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Homes, History, and Shadows: Select Criminal Law and Procedure Cases From The Supreme Court's 2020-21 Term

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LOOK BACK

The death of Justice Ruth Bader Ginsburg in September 2020 and the appointment of Justice Amy Coney Barrett to replace her solidified a 6-3 majority on the Court for Republican appointees and is already affecting how the Court approaches and decides its criminal law and procedure cases. Justice Ginsburg, a strong advocate for equality and fair treatment, generally construed criminal statutes narrowly and stressed the importance of defendants' procedural rights. Justice Barrett is an originalist who will look to history to seek answers on the scope of criminal procedure amendments. The combined appointments of Justice Gorsuch and Justice Barrett mean that litigants will need to focus more on historical analyses when arguing in front of the Court if they hope to garner a majority.

Although that interpretive method will often benefit the government in criminal cases, Justice Barrett—much like Justice Scalia for whom she clerked—will be a staunch advocate of Fourth Amendment protection in the home, as her votes in *Caniglia v. Strom*[1] and *Lange v. California*[2] this Term reflect. And she will focus on the text and structure when interpreting criminal statutes, as she did in *Van Buren v. United States*[3]—the only criminal case that she authored this Term in which she interpreted the Computer Fraud and Abuse Act of 1986 in a way that limited criminal liability.

In the Eighth Amendment context, Justice Ginsburg voted with the 5-4 majorities in *Roper v. Simmons*[4] and *Miller v. Alabama*[5] to restrict the availability of capital punishment and life without parole for juveniles, and she joined Justice Breyer's dissent in *Glossip v. Gross*[6] when he argued for the unconstitutionality of the death penalty. Justice Barrett, on the other hand, joined the majority in *Jones v. Mississippi*[7] this Term to scale back *Miller*'s protections for children and voted with the majority in multiple per curiam cases this Term that reversed habeas grants of relief in death penalty cases.[8]

In addition to the change in Court personnel, this year has also been marked by controversy about the Court's procedures.[9] The Supreme Court typically grants certiorari, receives full briefing, has oral arguments, and delivers signed opinions in 60-70 cases as part of its merits review process. The Court also decides cases as part of its "shadow docket,"[10] where there is not full briefing and the decisions are issued summarily, often through brief, unsigned orders that have little explanation and leave lower courts in the dark about how to apply precedent going forward. Although the shadow docket has always existed, there has been a serious uptick in the extent to which the justices are using it to issue significant decisions without the daylight that comes with the traditional merits review process. The Court has been particularly active in using the shadow docket in capital cases and has also used it this year to send signals to lower courts about qualified immunity and excessive force doctrine.

FOURTH AMENDMENT

The Court considered four Fourth Amendment cases this Term, two of which addressed when police may enter a home without a warrant (*Caniglia v. Strom* and *Lange v. California*). The Court also addressed when an officer's application of physical force to a person's body constitutes a seizure (*Torres v. Madrid*) and whether tribal officers acting on a reservation have the power to detain and search non-tribal members suspected of unlawful conduct (*United States v. Cooley*).

WARRANTLESS HOME ENTRIES

In both *Caniglia v. Strom* and *Lange v. California,* the Court rejected police attempts to expand their power to enter homes without warrants, emphasizing that an individual's Fourth Amendment protections are at their zenith in the home both as a matter of precedent and history. First, in *Caniglia v. Strom*,[11] the Court held that there is no community-caretaking exception to the warrant requirement that permits warrantless police entry into a person's home.

Edward Caniglia's wife requested a welfare check on her husband when she could not reach him the day after he retrieved his gun and asked her to shoot him with it. Mr. Caniglia was on the porch when the police arrived, and they convinced him to go to the hospital on the condition that they would not remove his two handguns. Then, having misinformed Mrs. Caniglia about her husband's wishes, the officers entered the home and seized the guns. Mr. Caniglia sued the officers under 42 U.S.C. § 1983.

Footnotes

1. 141 S. Ct. 1596 (2021).
2. 141 S. Ct. 2011 (2021).
3. 141 S. Ct. 1648 (2021).
4. 543 U.S. 551 (2005).
5. 567 U.S. 460 (2012).
6. 576 U.S. 863 (2015).
7. 141 S. Ct. 1307 (2021).
8. *See, e.g.*, Shinn v. Kayer, 141 S. Ct. 517 (2021); Mays v. Hines, 141 S. Ct. 1145 (2021); Dunn v. Reeves, 141 S. Ct. 2405 (2021).
9. *See, e.g.*, Tierney Sneed, *Senate Judiciary Committee to Hold Hearing on Supreme Court's Abortion Ruling and "Shadow Docket,"* CNN (Sept. 3, 2021), https://www.cnn.com/2021/09/03/politics/senate-judiciary-hearing-supreme-court-shadow-docket/index.html; Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court's "Shadow Docket,"* N.Y. Times (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html.
10. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3-5 (2015).
11. 141 S. Ct. 1596 (2021).

