2019

Select Criminal Law and Procedure Cases from the U.S. Supreme Court's 2018-2019 Term

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Although the 2018-19 Term at the Supreme Court did not include any blockbuster rulings like *Carpenter v. United States*,[1] the Court issued a number of significant criminal law and procedure rulings. It addressed warrantless blood-alcohol testing, the dual-sovereignty doctrine, the right to trial by jury, ineffective assistance of trial counsel, questions of incorporation, prisoners' competence to be executed, permissible methods of execution, and some important statutory interpretation questions.

Looking back on the Term, Justice Gorsuch clearly solidified his position as the libertarian "swing" vote in criminal procedure cases. He joined the liberals to uphold a defendant's right to trial by jury, strike down a federal statute as unconstitutionally vague, and incorporate the Eighth Amendment's prohibition against excessive fines against the states. At the same time, he took a very pro-death penalty stance in the Eighth Amendment cases and joined Justice Thomas in a dissent that questioned the validity of *Gideon v. Wainwright*'s holding that indigent criminal defendants are constitutionally entitled to appointed counsel. With Justice Kavanaugh consistently voting with the conservatives, Justice Gorsuch will likely continue to play a large role in shaping the Court's criminal law and procedure jurisprudence.

FOURTH AMENDMENT

In its only Fourth Amendment case this Term, the Supreme Court held in *Mitchell v. Wisconsin*[2] that police may almost always order a warrantless blood test to measure a driver's blood-alcohol content (BAC) without offending the Fourth Amendment provided that (a) they have probable cause to believe that the driver has committed a drunk-driving offense, and (b) the driver's unconsciousness or stupor requires him to be taken to the hospital or other facility before the police can administer a standard evidentiary breath test. Police arrested Gerald Mitchell for operating a vehicle while intoxicated after Mitchell failed a preliminary breath test. The arresting officer drove Mitchell to the police station to conduct a standard evidentiary breath test, but Mitchell was "too lethargic even for a breath test."[3] Police then drove him to the hospital for blood testing, but Mitchell was unconscious by the time they arrived. The officer asked hospital staff to test Mitchell's blood, revealing a 0.22 BAC. The Wisconsin courts denied Mitchell's suppression arguments, and he was convicted of drunk driving.

Justice Alito, writing for a plurality of the Court that included Chief Justice Roberts and Justices Breyer and Kavanaugh, adopted a rebuttable presumption that police can seek warrantless blood tests on unconscious suspected drunk drivers without running afoul of the Fourth Amendment. After explaining that, "under the exception for exigent circumstances, a warrantless search is allowed when 'there is compelling need for official action and no time to secure a warrant,'"[4] Justice Alito laid out the case for a compelling need here. He noted that highway safety is a compelling interest, enforcement of strict BAC limits lead to highway safety, and enforcement can only occur with accurate and prompt testing. The plurality relied on the fact that every state has implied-consent laws that promote prompt BAC testing by breath test or—if breath testing is unavailable—by blood test to support its view that there is a compelling state need; the state only need prove that it had no time to secure a warrant.

Citing the Court's decision in *Missouri v. McNeely*,[5] the plurality acknowledged that "the fleeting quality of BAC evidence alone is not enough" to satisfy the exigent circumstances exception.[6] But the addition of "some other factor creat[ing] pressing health, safety, or law enforcement needs that would take priority over a warrant application" may be enough to trigger an exigency exception.[7] For example, the plurality described *Schmerber v. California*[8] as a case permitting a warrantless blood test on a drunk driver who had gotten into a car accident because the accident itself created an emergency requiring the officer to attend to other pressing needs—i.e., helping the injured, administering first aid, preserving evidence at the scene, and redirecting traffic. As a result, the further delay associated with seeking a warrant would risk destruction of evidence. Similarly, according to the plurality, unconscious-driver cases are emergencies that require the police to attend to individuals' medical well-being and might further delay warrant application. The plurality therefore reasoned that the exigency exception will almost always apply to warrantless blood draws for unconscious drunk drivers like Mitchell.

The plurality "d[id] not rule out the possibility that in an unusual case the defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged

Footnotes

1. 138 S. Ct. 2206 (2018).
2. 139 S. Ct. 2525 (2019).
3. *Id.* at 2532.
4. 139 S. Ct. at 2534 (quoting Missouri v. McNeely, 569 U.S. 141, 149 (2013) (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978))).
5. 569 U.S. 141.
6. 139 S. Ct. at 2533.
7. *Id.* at 2537.
8. 384 U.S. 757 (1966).

that a warrant application would interfere with other pressing needs or duties."[9] The case was remanded to provide Mitchell the opportunity to make this showing.

Justice Thomas provided the fifth vote, concurring in the judgment but advocating for the broader rule that he wanted (and did not get) in *McNeely:* that the imminent destruction of evidence is a risk in every drunk-driving arrest and should trigger application of the exigent circumstances exception whenever the police have probable cause to believe a driver is drunk whether the driver is conscious or unconscious.

Justices Sotomayor, Ginsburg, Kagan, and Gorsuch dissented in two separate opinions. All of the dissenters felt the exigency exception was not properly before the Court. The Court had granted certiorari to address the contours of the implied-consent exception; instead, the plurality reached out to decide the case on exigency grounds even though Wisconsin admitted that there was no exigency and had never relied on that exception to justify its actions.

Justice Sotomayor, joined by Justices Ginsburg and Kagan, also addressed the application of the exigency exception on the merits. They felt that the same reasons for rejecting a categorical exigency exception in *McNeely* apply to cases where the driver is unconscious: there is already an inherent delay in taking a suspect to a hospital to get blood drawn; many jurisdictions have streamlined processes for obtaining warrants quickly; and alcohol dissipates from the blood at predictable rates that can be used to figure out what the BAC had been at an earlier point. For all of these reasons, Justice Sotomayor would require the police to get a warrant or show individualized reasons why they could not in a given case instead of adopting a categorical presumption.

FIFTH AMENDMENT

In *Gamble v. United States*,[10] the Court granted certiorari to reconsider the separate-sovereigns (or dual-sovereignty) doctrine of the Double Jeopardy Clause. Though the Fifth Amendment Double Jeopardy Clause protects citizens from "be[ing] twice put in jeopardy" "for the same offence," the separate-sovereigns doctrine limits the Double Jeopardy Clause to prosecutions brought by one sovereign. As a result, a state may prosecute a defendant under state law even if the federal government has already prosecuted him for the same offense under a federal statute and vice versa. In a much-awaited decision, the Court upheld the dual-sovereignty doctrine.

After Terrance Gamble was convicted and sent to prison for being a felon in possession of a firearm, he argued that the federal government could not also charge him with being a felon in possession of a firearm because it would violate the Double Jeopardy Clause. Justice Alito, writing for the majority and joined by all but Justices Ginsburg and Gorsuch, upheld Gamble's convictions and the dual-sovereignty doctrine. Justice Alito criticized Gamble's characterization of the doctrine as an exception to the Double Jeopardy Clause. Focusing on the text, Justice Alito noted that the Double Jeopardy Clause has always been about protecting individuals from prosecution for "the same 'offence,' not for the same conduct or actions."[11] Offenses are defined by sovereigns, and therefore the separate-sovereignty doctrine is not an exception to the Double Jeopardy Clause, but a doctrine that "follows from the text that defines that right in the first place."[12]

"[T]he separate-sovereignty doctrine is not an exception to the Double Jeopardy Clause..."

