purposes.” Id. Given this practice, it is foreseeable that some prosecutions, which deal with multiple “disqualifying” statuses, might mistakenly end with duplicative punishments.

See Rosenzweig, supra note 3, at 2084 (stating that the S.G. “controls virtually all of the government’s appellate litigation). But see supra note 110.
See Richardson, 439 F.3d at 422, and cases collected therein. Of the cases cited by the Eighth Circuit as rejecting multiple prosecutions under § 922, five were decided before Munoz-Romo and another five were decided between Munoz-Romo and Richardson.

E.g. United States v. Brown, 342 F.3d 1245, 1246 (11th Cir. 2003) (noting on GVR that panel was bound by prior panel decision “until it is overruled by this court en banc or by the Supreme Court”).

439 F.3d 421; see also United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993) (en banc) (overruling prior panel ruling in light of Supreme Court GVR).

E.g. Brown, 342 F.3d 1245.

Brown, 342 F.3d at 1248 (Hill, J, specially concurring).


Brown, 342 F.3d at 1246. In fact, Brown had initially been appointed counsel, but she then retained her own attorney and filed a stipulation to substitute that attorney as her counsel of record. United States v. Brown, 299 F.3d 1252, 1254 (11th Cir. 2002). Seven weeks afterwards, that attorney filed a motion to withdraw, “indicating that Brown no longer wished him to represent her.” Id. It was this latter motion that the magistrate judge denied.

Brown, 299 F.3d at 1259-60 (citing United States v. Renfro, 620 F.2d 497, 500 (5th Cir. 1980)). This was not the sole (or even the main) issue on appeal—Brown also raised a Batson challenge as well as several of the trial court’s evidentiary rulings. Id. at 1255-60.

This brief is not available from the Solicitor General’s website, http://www.usdoj.gov/osg/briefs/search.html. As a result, it is unclear whether the Solicitor opposed certiorari. However, in one of the concurring opinions on remand, it appears that the S.G. had opposed certiorari in its brief to the Court, notwithstanding the error. Brown, 342 F.3d at 1247 (Carnes, J., concurring) (“The Solicitor General’s position is that we can review the magistrate judge’s order but only for plain error of which he says there is none.”). However, that same opinion also states that “the Solicitor General suggested to the Supreme Court that it might wish to remand this case to us.” Id. Thus, it remains unclear exactly what posture the S.G. took before the Court.

Brown, 342 F.3d at 1246 (paraphrasing the S.G.’s brief).


Brown, 342 F.3d at 1246.

Brown, 342 F.3d at 1247 (Carnes, J., concurring).

Id.
The court did not follow Hill’s recommendation, and as of this writing, the Eleventh Circuit remains bound to its opinion in Renfro. See United States v. Timothy, 151 Fed. Appx. 741, 743-44 (11th Cir. 2005) (citing Brown and Renfro for the proposition that objections to magistrate judge rulings cannot be appealed directly to the circuit court).


Id. at *2.

Id. at *5.

See United States v. Williams, 949 F.2d 220, 221 (6th Cir.) (discussing Solicitor’s brief on remand from GVR).

See also Williams v. United States, 500 U.S. 901, 902 (1991) (Kennedy & Scalia, JJ., and Rehnquist, C.J., dissenting) (dissenting from use of GVR “when the Solicitor General disagrees with the reasoning of the court of appeals but defends its result,” as it did in this case).

Williams, 500 U.S. at 901 (1991) (mem.).

United States v. Williams, 949 F.2d at 221 (stating that “one panel of this court is bound by the on-point published decision of an earlier panel”).

Id.


United States v. Williams, 949 F.2d at 221-22 (finding that “under any standard of review the lower courts' conclusion that petitioner's arrest was justified by probable cause was correct”).

Williams, 949 F.2d at 222 (Jones, J., dissenting).

Id. at 222-23. In its earlier opinion, the court had summarized the pertinent facts as follows:

On April 17, 1989, two Cleveland detectives, working undercover, were surveilling the Cleveland Greyhound bus station. They were awaiting the arrival of a bus from Detroit, Michigan, a city considered to be a source city for narcotics coming into the Cleveland area. The defendant and another black male got off the bus with no luggage and were not met by friends or family. The two detectives decided to approach the two youths who began to walk away. The defendant and his companion became aware that they were being approached and broke into a
run. The detectives yelled, “Stop. Police[.]” and gave chase. The person other than the defendant who was fleeing took a plastic bag out of his pocket, which appeared to contain crack cocaine, and tore it open with his teeth in an effort to dissipate the contents. The two suspects separated as they ran and only the defendant was overtaken. He was arrested and given his Miranda rights.


[142] Although Williams and the cases relied upon therein have not been expressly overruled, the Sixth Circuit noted the confusion, see United States v. Sims, 975 F.2d 1225, 1238 (6th Cir. 1992), and eventually clarified that while the lower court’s factual findings were subject to “clearly erroneous” review, its conclusion as to the existence of probable cause was reviewed de novo. United States v. Leake, 998 F.2d 1359 (6th Cir. 1993). However, given the fact-specific nature of the inquiry, it is not clear that this standard has been particularly illuminating. See United States v. Soto, 124 Fed.Appx. 956, 960-63 (6th Cir. 2005) (stating that legal conclusions would be reviewed de novo, but then concluding that “[t]he district court’s determination that there was probable cause to arrest Soto was not clearly erroneous”).


[144] See Rosenzweig, supra note 3, at 2116-17 (suggesting that “fact-specific questions” that are “unlikely to recur” are best dealt with by summary reversal, while legal or procedural questions that do not undercut the ultimate outcome might be better addressed by denial of certiorari or full merits review).

[145] Recall that in this case, the Eighth Circuit had adopted the same rule as the Fifth Circuit, where Munoz-Romo was litigated. Thus, even though the GVR to the Fifth Circuit prompted that circuit to change its rule, the Eighth Circuit retained that same rule for over fifteen years.

[146] See Rosenzweig, supra note 3, at 2112-13, 2116 (suggesting that the Court can grant certiorari and “force the Government to defend its position,” either by refusing to accept the confession of error or by refusing to accept the S.G.’s conclusion that the ultimate result is sound notwithstanding the error).

[147] See id. at 2113 (citing Weber v. United States, 315 U.S. 787 (1942) (per curiam)).

[148] See id. (discussing the possibility that “another attorney in the Solicitor General’s office, in another Justice Department division, or in another federal department or agency involved in the case could assume the responsibility” to argue). See also Lawrence, 516 U.S. at 186 (Scalia, J., dissenting) (“It is fully within our power to review this case . . . by granting certiorari and proceeding to consider the merits; or indeed, where the circumstances warrant, to summarily reverse).

[149] See supra notes 106-09 and accompanying text.
For example, if summary reversal requires facts that are not available to the Court or raises questions that have not been presented, it may be unable to consider the merits itself. See SUP. CT. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").