The First Circuit affirmed the District Court's grant of summary judgment to the officers, holding that the officers' removal of Mr. Caniglia and his firearms from the home fell within the "community caretaking" exception to the Fourth Amendment's warrant requirement — an exception previously discussed in passing in *Cady v. Dombrowski*[12] in the context of a search of an impounded car found on a public highway.

The Court unanimously reversed. Justice Thomas wrote the opinion, noting that the Fourth Amendment at its "'very core'" protects homes against unreasonable government intrusion.[13] Turning to *Cady*, he emphasized that *Cady* involved a warrantless search of a disabled car and the opinion "repeatedly stressed" that there is "a constitutional difference" between cars and homes.[14] Cars "can become disabled or involved in … accident[s] on public highways," which require police to "perform noncriminal 'community caretaking functions' such as providing aid to motorists."[15] The same is not true of homes, and *Cady* did not provide police with an "open-ended license to perform [civic tasks] anywhere."[16]

Chief Justice Roberts, joined by Justice Breyer, wrote a brief concurring opinion to remind courts that *Brigham City v. Stewart*[17] still permits officers to enter a home without a warrant to assist individuals facing serious violence or injury when it is objectively reasonable to do so. Justice Kavanaugh also wrote separately to assert that police could rely on the exigent circumstances exception to the warrant requirement to enter a home if they were reasonably trying to prevent a suicide or help a potentially injured elderly person. Justice Alito also concurred to note the limits of the majority's decision and express his view that the Fourth Amendment rules might be different in some non-criminal-law-enforcement contexts. He emphasized that the Court was not addressing when police could conduct a search or seizure to prevent a person from committing suicide, to seize guns to prevent infliction of harm on innocents, or to determine if an elderly resident was incapacitated and in urgent need of medical attention.

In the end, *Caniglia* raised more questions than it answered. There is no community-caretaking exception to the warrant requirement that will permit police to enter the home, but the scope of the emergency aid and exigency exceptions to the warrant requirement remain unclear. Lower courts will have to address the scope of those exceptions as they arise.

The Supreme Court addressed one aspect of the exigent circumstances exception in *Lange v. California*,[18] when it held that there is no *per se* hot-pursuit exception to the warrant requirement that permits police to follow a person suspected of a misdemeanor into his home. Instead, when a fleeing individual is suspected of a misdemeanor, the court must determine case by case whether exigent circumstances justify a warrantless police entry into the home.

"In the end, *Caniglia* raised more questions than it answered."

Arthur Lange was honking his horn and playing loud music while driving. As he approached his house, a California police officer attempted to stop him for a civil noise infraction. Mr. Lange, who claimed that he did not see the officer, drove up his driveway and into his attached garage—an area considered the "curtilage" of the home for Fourth Amendment purposes.[19] Claiming that he was in hot pursuit of Mr. Lange for having committed the misdemeanor offense of failing to comply with a police signal, the officer followed him into the garage and confronted Mr. Lange who immediately appeared to be intoxicated. Mr. Lange was charged with driving under the influence of alcohol and moved to suppress all evidence of his intoxication as tainted by an illegal entry into his home without a warrant. The trial court denied the motion to suppress and the California Court of Appeals affirmed, adopting a blanket rule that there are always exigent circumstances that permit police to enter a home without a warrant when they are in hot pursuit of a fleeing individual suspected of a misdemeanor. The Supreme Court reversed.

Justice Kagan delivered the majority opinion, joined in full by Justices Breyer, Sotomayor, Gorsuch, Kavanaugh, and Barrett and in part by Justice Thomas. The majority began with a discussion of the exigent circumstances exception to the warrant requirement, which "applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.'"[20] She emphasized the sanctity of the home and noted that the gravity of the underlying offense being investigated is an important factor to be considered in the exigency analysis, citing the Court's prior decision in *Welsh v. Wisconsin*[21] in which the Court had refused to sanction police reliance on exigent circumstances to justify a warrantless home entry for a nonjailable DUI offense.