Justice Alito also rejected Gamble's historical argument that those who ratified the Fifth Amendment thought common-law principles would bar dual prosecutions like these. The Court was not persuaded by Gamble's evidence supporting this claim, nor was the Court convinced that incorporation of the Double Jeopardy Clause against the states had substantively changed the right. Instead, the Court noted that the dual-sovereignty doctrine is deeply rooted and "honors the substantive differences between the interests that two sovereigns can have in punishing the same act."[13]

Justice Thomas joined the majority but filed a separate concurrence on the role of stare decisis. Though the majority emphasized its reluctance to overrule precedent, Justice Thomas noted that stare decisis can result in overreliance on erroneous prior decisions. He urged the Court to reconsider its stare decisis standard arguing that no special justification should be required for the Court to reverse flawed precedent. Having said that, he concurred in the decision, noting that the dual-sovereignty doctrine was not a flawed precedent and should be upheld.

Justice Ginsburg and Justice Gorsuch filed separate dissents. Justice Ginsburg advocated for overturning the dual-sovereignty doctrine, arguing that state governments and the federal government were "parts of one whole."[14] It is not the governments that have sovereignty; "ultimate sovereignty resides in the *governed*."[15] Using a historical analysis, Justice Ginsburg argued that the dual-sovereignty doctrine was originally intended to protect individual liberties, but the majority's *Gamble* decision only restricts individual liberties. She thought the Court should have overturned the dual-sovereignty doctrine, noting that it "has been subject to relentless criticism by members of the bench, bar, and academy."[16]

Justice Gorsuch also dissented. His reading of the text, structure, and historical sources gave him a different understanding of the word "offence" than the majority. An offense, Justice Gorsuch maintained, was not historically sovereign-specific, and the great weight of common-law authority deemed successive prosecutions by separate sovereigns out of bounds. Applying the Court's stare decisis factors, Justice Gorsuch would have abrogated the dual-sovereignty doctrine.

9. 139 S. Ct. at 2539.
10. 139 S. Ct. 1960 (2019).
11. *Gamble*, 139 S. Ct. at 1965 (quoting Grady v. Corbin, 495 U.S. 508, 529 (1990)).
12. *Id.* at 1965.
13. *Id.* at 1966.
14. *Id.* at 1990 (Ginsburg, J., dissenting) (quoting The Federalist No. 82, p. 493 (C. Rossiter ed. 1961) (A. Hamilton)).
15. *Id.* (internal quotations omitted) (emphasis in original).
16. *Id.* at 1995.

"The [*Haymond*] decision clearly puts other sections of the federal revocation statute that affect a large number of cases at risk..."

SIXTH AMENDMENT

This Term's Sixth Amendment cases included one potentially important ruling in a right-to-trial-by-jury case (*United States v. Haymond*) and two smaller rulings—one addressing an ineffective-assistance-of-counsel issue (*Garza v. Idaho*), and the other addressing a *Batson* challenge (*Flowers v. Mississippi*).

THE RIGHT TO TRIAL BY JURY

United States v. Haymond[17] is a potentially revolutionary case in the Court's *Apprendi* line. Andre Haymond was convicted of possessing child pornography and sentenced to a prison term followed by 10 years of supervised release pursuant to 18 U.S.C. § 3583. When it was later alleged that he violated the terms of his supervised release by possessing more child pornography, a federal district judge acting without a jury and under a preponderance-of-the-evidence standard found that he knowingly possessed some of the images. Under a special provision in the federal supervised-release statutory regime (§ 3583(k)), a judge who finds by a preponderance that a defendant on supervised release committed certain enumerated offenses—including possession of child pornography—*must* impose an additional prison term of at least five years and up to life. Without that special provision, Mr. Haymond would have been eligible to receive a sentence of between zero and two additional years in prison. The trial judge reluctantly sentenced Mr. Haymond to five years, and, on appeal, the Tenth Circuit Court of Appeals concluded that the five-year sentence required by § 3583(k) violated Mr. Haymond's Fifth and Sixth Amendment rights to trial by jury. The Supreme Court agreed.

Justice Gorsuch, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote a plurality opinion that began by emphasizing that, under *Apprendi*,[18] *Blakely*,[19] and *Alleyene*,[20] a jury must find beyond a reasonable doubt every fact that the law makes essential to a punishment that a judge might later seek to impose. It rejected the government's argument that the Sixth Amendment's jury promise does not apply to supervised-release revocation hearings, noting that its prior precedents had "rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.'"[21] The same is true of efforts to recast punishment as mere "'sentence modification' imposed at a 'postjudgment sentence-administration proceeding.'"[22]

The plurality also rejected the government's argument that supervised-release-revocation proceedings are akin to historic parole- and probation-revocation proceedings (which have traditionally not been subject to Fifth and Sixth Amendment protections[23]). Whereas a defendant who violates probation or parole can typically only serve the remaining prison term authorized by the jury for his original crime of conviction, supervised-release provisions like § 3583(k) expose a defendant to an additional mandatory minimum prison term beyond that originally authorized by the jury. This, the plurality noted, creates an *Alleyene* problem. Without § 3583(k), Mr. Haymond faced a total lawful prison term of between zero and ten years. Section 3583(k) raised the minimum sentence he faced from zero to five years based solely on a judge's determination by a preponderance of the evidence in violation of *Alleyene*.

Having concluded that § 3583(k)'s addition of a mandatory minimum violated Mr. Haymond's right to a trial by jury, the plurality would remand the case for the lower court to address the question of remedy and decide whether § 3583(k) is unenforceable or permits the judge to empanel a jury to find the necessary facts to trigger the mandatory minimum.

Justice Breyer concurred, providing the fifth vote. He agreed with the plurality that § 3583(k) was "more like punishment for a new offense,"[24] and therefore findings of fact should be made by the jury, but he emphasized that his agreement with the plurality was limited to the special § 3583(k) provision. That provision, he explained, has some unique features that make it akin to punishment: it only applies to a discrete set of federal offenses; it takes away the judge's discretion regarding whether and how much prison is appropriate; and it imposes a mandatory minimum of five years in prison. He wrote separately to make it clear that, as a general matter, he viewed the judge's role in supervised-release proceedings as consistent with traditional parole and he "would not transplant the *Apprendi* line of cases to the supervised-release context."[25]

But, having brought the *Apprendi* line into the supervised-release context, it may be difficult for the Court to limit its impact. The decision clearly puts other sections of the federal revocation statute that affect a large number of cases at risk, as well as various state provisions on the revocation of probation, parole, and supervised release.

Justice Alito, writing in dissent for himself, the Chief Justice, and Justices Thomas and Kavanaugh, warned that the plurality opinion "sports rhetoric with potentially revolutionary implications" and is crafted so as to "lay[] the groundwork for later decisions of *much* broader scope."[26] The dissent then recounts how much of the plurality opinion's language suggests that the Sixth Amendment jury trial right applies to "*any* supervised-release revocation proceeding."[27] And, the dissent threatens, "if every supervised-release revocation proceeding is a criminal prosecution, as the plurality suggest, the whole concept of supervised release will come crashing down."[28] Although the plurality states in a footnote that it is "not pass[ing] judgment one way or the

17. 139 S. Ct. 2369 (2019).
18. Apprendi v. New Jersey, 530 U.S. 466 (2000).
19. Blakely v. Washington, 542 U.S. 296 (2004).
20. Alleyene v. United States, 570 U.S. 99 (2013).
21. *Haymond*, 139 S. Ct. at 2379.
22. *Id.*
23. *See* Garnon v. Scarpelli, 411 U.S. 778 (1973) (probation hearings); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole hearings).
24. *Id.* at 2386 (Breyer, J., concurring in the judgment).
25. *Id.* at 2385.
26. *Id.* at 2386 (Alito, J., dissenting).
27. *Id.* at 2387 (emphasis in original).
28. *Id.* at 2388.

other on § 3583(e)'s consistency with *Apprendi*,"[29] under the plurality's logic, "a term of supervised release could never be ordered [by a judge acting without a jury] for a defendant who is sentenced to the statutory maximum term of imprisonment, and only a short period" could be imposed for one sentenced to something close to the maximum.[30]

On the merits, the dissenters disagreed with the plurality's belief that supervised release falls within the meaning of "criminal prosecutions" for which the Sixth Amendment provides a right to jury trial. Relying on the original meaning of "accused" and "criminal prosecution," the dissent concluded that "[a] supervised-release revocation proceeding is not part of the criminal prosecution that landed a defendant in prison in the first place because '[a] "criminal prosecution" . . . ends when sentence has been pronounced on the convicted or a verdict of "Not guilty" has cleared the defendant of the charge.'"[31] Instead, the dissenters believe that supervised release should be treated like parole and probation hearings, which the court had previously held were not considered part of the criminal prosecution for purposes of the Sixth Amendment.

Going forward, in addition to determining which other parole, probation, or supervised-release statutes are affected by *Haymond*'s holding, lower courts addressing the remedial question will have to grapple with the implications of the *Haymond* decision: If the right to a jury trial applies at § 3583(k) revocation hearings, what other rights should be afforded to defendants at these hearings? Is there a Sixth Amendment right to counsel?[32] A Fifth Amendment right to testify or not to take the stand?[33] A right to confront witnesses?[34] This will hardly be the Court's last word on the scope of the *Haymond* decision. We'll have to see how limited Justice Breyer's view will be down the line.

INEFFECTIVE ASSISTANCE OF COUNSEL

In *Garza v. Idaho*,[35] the Supreme Court extended *Roe v. Flores-Ortega*[36] and held that (a) a lawyer provides constitutionally deficient performance when she fails to file a notice of appeal after the client requests an appeal—even when the underlying plea included a waiver of appeal—and (b) prejudice will be presumed in such cases. Gilberto Garza, Jr. entered an *Alford* plea to aggravated assault and possession of a controlled substance with intent to deliver, signing an appeal waiver as part of the plea agreement. Following sentencing, Garza informed his trial counsel of his desire to appeal, but counsel did not file the appeal. After the period for filing a notice of appeal passed, Garza sought post-conviction relief in state court, claiming his trial counsel was ineffective for failing to file a notice of appeal despite Garza's instructions to do so. The Idaho state courts denied relief, holding that Garza failed to show both deficient performance and resulting prejudice to his appeal and thus did not merit relief under the *Strickland v. Washington*[37] standard for assessing ineffective-assistance-of-counsel claims.

"[T]rial counsel's failure to file an appeal after Garza requested one triggered the *Flores-Ortega* presumption of prejudice."

In a 6–3 opinion authored by Justice Sotomayor, the Court reversed. In *Flores-Oretga*, the Court had already explained that a lawyer who disregards specific instructions from her client to file a notice of appeal renders deficient performance under *Strickland*. The *Garza* majority held that this remains true even when the client signed an appeal waiver because no appeal waiver serves to bar all appellate claims and filing an appeal is a purely ministerial act that counsel performs to effectuate a decision that the defendant alone is entitled to make.

With regard to prejudice, *Flores-Ortega* had held that, "when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed 'with no further showing from the defendant of the merits of his underlying claims.'"[38] According to the *Garza* majority, trial counsel's failure to file an appeal after Garza requested one triggered the *Flores-Ortega* presumption of prejudice. As was true in *Flores-Ortega*, "the loss of the 'entire [appellate] proceeding itself, which a defendant wanted at the time and to which he had a right, … demands a presumption of prejudice.'"[39]

Justice Thomas, joined by Justices Gorsuch and Alito, dissented, arguing both that trial counsel's performance was not deficient and that *Flores-Ortega*'s presumption of prejudice should not apply when the defendant has executed an appeal waiver. Justice Thomas argued that "a defendant who has executed an appeal waiver cannot show prejudice arising from his counsel's decision not to appeal unless he (1) identifies claims he would have pursued that were outside the appeal waiver; (2) shows that the plea was involuntary or unknowing; or (3) establishes that the government breached the plea agreement."[40] Justice Thomas contended that Garza waived his right to appeal with his plea agreement, and therefore Garza, not his trial counsel, forfeited his appeal. Justice Thomas likened this issue to other waived issues, noting that counsel should not be deemed ineffective for failing to challenge a waived issue. Thus, Justice Thomas concluded, Garza's trial counsel pursued "the only professionally reasonable course of action for counsel under the circumstances" by failing to file a notice to appeal.[41]

Joined now only by Justice Gorsuch, Justice Thomas concluded by lamenting the Court's further break from the original meaning of the Sixth Amendment. Noting that the Sixth Amendment originally provided defendants with a right only to employ counsel or use volunteered services, Justice Thomas argued that

29. *Id.*
30. *Id.* at 2390.
31. *Id.* at 2393 (quoting F. HELLER, SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 54 (1951)).
32. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973).
33. *See* Salinas v. Texas, 570 U.S. 178 (2013).
34. *See* Williams v. Illinois, 567 U.S. 50 (2012).
35. 139 S. Ct. 738 (2019).
36. Roe v. Flores-Ortega, 528 U.S. 470 (2000).
37. 466 U.S. 668 (1984).
38. *Garza*, 139 S. Ct. at 742 (quoting *Flores-Ortega*, 528 U.S. at 484).
39. *Id.* at 748 (quoting *Flores-Ortega*, 528 U.S. at 483).
40. *Id.* at 752 (Thomas, J., dissenting).
41. *Id.* at 753.

"The Court [in *Flowers*] found significant evidence of discriminatory intent."

providing government-funded counsel to indigent defendants, requiring that counsel be effective, and establishing presumptions of prejudice for ineffective counsel has resulted in "convicted criminals . . . relitigat[ing] their trial and appellate claims through collateral challenges couched as ineffective-assistance-of-counsel claims."[42] After describing *Gideon v. Wainwright*[43] and its progeny as "dubious authority" that went "beyond our constitutionally prescribed role," he urged the Court not to extend the right-to-appointed-counsel cases any further.[44]

A *BATSON* CHALLENGE

The Court reviewed a *Batson*[45] challenge in *Flowers v. Mississippi*[46] and deemed a trial court's finding of no discriminatory intent in the State's use of its preemptory strikes clear error. At Curtis Flowers's murder trial, the prosecution used its preemptory strikes to remove five of the six African-American prospective jurors. After he was convicted and sentenced to death, Flowers appealed on the grounds that the State violated his Sixth and Fourteenth Amendment rights in issuing racially discriminatory preemptory strikes. The Mississippi Supreme Court upheld the conviction, but the U.S. Supreme Court remanded the case in light of *Foster v. Chatman*.[47] On remand, the Mississippi Court again upheld Flowers's conviction, and he appealed.