The majority distinguished *United States v. Santana*,[22] which permitted the police to pursue a fleeing felon into her home without a warrant. While refusing to say whether there is a categorical hot-pursuit exception for fleeing felons, the majority emphasized that people suspected of committing misdemeanors are different from those suspected of committing felonies, because misdemeanors tend to involve "less violent and less dangerous crimes."[23] As a result, "'there is reason to question whether a compelling law enforcement need is present,' so it is 'particularly appropriate' to 'hesitat[e] in finding exigent circumstances'" in misdemeanor cases.[24] The majority recognized that where the totality of the circumstances demonstrated an exigency — such as imminent harm to others, a threat to the

12. 413 U.S. 433, 441 (1973).
13. *Caniglia*, 141 S. Ct. at 1599 (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).
14. *Id.* (quoting *Cady*, 413 U.S. at 439).
15. *Id.* at 1660 (quoting *Cady*, 413 U.S. at 441).
16. *Id.*
17. 547 U.S. 398 (2006).
18. 141 S. Ct. 2011 (2021).
19. *See, e.g.*, United States v. Dunn, 480 U.S. 294 (1987) (defining the "curtilage" for Fourth Amendment purposes).
20. *Lange*, 141 S. Ct. at 2017 (quoting Kentucky v. King, 563 U.S. 452, 460 (2011) (internal quotation marks omitted)).
21. 466 U.S. 740 (1984).
22. 427 U.S. 38 (1976).
23. *Lange*, 141 S. Ct. at 2020.
24. *Id.* (quoting *Welsh*, 466 U.S. at 750).

"For most misdemeanors, 'flight alone was not enough.'"

officer himself, destruction of evidence, or escape from the home — the police will be able to act without waiting for a warrant. But courts must complete case-by-case analyses, even if "in many, if not most, cases" an exigency will exist that permits a warrantless home entry.[25]

In the part of the opinion joined by Justice Thomas the majority looked to the common law at the time of the founding and noted that it "afforded strong home protection from government intrusion."[26] While there was a common-law exception for hot pursuit of fleeing felons, the list of felony crimes was much smaller (mostly capital offenses). For most misdemeanors, "flight alone was not enough."[27]

Justice Thomas filed a separate concurring opinion in which he identified certain categorical exceptions in the common-law history where warrantless entry into a home was typically permitted when government officials pursued a fleeing misdemeanant. These included situations where a person was (a) arrested for a misdemeanor and then escaped, (b) suspected of committing an affray offense, (c) suspected of committing an offense that could become a felony if the victim died (pre-felonies), and (d) alleged to have committed a breach-of-the-peace offense. Justice Thomas would preserve these historical exceptions and permit *per se* entry into the home when in hot pursuit of an alleged misdemeanant who fell in one of these categories. For other misdemeanor offenses, he agreed with the majority that history did not support a categorical rule. Finally, restating his opposition to the exclusionary rule, Justice Thomas, now joined by Justice Kavanaugh, argued that courts should not suppress evidence in any cases involving unlawful entry.

Chief Justice Roberts, joined by Justice Alito, wrote a separate opinion in support of California's *per se* rule. He argued that hot pursuit itself generates an exigency sufficient to justify a warrantless home entry, because every case involving flight is one in which there is a risk that the suspect will escape, resort to violence, or destroy evidence. He expressed concern that the majority's case-by-case approach will lead to "absurd" and "dangerous" results and will fail to provide clear guidance to police who need to make split-second determinations.[28] In the Chief Justice's view, alternative safeguards exist to protect the privacy of the home. For example, police entry into the home would have to be reasonable in manner and limited to apprehending the suspect. And the warrantless hot-pursuit exception would only apply if there was a true hot pursuit where the suspect knew that an officer wanted him to stop, and he fled into the home to thwart an otherwise proper arrest. The Chief ultimately concurred, agreeing to vacate and remand Mr. Lange's case for consideration of whether there was a true hot pursuit on the facts.

Justice Kavanaugh wrote a separate concurrence to express his view that there was no real difference between the majority opinion and Chief Justice Roberts's concurrence. Because cases of fleeing misdemeanor suspects will "almost always *also*" involve other exigent circumstances, an officer will typically be able to enter the home without a warrant.[29]

While *Lange* rejected a *per se* warrant exception for hot pursuit of fleeing misdemeanants, the opinion leaves open the question of whether a *per se* exception exists for all fleeing felons. We will have to see how lower courts resolve that question going forward.