In a 7–2 decision authored by Justice Kavanaugh, the Court overturned the conviction. The Court found significant evidence of discriminatory intent. First, there was the history in the case. In Flowers's previous five trials, three had been reversed by the state courts due to prosecutorial misconduct, including two prior *Batson* violations by the same prosecutor who tried the instant case. In all six of Flowers's trial combined, the State had used peremptory challenges to strike 41 of 42 black prospective jurors. There was "dramatically disparate questioning of black and white prospective jurors," and the prosecutor struck all but one prospective black juror in the instant case.[48] Finally, the prosecutor had given paltry explanations for striking one black juror who was similarly situated to unchallenged white jurors. Justice Kavanaugh noted that while the Court "need not and do[es] not decide that any one of those [] facts alone . . . require[s] reversal," the cumulative evidence proved that the preemptory strikes were motivated by discriminatory intent.[49]

Justice Thomas, joined in part by Justice Gorsuch, dissented. Justice Thomas argued that the case did not present a true question of law and believed that the Court "disregarded [its] traditional criteria to take this case."[50] Justice Thomas also disagreed with the majority's understanding of the facts. He believed there were race-neutral reasons for each preemptory strike. He concluded by suggesting that the majority opinion "distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts."[51] Writing for himself alone, Justice Thomas went on to question the legitimacy of the *Batson* decision itself, noting that it has "led the Court to disregard Article III's limitations on standing by giving a windfall to a convicted criminal who … suffered no injury;" "forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes;" and "blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials."[52]

In the end, *Flowers* adds very little to the *Batson* line of cases. The majority itself recognized that the decision "break[s] no new legal ground."[53] Justice Alito concurred specifically to note that the case involved a "unique combination[ ] of circumstances."[54]

EIGHTH AMENDMENT

This Term's Eighth Amendment cases ran the gamut from a case about the incorporation of the Excessive Fines Clause (*Timbs v. Indiana*) to cases addressing methods of execution (*Bucklew v. Precythe*) and inmates' competence to be executed (*Madison v. Alabama* and *Moore v. Texas*).

INCORPORATING THE EXCESSIVE FINES CLAUSE

In the first incorporation case since 2010,[55] the Court held in *Timbs v. Indiana*[56] that the Fourteenth Amendment Due Process Clause incorporates the Eighth Amendment Excessive Fines Clause against the states. After Tyson Timbs pleaded guilty and was sentenced for dealing in a controlled substance and conspiracy to commit theft, the state sought civil forfeiture of Timbs's Land Rover SUV, which the state suspected was used to transport heroin. During the forfeiture hearing, the Indiana trial court found that, although the vehicle had been used to facilitate the commission of a crime, forfeiture of the vehicle would be unconstitutional under the Eighth Amendment Excessive Fines Clause, because the vehicle was worth $42,000—more than four times the maximum $10,000 monetary fine assessable against Timbs for his drug conviction. The Indiana Supreme Court reversed, holding that the constitutional prohibition on excessive fines constrained only federal action and was inapplicable in state cases. The Supreme Court unanimously disagreed.

Writing for the majority, Justice Ginsburg—joined by all but Justice Thomas, who concurred in the judgment—found that the protection against excessive fines was "'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history

42. *Id.* at 756.
43. 372 U.S. 335 (1963).
44. *Garza*, 139 S. Ct. at 759 (Thomas, J., dissenting).
45. Batson v. Kentucky, 476 U.S. 79 (1986).
46. 139 S. Ct. 2228 (2019).
47. 136 S. Ct. 1737 (2016) (finding that preemptory strikes were racially motivated when there is a showing of discriminatory intent).
48. *Flowers*, 139 S. Ct. at 2235.
49. *Id.* at 2235.
50. *Id.* at 2254 (Thomas, J., dissenting).
51. *Id.* at 2274.
52. *Id.* at 2269.
53. *Id.* at 2235 (majority opinion).
54. *Id.* at 2252 (Alito, J., concurring).
55. *See* McDonald v. Chicago, 561 U.S. 742 (2010) (holding that the Fourteenth Amendment incorporated the Second Amendment right to keep and bear arms against the states).
56. 139 S. Ct. 682 (2019).

and tradition.'"[57] Noting that all fifty states have a constitutional provision prohibiting the imposition of excessive fines and that the protection against excessive fines "has been a constant shield throughout Anglo-American history," the majority found the historical and logical case for incorporating the Excessive Fines Clause "overwhelming."[58]

Justice Gorsuch concurred, noting that a better vehicle for incorporation may be the Fourteenth Amendment Privileges and Immunities Clause. However, Justice Gorsuch did not believe the case turned on that decision. Justice Thomas disagreed, concurring only in the judgment. Justice Thomas argued that the right to be free from excessive fines, a "substantive right that has nothing to do with 'process'" should not be incorporated through the Due Process Clause, but rather be characterized as "one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment."[59]

EXECUTION METHODS

In *Bucklew v. Precythe*,[60] the Court addressed the legal test for as-applied challenges to state execution methods. In 2013 Missouri revised its lethal injection protocol to require the use of pentobarbital to execute prisoners in capital cases. Twelve days before his scheduled execution using this protocol, Russell Bucklew raised an as-applied challenge to the use of pentobarbital in his case, arguing that, as a result of vascular tumors that he had in his head, neck, and throat due to a medical condition called cavernous hemangioma, the use of the pentobarbital would cause him severe pain in violation of the Eighth Amendment. In *Baze v. Rees*[61] and *Glossip v. Gross*,[62] the Court had required an inmate filing a facial challenge to a method of execution under the Eighth Amendment to show that there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain [] that the State has refused to adopt without a legitimate penological reason."[63] Bucklew argued that the *Baze-Glossip* test only applied to facial challenges to execution methods and not as-applied claims like his. When pressed by the lower courts for an alternative method, Bucklew suggested the use of nitrogen gas and was given an opportunity to present evidence about the use of that method. Ultimately, the district court rejected his arguments, applying the *Baze-Glossip* test to his claim and granting the State's motion for summary judgment after finding that Bucklew presented no evidence that the use of nitrogen gas would substantially reduce the risk of severe pain. The Eighth Circuit Court of Appeals affirmed, and so did the Supreme Court in a 5-4 decision written by Justice Gorsuch.

First, the majority examined the original and historical understanding of the death penalty, noting that capital punishment is permitted by the Constitution and has often involved methods that can and did result in significant pain, such as hanging. According to the majority, the Eighth Amendment does not guarantee a painless death; it merely prohibits the state from seeking to "add terror, pain, or disgrace" to executions.[64] The analysis is "necessarily comparative" and requires the Court to examine the State's proposed execution method and compare it to another viable alternative.[65] The *Baze-Glossip* comparative test, the Court held, applies whether the challenge is facial or as applied.

"Justice Thomas concurred, noting ... the Eighth Amendment only prohibits methods 'deliberately designed to inflict pain.'"

Next, the majority held that Bucklew failed to satisfy his obligations under the *Baze-Glossip* test because (1) he failed to show that his proposed alternative was more than theoretically available, having provided no evidence about how nitrogen gas would be administered, in what concentration, and what protocols would ensure the safety of the execution team; (2) the State had a legitimate reason for declining to adopt an "untried and untested" nitrogen gas protocol that no state had ever used before, because "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it;"[66] and (3) Bucklew failed to show that the use of nitrogen gas would significantly reduce a substantial risk of severe pain; instead, the majority felt that all of his contentions rested on speculation or were contradicted by record evidence.

Justice Thomas concurred, noting that he continues to believe that the Eighth Amendment only prohibits methods "deliberately designed to inflict pain."[67] Much of the history that Justice Gorsuch unearthed in the majority opinion supported this contention, but the majority ultimately felt that it was not necessary to "revisit[] that debate," because the State "was entitled to summary judgment . . . under the more forgiving *Baze-Glossip* test."[68]

Justice Kavanaugh wrote a separate concurrence to emphasize that all nine justices agreed that the *Baze-Glossip* test does not require the alternative method of execution identified by the inmate to be authorized under current state law. Given this, Justice Kavanaugh argued that an inmate facing a serious risk of pain will typically be able to identify an available alternative.

Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, dissented. The dissenting justices felt that it was improper to apply the *Baze-Glossip* test to as-applied challenges, noting that Missouri's execution protocol could cause Bucklew "excruciating" pain and was tantamount to torture.[69] And even if Bucklew did have the burden of suggesting a less painful alternative, the dissenters believed that he met that burden. Noting that Missouri law permits the use of nitrogen gas,

57. *Id.* at 686–87 (quoting *McDonald*, 561 U.S. at 767) (alterations in original).
58. *Id.* at 689.
59. *Id.* at 691 (Thomas, J., concurring in the judgment).
60. 139 S. Ct. 1112 (2019).
61. 553 U.S. 35 (2008).
62. 135 S. Ct. 2726 (2015).
63. *Bucklew*, 139 S. Ct. at 1125.
64. *Id.* at 1124.
65. *Id.* at 1126.
66. *Id.* at 1130.
67. *Id.* at 1135 (Thomas, J., concurring).
68. *Id.*at 1126 (majority opinion).
69. *Id.* at 1141 (Breyer, J., dissenting).

"[I]f the prisoner cannot understand the State's rationale for seeking capital punishment, the execution cannot serve its retributive purpose."

that three other states have authorized its use for executions, and that Bucklew's expert had suggested it would result in less pain, the dissenters believed that there was at the very least a genuine issue of material fact based on the record.

Justice Sotomayor wrote separately to lament the Court's *Baze-Glossip* requirement that condemned inmates must identify an available means for their own executions and to chastise the majority for suggesting that last-minute stays "should be the extreme exception."[70] Justice Sotomayor warned that if those comments were to be "mistaken for a new governing standard, they would effect a radical reinvention of established law and the judicial role."[71]

COMPETENCE TO BE EXECUTED

In *Madison v. Alabama*,[72] the Court built on its prior decisions in *Ford v. Wainwright*[73] and *Panetti v. Quarterman*[74] and issued two holdings: First, the Court clarified that the Eighth Amendment permits the execution of those who do not remember their criminal acts as long as they are able to rationally understand why they are going to be executed. Second, it held that the Eighth Amendment prohibits the execution of any prisoner whose mental illness renders him unable to rationally understand why the State seeks capital punishment regardless of the type of mental illness at issue.

Vernon Madison was convicted of capital murder in 1985. He sat on death row for the next thirty years, his mental condition deteriorating. After suffering a series of strokes, he was diagnosed with vascular dementia, which included cognitive impairment and memory loss. He asked for a stay of execution on grounds of mental incompetence, noting that he could no longer remember the details of his crime or understand why he was being executed. After the Alabama state courts rejected his request, Madison sought federal habeas corpus relief. The federal district court rejected his petition, but the Eleventh Circuit found that Madison met the Antiterrorism and Effective Death Penalty Act's (AEDPA) high burden of establishing that the state-court ruling "involved an unreasonable application of clearly established federal law" and also found that it rested on an "unreasonable determination of the facts."[75] In 2017 the Court—relying on the high burden required under AEDPA—reversed the Eleventh Circuit.[76]

Facing execution in 2018, Madison returned to state court and presented new evidence of further cognitive decline, but the Alabama state court found Madison mentally competent, noting he had not met the threshold showing for proving insanity. The Supreme Court vacated the Alabama state court judgment in a 5–3 opinion[77] authored by Justice Kagan and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor. First, it held that the Eighth Amendment does not prohibit Madison's execution just because his mental disorder left him without any memory of committing his crime. A prisoner is only incompetent to be executed under *Panetti* when mental illness renders him incapable of "reach[ing] a rational understanding of the reasons for [his] execution."[78] Individuals who do not remember their crimes can still grasp the reasons for the sentence, and therefore prisoners without a memory of their crimes are still competent under *Panetti*.

At the same time, the Court emphasized that memory loss, combined with "other mental shortfalls" can interact to "deprive a person of the capacity to comprehend why the State is exacting death as a punishment."[79] According to the Court, if the prisoner cannot understand the State's rationale for seeking capital punishment, the execution cannot serve its retributive purpose.[80] The cause of the mental illness is not the relevant criterion. Instead, the Court focuses on the effect of the mental disorder. Regardless of the kind of mental disorder—the Court mentioned psychosis, dementia, delusions, and other cognitive decline[81]—*Panetti* asks only whether the prisoner is able to rationally understand why the State seeks to execute him. Noting that it was unclear whether the lower court applied this standard properly, the Court remanded the case for further consideration, commanding the Alabama state court and other lower courts to supplement the existing record if necessary and "look beyond any given diagnosis to a downstream consequence" when conducting the Eighth Amendment analysis.[82]

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. The dissenters agreed that the Eighth Amendment permits the execution of a person who does not remember his crime, but they felt that the Court should not have gone beyond addressing that limited question, noting that it was the only question briefed in the petition for a writ of certiorari. Justice Alito accused Madison's counsel of "flagrantly flout[ing]" the Court's rules[83] by asking the Court to focus on the second, winning issue after certiorari was granted. On the merits, the dissenters found that the Alabama state court understood the full extent of Madison's dementia and appropriately considered it, so they felt there was no need to vacate the state court ruling.

In *Moore v. Texas*,[84] the Court reversed (for a second time)

70. *Id.* at 1134 (majority opinion).
71. *Id.* at 1146 (Sotomayor, J., dissenting).
72. 139 S. Ct. 718 (2019).
73. 477 U.S. 399 (1986).
74. 551 U.S. 930 (2007).
75. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (2012).
76. Madison v. Dunn, 138 S. Ct. 9 (2017).
77. Justice Kavanaugh did not take part in the decision.
78. Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (quoting *Panetti*, 551 U.S. at 958 (second alteration in original)).
79. *Id.* at 727–28.
80. *See id.* at 728.
81. *Id.*
82. *Id.* at 729.
83. *Id.* at 732 (Alito, J., dissenting); *see also* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").
84. 139 S. Ct. 666 (2019) (per curiam).