DEFINING A SEIZURE

In *Torres v. Madrid*,[30] the Court held that an officer "seizes" a person under the Fourth Amendment when the officer uses physical force on the person's body in a way that objectively manifests an intent to restrain even if the person does not submit and is not otherwise subdued by the officer's use of force. Two New Mexico State police officers went to an apartment complex to execute an arrest warrant for a woman accused of white-collar crimes when they saw Roxanne Torres in the parking lot. Although the officers knew that Ms. Torres was not the subject of the warrant, they approached her as she was getting into her car. One of the officers tried to open the car door and Ms. Torres, believing that the officers were carjackers, sped away. The officers fired thirteen bullets at her car, shooting her twice in the back and temporarily paralyzing her left arm. She continued to flee, and police did not apprehend her until the next day when they located her at a hospital. Ms. Torres sued the New Mexico State police officers for damages under 42 U.S.C. § 1983, alleging that they used excessive force that violated the Fourth Amendment when they shot her. The federal district court granted summary judgment to the officers and the Tenth Circuit Court of Appeals affirmed, holding that, under Circuit precedent,[31] she was not "seized" under the Fourth Amendment when the officers shot her, because the officer's actions would have to terminate her movements to constitute a seizure.

Chief Justice Roberts, joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh, reversed the Tenth Circuit's ruling in a 5-3 decision.[32] The majority started with precedent, noting that, in *California v. Hodari D.*,[33] the Court had interpreted the word "seizure" in the Fourth Amendment by consulting the common law definition of arrest, which required "*either* physical force … *or*, where that is absent, *submission* to the assertion of authority."[34] Looking independently at the history, the Court majority agreed that "the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped."[35] The majority described how English and early American courts regularly held that "[t]he touching of a person—frequently called a laying of hands—was enough" to constitute a seizure even

25. *Id.* at 2021.
26. *Id.* at 2022.
27. *Id.* at 2024.
28. *Id.* at 2028 (Roberts, J., concurring in judgment).
29. *Id.* at 2025 (Kavanaugh, J., concurring).
30. 141 S. Ct. 989 (2021).
31. *See* Brooks v. Gaenzle, 614 F.3d 1213, 1223 (10th Cir. 2010).
32. Justice Barrett did not participate in the consideration of this case.
33. 499 U.S. 621, 626 (1991).
34. *Torres,* 141 S. Ct. at 995 (quoting *Hodari D.*, 499 U.S. at 626).
35. *Id.* at 995.

without any resulting custody or control.[36] Noting that the Fourth Amendment focuses on "'the privacy and security of individuals,' not the particular manner of 'arbitrary invasion[] by governmental officials,'"[37] the majority saw "no basis for drawing an artificial line between grasping with a hand and other means of applying physical force to effect an arrest"— such as using a weapon to shoot a person.[38] As long as officers apply physical force to a person's body with intent to restrain, there is a seizure even if the person does not submit and is not subdued.

The Court emphasized that its holding will not transform every physical contact between a government official and a member of the public into a Fourth Amendment seizure, because a seizure still requires "the use of force *with intent to restrain*."[39] Accidental force or force intentionally applied for another purpose will not count. And the intent requirement is analyzed objectively: the question is "whether the challenged conduct objectively manifests an intent to restrain."[40] The subjective motivations of the police and subjective perceptions of the suspect do not control.

The majority also noted that a seizure by force without submission lasts only as long as the application of force. Under this interpretation, many seizures by force that do not result in capture will be brief or fleeting, which could affect the extent of a damages remedy or what evidence should be excluded as a fruit of any illegal seizure. On remand, Ms. Torres will still need to establish the unreasonableness of the officers' actions, argue that their actions warrant damages, and get past qualified immunity barriers to recovery.

Justice Gorsuch, joined by Justices Thomas and Alito, dissented. In their view, "the Fourth Amendment's text, its history, and our precedent all confirm that 'seizing' something doesn't mean touching it; it means taking possession."[41] As a textual matter, the dissent emphasized that "seizure" must have the same meaning when applied to persons, houses, papers, and effects, and criticized the majority for imposing a different definition for physical force used on "people."[42] The dissent interpreted the history and commentaries as requiring physical possession for an arrest and criticized the majority for improperly focusing on "obscure" and "specialized" civil debt collection cases for its "mere touch" rule, noting that these "long-abandoned civil debt collection practices" should not be injected into the criminal law.[43] As for *Hodari D.*, the dissent dismissed the relevant language as dicta and cited language from *Brower v. County of Inyo*[44] to support its view that a seizure only occurs "'when there is a governmental termination of freedom of movement through means intentionally applied.'"[45]

Although the Court's *Torres* decision provides lower courts with a rule that physical force intentionally applied to restrain a suspect will be a seizure, what constitutes physical force will be a subject of dispute in lower courts. The dissenters raised questions about officers who pepper spray a suspect, detonate a flash-bang grenade that damages someone's ears, or shine a laser and damage an individual's eyes with the intent to stop them, but the majority refused on opine on those "matters not presented here."[46]

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TRIBAL POLICE POWER AND THE FOURTH AMENDMENT

In *United States v. Cooley*,[47] the Court held that tribal police officers have the authority to detain and search non-Indians suspected of violating state or federal law on public highways that run through reservations. An officer in the Crow Police Department stopped to help a parked truck on the side of a road that runs through the reservation. Joshua Cooley, the driver who was not a tribal member, appeared intoxicated and the tribal officer saw two semiautomatic rifles in the car. The officer detained Mr. Cooley and searched the car, finding methamphetamine. The district court suppressed the evidence obtained during the stop, holding that tribal police lacked the authority to investigate state or federal law violations on reservation land. The Ninth Circuit Court of Appeals affirmed, noting that tribal officers could only stop and search individuals on reservation land if the state or federal law violation was "apparent" and they determined that the suspect was not a member of a tribe.[48]

The Supreme Court unanimously reversed. Justice Breyer, writing for the Court, recognized that *Montana v. United States*[49] had established a general rule that tribes do not retain inherent governmental powers over non-Indians' conduct on reservations. But *Montana* also recognized a health and welfare exception under which "a tribe retains inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on ... the health or welfare of the tribe.'"[50] According to the Court, "[t]o deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats."[51]

36. *Id.* at 996.
37. *Id.* at 998 (quoting Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967)).
38. *Id.* at 997.
39. *Id.* at 998.
40. *Id.*
41. *Id.* at 1006 (Gorsuch, J., dissenting).
42. *Id.* at 1014 (Gorsuch, J., dissenting).
43. *Id.* at 1011–12 (Gorsuch, J., dissenting).
44. 489 U.S. 593, 597 (1989).
45. *Torres*, 141 S. Ct. at 1014 (Gorsuch, J., dissenting) (quoting *Brower*, 489 U.S. at 597).
46. *Id.* at 998 (Gorsuch, J., dissenting).
47. 141 S. Ct. 1638 (2021).
48. *Id.*
49. 450 U.S. 544 (1981).
50. *Id.* at 1641 (quoting *Montana*, 450 U.S. at 566).
51. *Id.* at 1643.

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EIGHTH AMENDMENT

In *Jones v. Mississippi*,[52] the Supreme Court drastically limited the impact of its prior decisions in *Miller v. Alabama*[53] and *Montgomery v. Louisiana*.[54] *Miller* had held that the Eighth Amendment prohibition against Cruel and Unusual Punishment forbids the mandatory imposition of life-without-parole (LWOP) sentences for juveniles convicted of murder and further held that only juveniles who were permanently incorrigible could constitutionally receive LWOP sentences. *Montgomery* built on *Miller*, holding that *Miller* announced a substantive rule of criminal procedure that applied retroactively to all individuals then-serving LWOP sentences for crimes committed as children. The *Jones* Court retreated from *Miller* and *Montgomery*, holding that a sentencer need not make a separate factual finding that a juvenile is permanently incorrigible before sentencing that juvenile to LWOP for murder. Nor must the sentencer make any on-the-record statements that implicitly establish permanent incorrigibility. Instead, according to the Court, the Eighth Amendment is satisfied as long as the sentencer has discretion to impose a sentence less than LWOP.

The case arose after a Mississippi judge imposed a mandatory LWOP sentence on Brett Jones for murdering his grandfather when he was fifteen years old. At Mr. Jones's post-*Miller* resentencing, the judge reimposed the LWOP sentence without making any findings related to his permanent incorrigibility. Mr. Jones appealed, arguing that *Miller* and *Montgomery* required the sentencing judge to make a separate factual finding of permanent incorrigibility. The Supreme Court, in a 6-3 decision, disagreed.