Texas's determination that Mr. Moore was not sufficiently intellectually disabled to prevent his execution under *Atkins v. Virginia*.[85] The first *Moore* case reached the Supreme Court in 2016.[86] In a majority opinion written by Justice Ginsburg, the Court held in *Moore I* that the state court had made a number of critical errors when analyzing Moore's intellectual disability, including (1) deviating from prevailing clinical standards by overemphasizing Moore's perceived adaptive strengths rather than focusing on his adaptive deficits; (2) relying too heavily on adaptive improvements made in prison; and (3) relying on factors that had no grounding in prevailing medical practice and instead called for lay perceptions of and stereotypes about intellectual disability. On remand, the Texas court once again found that Moore lacked an intellectual disability. Moore, now with the support of the local district attorney, petitioned the Court asking for reversal.

In a per curiam opinion decided without oral argument, the Court reversed Texas's decision a second time, emphasizing that the Texas court's remand decision repeated the same analysis that it had found wanting in its 2017 decision. The per curiam opinion "agree[d] with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectually disability," and remanded the case again.[87]

Chief Justice Roberts, a dissenter in *Moore I*,[88] concurred. Although he still believes, as he wrote in 2017, that the Court has failed to provide clarity for enforcing the requirements of *Atkins*, he agreed that the Texas court had repeated the same errors that the Court had previously condemned. Noting the same lack of clarity to lower courts, Justice Alito dissented, joined by Justices Thomas and Gorsuch. Justice Alito wrote that "[t]he error in this litigation was not the state court's decision on remand but our own failure to provide a coherent rule of decision" in the first *Moore* case.[89] He therefore argued that the majority used this lack of clarity to serve as factfinders rather than a court of last review.

In the end, *Moore II* probably does not have a lot of precedential value as it essentially repeats what the Court previously said in *Moore I*. Instead, it is an example of the Court intervening to stop a lower court from disregarding its prior instructions and to prevent a perceived injustice in a capital punishment case.

HABEAS CORPUS

Moore I was also the subject of the only habeas case on the Court's docket this Term. In *Shoop v. Hill*,[90] the Court issued a unanimous per curiam opinion to remind lower courts that Supreme Court decisions that post-date a state court's determination cannot be considered "clearly established law" for purposes of determining whether a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" under 28 U.S.C. § 2254(d)(1). Danny Hill had filed a federal habeas petition arguing that the Ohio state court had unreasonably erred when it concluded that he was not sufficiently intellectually disabled to prohibit his execution under *Atkins*. The Sixth Circuit Court of Appeals agreed, relying on the factors and language in *Moore I* to grant Hill's *Atkins* claim. The Supreme Court reversed, noting that *Moore I* was decided nine years after the Ohio state court decision under review and, as a result, could not be considered "clearly-established federal law" for habeas review purposes in this case.[91] The Court remanded for the Sixth Circuit to re-examine Hill's claims based strictly on the legal rules that were clearly established at the relevant time. *Shoop v. Hill* is yet another example of how restrictive federal habeas corpus review of state court prisoners' claims is under the Anti-Terrorism and Effective Death Penalty Act.

"Many of the Court's criminal cases this Term focused on issues of statutory interpretation..."

STATUTORY INTERPRETATION IN CRIMINAL LAW

Many of the Court's criminal cases this Term focused on issues of statutory interpretation, addressing questions about whether to apply a knowing *mens rea* requirement to the status-element of a federal crime prohibiting possession of firearms by illegal aliens (*Rehaif v. United States*), how to interpret the enhanced penalty clauses in the Armed Career Criminal Act (*United States v. Stitt, Quarles v. United States*, *Stokeling v. United States*), whether the statute authorizing enhanced penalties for firearm use during the commission of violent felonies is unconstitutionally vague (*United States v. Davis*) and whether statutory tolling of a supervised release period is appropriate during periods of pretrial incarceration for unrelated offenses (*United States v. Mont*).

MENS REA REQUIREMENTS

In *Rehaif v. United States*,[92] the Court addressed the relationship between 18 U.S.C. §§ 922(g) & 924(a)(2). Section 922(g) makes it unlawful for nine different categories of individuals to possess firearms, including aliens who are "illegally or unlawfully" in the country. Section 924(a)(2) adds that a person who "knowingly violates" § 922(g) shall be imprisoned for up to ten years. In *Rehaif*, the Court held that the knowing scienter requirement in § 924(a)(2) applies to both the conduct element of § 922(g)—possession of a firearm—and its status element—that the defendant is an alien who is illegally or unlawfully in the country. As a result, to be guilty under § 924(a)(2), a defendant must know both that he possessed a firearm ***and*** that he was an alien who was illegally or unlawfully in the country.

In a 7–2 opinion delivered by Justice Breyer, the Court noted its longstanding presumption when interpreting federal criminal statutes that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct. It then emphasized

85. 536 U.S. 304 (2002).
86. Moore v. Texas, 137 S. Ct. 1039 (2017).
87. *Moore II*, 139 S. Ct. at 672.
88. *See Moore I*, 137 S. Ct. at 1053–62 (Roberts, C.J., dissenting).
89. *Moore II*, 139 S. Ct. at 674 (Alito, J., dissenting).
90. 139 S. Ct. 504 (2019).
91. *See* Greene v. Fisher, 565 U.S. 34 (2011) (noting that the clearly-established federal law is the law that existed at the time of the relevant state court decision).
92. 139 S. Ct. 2191 (2019).

"[T]ens of thousands of prisoners currently serving sentences under § 922(g) will seek relief from their convictions."

that this presumption "applies with equal or greater force when Congress includes a general scienter provision in the statute itself"[93] as it did in § 924(a)(2). Finding that neither the text nor the legislative history provide a reason to depart from that presumption, the Court held that "knowingly" modifies both elements of the violation—illegal status and firearm possession. The majority felt that applying the scienter requirement to the status element was necessary to separate wrongful from innocent acts; after all, possession of a gun can be entirely innocent. Without knowledge of his status, a defendant "may well lack the intent needed to make his behavior wrongful."[94]

Justice Alito, joined by Justice Thomas, dissented, noting that "every single Court of Appeals to address the question"[95] had read no scienter requirement into the illegal status element of the statute. Noting that the text itself does not answer the question, Justice Alito emphasized that the Court had never before imposed a *mens rea* requirement on a status element in an offense and that applying a knowledge requirement to the status element in § 922(g) would be factually problematic, would frustrate Congress's public safety objective, and would lead to perverse results.

Justice Alito also warned that the majority's decision in *Rehaif* will have "far reaching" practical effects.[96] First, tens of thousands of prisoners currently serving sentences under § 922(g) will seek relief from their convictions. Second, federal courts will have to grapple with how to apply a knowledge requirement to other status elements in § 922(g), which will raise a host of questions. For example, under § 922(g)(4), a person who has been "adjudicated as a mental defective" may not knowingly possess a firearm. Does that person also have to know that he has been adjudicated as a mental defective? Do felons have to know their status as felons? Finally, the Court's reasoning may also reach beyond § 922(g). Other federal statutes and a host of state statutes codify status-based offenses. Should courts presume that those elements have *mens rea* requirements as well? Only time will tell how far *Rehaif*'s logic extends.