Justice Kavanaugh's majority opinion, which was joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett, highlighted language in *Montgomery* stating that "*Miller* did not impose a formal factfinding requirement" to argue that precedent foreclosed any such requirement.[55] In response to Mr. Jones's attempts to analogize to Eighth Amendment cases prohibiting the death penalty for individuals deemed intellectually disabled[56] and legally insane[57] where findings are required, the majority noted that those cases involve eligibility criteria that must be met before an individual can be sentenced to death. In contrast, the majority stated, *Miller* only "required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence."[58]

The majority also rejected Mr. Jones's alternative argument that a sentencer must provide an on-the-record explanation to illustrate an "implicit finding" of permanent incorrigibility, noting that an explanation would not be necessary to ensure consideration of youth, that neither *Miller* nor the Court's death penalty precedents required such an explanation, and that historical and contemporary sentencing practices did not support it.

Justice Thomas concurred, agreeing that the Eighth Amendment does not mandate an additional sentencing procedure or factual findings. But he argued that the majority should have overruled *Montgomery*. Justice Thomas reasoned that *Miller* announced a purely procedural rule, and not a substantive or watershed one; as such, *Miller* could not apply retroactively. Justice Thomas wrote that the majority overruled *Montgomery* "in substance but not in name."[59] Under *Montgomery*'s reasoning, *Miller*'s substantive rule created a categorical exemption for young people capable of rehabilitation and factual findings would be necessary to determine whether children fall into that class. Justice Thomas would rather reject *Montgomery*, as in his view, it contradicts the principle that the legislature should decide who should receive particular punishments.

Justice Sotomayor, joined by Justices Breyer and Kagan, dissented, arguing that the majority "guts" *Miller* and *Montgomery*.[60] She accused the majority of selectively quoting dicta from *Montgomery* and cited the *Montgomery* Court's recognition that, "'[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.'"[61] *Miller*, she argued, drew on the Supreme Court's death penalty cases involving "categorical bans"[62] and set a substantive limit on sentencing that requires a factual eligibility finding. The dissenters agreed with Justice Thomas that the majority decision was inconsistent with *Montgomery* and lamented the practical effects that would flow from the Court's decision. They noted that, although *Miller* made it clear that LWOP would rarely be appropriate for juveniles, states like Mississippi that do not require factual findings of permanent incorrigibility continue to impose LWOP with alarming frequency. Justice Sotomayor also emphasized that such sentences are disproportionately imposed on people of color, noting that 72 percent of children sentenced to LWOP after *Miller* have been Black. Because the Mississippi sentencing court never asked if "Jones [was] one of the rare juveniles whose crimes reflect irreparable corruption," the dissenters would find that his sentence violated the Eighth Amendment.[63]

RETROACTIVITY

Last Term, in *Ramos v. Louisiana*,[64] the Court incorporated the right to a unanimous jury verdict against the states and held that Oregon's and Louisiana's rules that permitted non-unanimous jury verdicts violated the Sixth Amendment. In *Edwards v. Vannoy*,[65] the Supreme Court held that *Ramos* did not apply

52. 141 S. Ct. 1307 (2021).
53. 567 U.S. 460 (2012).
54. 577 U.S. 190 (2016).
55. *Jones*, 141 S. Ct. at 211.
56. Atkins v. Virginia, 536 U.S. 304 (2002).
57. Ford v. Wainwright, 477 U.S. 399 (1986).
58. *Jones*, 141 S. Ct. at 1316.
59. *Id.* at 1327 (Thomas, J., concurring in the judgment).
60. *Id.* at 1328 (Sotomayor, J., dissenting).
61. *Id.* (Sotomayor, J., dissenting) (quoting Montgomery v. Louisiana, 577 U.S. 190, 208 (2016)).
62. *Id.* at 1332 (Sotomayor, J., dissenting).
63. *Id.* at 1340 (Sotomayor, J., dissenting).
64. 140 S. Ct. 1390 (2020).
65. 141 S. Ct. 1547 (2021).

retroactively to criminal defendants whose convictions were final at the time of the decision.

Justice Kavanaugh wrote for a 6-3 majority, joined by Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, and Barrett. He first explained that, under *Teague v. Lane*,[66] there is a presumption that newly-recognized constitutional rules will not be applied retroactively to defendants whose convictions are final, meaning that they have completed their direct appeals and are at the state or federal postconviction stages. This presumption exists, he explained, to promote the criminal system's interests in finality.

In *Teague*, the Court articulated two exceptions—situations where a new rule of criminal procedure would be applied retroactively even to defendants whose convictions were already final. First, a new substantive constitutional rule applies retroactively if it either (a) provides that the conduct for which the defendant was prosecuted is constitutionally protected or (b) prohibits a certain category of punishment for a class of defendants based on their status or offense.[67] The majority noted that *Ramos* was not a substantive ruling but a procedural one, so this exception did not apply.

Second, the Court recognized in *Teague* that a new procedural constitutional rule would apply retroactively if it was deemed to be a watershed rule of criminal procedure that was necessary to prevent "an impermissibly large risk of an inaccurate conviction"[68] and "alters 'our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[69] Justice Kavanaugh explained that the Supreme Court described this exception as "extremely narrow" when it was created, noted that *Gideon v. Wainwright*[70] is the only prior case that would have qualified under the exception, and emphasized that "it is 'unlikely' that any such procedural rules 'have yet to emerge.'"[71] In fact, Justice Kavanaugh noted, "in the 32 years since *Teague* … the Court has *never* found that any new procedural rule actually satisfies that purported exception."[72] Because the exception "has been theoretical, not real," the *Edwards* majority declared it "moribund" and held that "[n]ew procedural rules do not apply retroactively on federal collateral review."[73] As the majority put it, "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."[74] Because Thedrick Edwards's case was at the federal habeas review stage when *Ramos* was decided, he was not entitled to the benefit of the *Ramos* decision and his convictions for armed robbery, kidnapping, and rape would stand even though he was convicted by a non-unanimous Louisiana jury.

Although the majority overturned *Teague*'s watershed exception, the retroactive effect of new substantive rules remains good law and the Court emphasized that states were still free to give broader retroactive effect to its procedural decisions in state postconviction processes.

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Justice Gorsuch, joined by Justice Thomas, concurred to offer his views about the proper, narrow focus of habeas review as a historical matter. He emphasized that federal habeas review was originally created to test the legitimacy of pretrial executive detentions and not to re-adjudicate criminal convictions. Only if a convicting court acted without jurisdiction would habeas review be permissible after a conviction. In his view, *Teague*'s "watershed" exception conflicted with the original purpose and operation of the habeas review system, so he joined the majority's decision overruling it.

Justice Thomas, joined by Justice Gorsuch, also wrote a separate concurrence. Although he agreed with the majority's decision to eliminate *Teague*'s "watershed" procedural exception, he thought there were independent grounds to reject Edwards's claim under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The Louisiana courts rejected Edwards's argument that he was entitled to a unanimous jury verdict under then-existing, pre-*Ramos* precedent. Because that state court decision was not contrary to and did not involve an unreasonable application of clearly established federal law at the time, Justice Thomas would have held that AEDPA independently precluded relief.

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. She criticized the majority for failing to respect precedent and overturning *Teague*'s procedural, watershed exception without going through the *stare decisis* factors. On the merits, she believed that *Ramos* was a watershed decision, worthy of retroactive application, because it overturned a prior rule on fundamental fairness grounds, was grounded in historical importance central to the Framers and bedrock in the "Nation's constitutional traditions,"[75] and centered racial justice concerns, as the non-unanimous jury rule operated "'as an engine of discrimination against [B]lack defendants.'"[76]

THE SHADOW DOCKET

HABEAS CORPUS: INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS IN CAPITAL CASES

The Supreme Court summarily reversed three different federal circuit courts of appeal decisions granting federal habeas relief to capital petitioners on the basis of ineffective-assistance-of-trial-

66. 489 U.S. 288 (1989).
67. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190 (2016); Welch v. United States, 136 S. Ct. 1257 (2016); Penry v. Lynaugh, 492 U.S. 302 (1989).
68. Whorton v. Bockting, 549 U.S. 406, 418 (2007).
69. *Edwards*, 141 S. Ct. at 1557 (citing *Whorton*, 549 U.S. at 417-18).
70. 372 U.S. 335 (1963).
71. *Edwards*, 141 S. Ct. at 1555 (quoting *Whorton*, 549 U.S. at 417-18 and citing Gideon v. Wainwright, 372 U.S. 335 (1963)).
72. *Id.* at 1555.
73. *Id.* at 1561–62.
74. *Id.* at 1560.
75. *Id.* at 1576 (Kagan, J., dissenting).
76. *Id.* at 1578 (Kagan, J., dissenting) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1400–01 (2020) (Kavanaugh, J., concurring in part)).

"[I]n each case, the Supreme Court chastised the lower federal court ..."

counsel claims. Each case was decided as part of the shadow docket in a per curiam summary disposition and, in each case, the Supreme Court chastised the lower federal court for failing to afford the state court decisions the proper amount of deference under the Antiterrorism and Effective Death Penalty Act (AEDPA).