THE ARMED CAREER CRIMINAL ACT (ACCA)

The ACCA requires judges to impose a fifteen-year sentence enhancement when a felon who has three prior convictions for certain violent or drug-related crimes is convicted of unlawfully possessing a firearm.[97] In three cases this Term, the Court addressed statutory interpretation questions about the predicate offenses that prosecutors relied on to seek ACCA enhancements.

United States v. Stitt[98] and *Quarles v. United States*[99] both address the ACCA's definition of burglary. Although burglary is specifically enumerated as an offense that can trigger ACCA enhancement, the ACCA does not define it. In *Taylor v. United States*,[100] the Court interpreted "burglary" under the ACCA to include the generic, contemporary meaning of burglary—an unlawful or unprivileged entry into, or remaining in, a building or other structure, with the intent to commit a crime.

In *United States v. Stitt*,[101] a unanimous Court concluded that the ACCA's generic definition of "burglary" includes state burglary statutes that criminalize the breaking and entering of vehicles designed for overnight accommodation of persons. Justice Breyer, writing for the Court, noted that "Congress intended the definition of 'burglary' to reflect 'the generic sense in which the term [was] used in the criminal codes of most States' at the time the Act was passed."[102] According to the Court, a majority of state burglary statutes covered vehicles adapted or customarily used for lodging when the ACCA was passed. Part of what makes burglary an inherently dangerous crime, the Court explained, is that it creates the possibility of a violent encounter between offender and occupant. Someone who breaks into an RV, mobile home, or other vehicle that is adapted or used for lodging runs the risk of such a violent encounter.

In *Quarles*, the Court addressed whether Michigan's third-degree home invasion offense—which criminalizes forming the intent to commit a crime *at any time* after a person unlawfully remains in a building or structure—is a form of generic burglary under the ACCA. Justice Kavanaugh, in another unanimous opinion, wrote for the Court that generic remaining-in burglary under the ACCA does not require a person to have the intent to commit a crime at the moment she first unlawfully remains in a building or structure. Under the ACCA's burglary definition, such intent can be formed at any time while unlawfully remaining in the building or structure.

According to the Court, Congress intended to include both types of burglary—when there is intent upon first unlawful entry and when intent develops during an unlawful remaining in a building or structure—in the ACCA's generic definition of burglary. Both types were criminalized in the states when the ACCA was enacted and both types are equally serious and "create[] the possibility of a violent confrontation," which is precisely what the ACCA intends to punish through enhanced sentencing.[103]

Finally, in *Stokeling v. United States*,[104] the Court addressed robbery rather than burglary, holding that robbery could serve as a predicate violent felony under the ACCA even in states like Florida where robbery requires only slight force. Although robbery is not an enumerated predicate like burglary, the ACCA also defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[105]

93. *Id.* at 2195.
94. *Id.* at 2197.
95. *Id.* at 2201 (Alito, J., dissenting).
96. *Id.* at 2212.
97. 18 U.S.C. § 924(e) (2012).
98. 139 S. Ct. 399 (2019).
99. 139 S. Ct. 1872 (2019).
100. 495 U.S. 575 (1990).
101. 139 S. Ct. 399 (2019).
102. *Stitt*, 139 S. Ct. at 406 (quoting *Taylor*, 495 U.S. at 598).
103. Quarles v. United States, 139 S. Ct. 1872, 1879 (2019).
104. 139 S. Ct. 544 (2019).
105. 18 U.S.C. § 924(e)(2)(b)(i) (2012).

Denard Stokeling's sentence for possessing a firearm was enhanced under the ACCA based, in part, on a Florida robbery conviction that requires "resistance by the victim that is overcome by the physical force of the offender."[106] Stokeling contended Florida robbery required a significantly smaller showing than the violence required by the ACCA and argued that only physical force "reasonably expected to cause pain or injury" should trigger application of an ACCA enhancement.[107]

Justice Thomas, joined by Justices Breyer, Alito, Gorsuch, and Kavanaugh, disagreed and found that robbery may serve as a predicate offense for ACCA enhancement purposes even in states that define robbery as merely overcoming a victim's resistance. The majority noted that robbery requiring "the use of 'force or violence'"[108] was included as an enumerated offense when the ACCA was first enacted. At the time, under the common-law definition of robbery, violence existed when force was needed to overcome the victim's resistance, however slight. The majority emphasized that, when Congress revised the statute in 1986, it was intending to expand the ACCA's coverage and used the same word—"force"—when defining crimes of violence, thus suggesting that it intended the term to retain the same common-law meaning and include common-law robbery predicated on the use of force to overcome a victim's resistance.

Justice Sotomayor, writing for the dissent, disagreed. Citing the Court's prior decision in *Johnson v. United States*,[109] which held that Florida's felony battery offense is not a predicate violent offense under the ACCA, she argued that the Court had found the ACCA's physical force requirement to require "violent," "substantial," and "strong" force.[110] For the dissent, a victim's resistance, which "can mean essentially no force at all,"[111] did not satisfy the *Johnson* standard. Many individuals labeled as "robbers" in Florida were not the sort that should merit sentence enhancement under the ACCA.

Justice Sotomayor continued by referencing legislative history, noting that "robbery" was taken out of the ACCA's list of offenses. Congress did not intend to include all forms of robbery, precisely because in places like Florida, "the label 'robbery' [applies] to crimes that are, at most, a half-notch above garden-variety pickpocketing or shoplifting."[112]

VAGUENESS DOCTRINE

In *United States v. Davis*,[113] the Court continued down the path it started in *Johnson v. United States*[114] and *Sessions v. Dimaya*[115] and deemed 18 U.S.C. § 924(c)'s residual clause unconstitutionally vague. Section 924(c)'s residual clause authorized enhanced penalties for defendants who used a firearm in connection with a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of the committing the offense."[116] Justice Gorsuch, writing for a 5-4 majority, noted that § 924(c)'s residual clause was almost identical to the clause the Court struck down in *Dimaya* and emphasized that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'"[117] The majority then rejected the government's attempt to save the statute by arguing for a conduct-specific, case-by-case approach to application of the clause, noting that it was inconsistent with the text, history, and structure of the federal criminal code.

"Mont challenged the jurisdiction of the federal district court, noting that his term of supervised release had ended two weeks prior."

Justice Kavanaugh, joined by the Chief Justice and Justices Thomas and Alito, dissented, noting that § 924(c), unlike the residual clauses addressed in other cases, punishes current conduct. It does not enhance a penalty for prior offenses. The dissenters believe that § 924(c)'s text and focus on present conduct, coupled with the Court's general practice of saving ambiguous statutes from unconstitutionality when fairly possible, meant that it should have been interpreted to consider current conduct instead of taking a constitutionally problematic categorical approach.

STATUTORY TOLLING

In *Mont v. United States*,[118] the Court held that pretrial detention lasting longer than 30 days and later credited as time served for a new conviction statutorily tolls an individual's period of supervised release for prior offenses under 18 U.S.C. § 3624(e). When Jason Mont was arrested in Ohio and held pretrial on drug-trafficking charges, he was four years and three months into a five-year period of federal supervised release for federal drug crimes. At a later federal hearing to determine whether he had violated the conditions of his supervised release, Mont challenged the jurisdiction of the federal district court, noting that his term of supervised release had ended two weeks prior. The Supreme Court held that Mont's supervised-release period was tolled while he was held in pretrial detention in state custody under § 3624(e), because it was later credited toward his state sentence.

Justice Thomas wrote for the Court, joined by Chief Justice Roberts and Justices Ginsburg, Alito, and Kavanaugh. Section 3624(e) provides that "[a] term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime . . . ."[119] Relying on dictionary definitions and canons of interpretation, Justice Thomas interpreted "imprisoned in connection with a conviction" to include periods of pretrial detention for which a defendant receives credit against a later sentence. According to the

106. Robinson v. State, 692 So.2d 883, 886 (Fla. 1997).
107. *Stokeling*, 139 S. Ct. at 554.
108. *Id.* at 551.
109. 559 U.S. 133 (2010).
110. *Stokeling*, 139 S. Ct. at 557 (Sotomayor, J., dissenting).
111. *Id.* at 558.
112. *Id.* at 565.
113. 139 S. Ct. 2319 (2019).
114. 135 S. Ct. 2251 (2015).
115. 138 S. Ct. 1204 (2018).
116. 18 U.S.C. § 924(c)(3)(B) (2012).
117. *Davis*, 139 S. Ct. at 2326.
118. 139 S. Ct. 1826 (2019).
119. 18 U.S.C. § 3624(e) (2012).

"After the charges were dropped, he sued the arresting officers under 42 U.S.C. § 1983..."

majority, the phrase "in connection with" bears a "broad interpretation" and Congress (like most states) instructs courts to include pretrial detention periods as time served when calculating imprisonment.[120] Congress could have said "after a conviction" or "following a conviction," if it wanted a more narrow construction. Additionally, the majority felt that the purpose of supervised release would be defeated if pretrial detention counted against the supervised release period. Supervised release is designed to assist individuals in transitioning back into society, and counting periods of incarceration against that clock would not serve that purpose.

Mont argued that the present-tense construction of the statute—the use of "*is* imprisoned"—prohibited courts from looking backwards and tolling a pre-conviction time period. Writing in dissent, Justice Sotomayor, joined by Justices Breyer, Kagan, and Gorsuch agreed. "[N]o one would say that a person 'is imprisoned in connection with a conviction' before any conviction has occurred."[121] Had Congress wanted to toll periods of pretrial confinement, it could have used words like "confined" or "detained" instead of "imprisoned" or it could have used the past tense. The majority approach is problematic, the dissent explains, because an offender's supervised-release status will remain uncertain until the underlying charges are resolved.

FIRST AMENDMENT

In *Nieves v. Bartlett*,[122] the Court considered the legal standard for addressing a plaintiff's claim that he was arrested in retaliation for his speech in violation of the First Amendment. Bartlett was arrested at a public winter sports festival in Alaska for disorderly conduct and resisting arrest. After the charges were dropped, he sued the arresting officers under 42 U.S.C. § 1983, alleging that the officers violated his First Amendment rights by arresting him in retaliation for his speech. (Bartlett had refused to speak with one officer and had intervened later to advise an underaged partygoer not to speak to the other officer.) The officers responded that they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with the police. The Supreme Court affirmed the lower court's decision to grant summary judgment to the officers and held that the existence of probable cause should generally defeat a retaliatory arrest claim.

Chief Justice Roberts, writing for himself and Justices Breyer, Alito, Kagan, and Kavanaugh, emphasized that, to prevail on a claim that government officials improperly retaliated against an individual for engaging in protected speech, the plaintiff must show that the government official acted with a retaliatory motive and that the retaliatory motive caused the adverse action against the plaintiff that resulted in an injury. The majority felt that establishing such "but for" causation is particularly challenging in the arrest context because "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest;"[123] officers often have to make "split-second judgments;"[124] and the existence of probable cause suggests that the arrest may have happened regardless of the officers' motives. To ensure that officers are not unnecessarily chilled from being able to do their jobs, the majority would ask if the officers' actions were objectively reasonable—namely, if they had probable cause to support the arrest. If so, then the retaliatory arrest claim would typically fail. But if the plaintiff establishes the absence of probable cause, then the majority would turn to the test enunciated in *Mt. Healthy City Board of Education v. Doyle*.[125] Under that test, "[t]he plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation."[126]

The Court did note that a "narrow qualification" to its holding is appropriate "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[127] In those cases, "an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'"[128] Thus, the majority noted that "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[129]

Justice Thomas concurred. Although he agreed with the majority's general rule, he would not adopt its qualification for cases where arrests are atypical noting that the qualification "has no basis in either the common law or our First Amendment precedents."[130]

Justice Gorsuch concurred in part and dissented in part. He believes that "a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim" and, as a result, there is "no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim."[131] But that doesn't mean that the existence of probable cause would not inform issues like causation. Justice Gorsuch agreed with the majority that the absence of probable cause is not an absolute requirement for a retaliatory arrest claim and the presence of probable cause is not an absolute defense, but he would reserve decision on the role that probable cause should play for future cases.

120. *Mont*, 139 S. Ct. at 1832.
121. *Id.* at 1837 (Sotomayor, J., dissenting).
122. 139 S. Ct. 1715 (2019).
123. *Id.* at 1724 (quoting Reichle v. Howards, 566 U.S. 658, 668 (2012)).
124. *Id.* (quoting Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018)).
125. 429 U.S. 274 (1977).
126. *Nieves*, 139 S. Ct. at 1725.
127. *Id.* at 1727.
128. *Id.* (quoting *Lozman*, 138 S. Ct. at 1953–54).
129. *Id.*
130. *Id.* at 1728 (Thomas, J., concurring in part and concurring in the judgment).
131. *Id.* at 1732 (Gorsuch, J., concurring in part and dissenting in part).

Justice Ginsburg, concurring in part and dissenting in part, believed that *Mt. Healthy City Board of Education v. Doyle* adopted the right test. Justice Sotomayor dissented separately to note that she agreed with Justice Gorsuch that the existence of probable cause "has undeniable evidentiary significance to the underlying question of what motivated an arrest,"[132] but she also agreed with Justice Ginsburg that courts should evaluate retaliatory arrest claims under the *Mt. Healthy* standard that is used in other First Amendment retaliation claims. She objected to the majority casting aside that standard in favor of a requirement that the plaintiff produce "comparison-based evidence," which she thinks will not sufficiently protect the First Amendment interests at stake.[133]

A LOOK AHEAD

In the 2019–20 Term, the Court will address some important criminal law and procedure issues. The Justices will return to the issue of incorporation in *Ramos v. Louisiana* to determine whether the Sixth Amendment's guarantee of a unanimous verdict applies to the states.[134] In *Kahler v. Kansas*, the Court will decide whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense.[135] And in Fourth Amendment jurisprudence, the Court will consider whether it is reasonable for officers making investigative stops to assume, absent any indications to the contrary, that the driver of a car is the registered owner.[136] It should be an exciting docket.

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132. *Id.* at 1736 (Sotomayor, J., dissenting).
133. *Id.* at 1737.
134. Ramos v. Louisiana, No. 18-5924.
135. No. 18-6135.
136. Kansas v. Glover, No. 18-556.

Answers to Crossword
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