First, in *Shinn v. Kayer*,[77] the Court reversed the Ninth Circuit Court of Appeals's decision to grant habeas relief to George Kayer. Mr. Kayer had been convicted of first-degree murder and sentenced to death for murdering an acquaintance as part of a robbery. In state postconviction proceedings, Mr. Kayer alleged his trial counsel were constitutionally ineffective for failing to investigate and present proper mitigation evidence. The state court rejected his claim after a hearing, holding that (a) counsels' performance was not deficient because Mr. Kayer had not cooperated with his team's efforts to gather more mitigating evidence, and (b) there was no prejudice in any event. On habeas, the Ninth Circuit granted Mr. Kayer relief in a divided opinion. The Supreme Court, in a 6-3 per curiam decision, reversed.[78]

The Court highlighted the high standard of deference required by *Strickland v. Washington*[79] to strategic decisions by trial counsel and noted the additional hurdles a state prisoner faces on federal habeas review when the state court had already adjudicated his claims. Under AEDPA, the state court decision must "be contrary to or involve an unreasonable application of clearly established Federal law" before a habeas petitioner is entitled to relief.[80] The Court accused the Ninth Circuit of analyzing the issues *de novo*, instead of asking if the state court's decision was "so obviously wrong as to be 'beyond any possibility for fair-minded disagreement."[81] Examining the state court's prejudice determination, the Court determined the new mitigation evidence offered at the post-conviction phase would not have created a substantial likelihood of a different outcome. Mr. Kayer had pointed to Arizona cases with similar aggravating and mitigating factors where defendants had obtained relief, but the Court noted that other published state court decisions should not inform the prejudice inquiry because capital sentencing is individualized. Because a fairminded jurist could have shared the Arizona court's views in evaluating the aggravating and mitigating factors, the Court deemed habeas relief inappropriate.

Second, in *Mays v. Hines*,[82] the Court issued an 8-1 per curiam decision reversing the Sixth Circuit Court of Appeals's grant of habeas relief to Anthony Hines.[83] Mr. Hines had been convicted of homicide and sentenced to death for murdering a hotel employee. In state postconviction proceedings, Mr. Hines alleged that his trial attorney was constitutionally ineffective, because the attorney failed to present evidence that would undermine the testimony of Kenneth Jones (the man who had discovered the employee's body) and had failed to argue that Jones may have been the killer. The Tennessee postconviction court found no prejudice. On federal habeas, the Sixth Circuit Court of Appeals disagreed in a divided opinion.

The Supreme Court reversed, criticizing the Sixth Circuit for not sufficiently considering the substantial evidence of Hines's guilt. As in *Kayer*, the Court accused the Sixth Circuit of conducting *de novo* review instead of following AEDPA's instruction that the state court's judgment should not be disturbed unless an error was "'beyond any possibility for fairminded disagreement.'"[84]

Finally, in *Dunn v. Reeves*,[85] the Court summarily reversed the Eleventh Circuit's grant of relief in a capital case. Matthew Reeves had been convicted of homicide and sentenced to death for shooting and killing a man in order to steal his wallet. He sought postconviction relief on the theory that his attorney was constitutionally ineffective, because he should have hired an expert to develop sentencing-phase mitigation evidence to document Mr. Reeves's intellectual disability. The Alabama postconviction court denied relief, noting that Mr. Reeves had failed to prove he was intellectually disabled and rejecting his claim that counsel should have hired an expert. The state court stressed the deference that *Strickland* shows to reasonable, strategic decisions and noted that the record was silent as to counsels' reasons for their decisions because Mr. Reeves failed to call trial counsel to testify at the state court hearing. The Eleventh Circuit granted federal habeas relief, because it interpreted the Alabama court as imposing a *per se* bar on relief when a petitioner does not question trial counsel or otherwise present testimony about the reasons for their actions.

The Supreme Court reversed, criticizing the Eleventh Circuit for mischaracterizing the Alabama court's decision. The Court did not think the Alabama court was imposing a *per se* rule. Instead, the majority thought the state court simply determined that the facts did not warrant relief and that decision was entitled to deference under AEDPA.

Justice Breyer dissented without opinion, and Justice Sotomayor wrote a dissenting opinion that Justice Kagan joined. Justice Sotomayor believed that Alabama had adopted a *per se* rule in direction violation of *Strickland*'s instruction to objectively determine if counsels' performance was deficient considering "all the circumstances of the case."[86] She criticized the Court majority for "putting words in the state court's mouth that the state court never uttered and which are flatly inconsistent with what the state court did say."[87] She then went further, indicting the majority for continuing a "troubling trend in which this Court strains to reverse summarily any grants of relief to those facing

77. 141 S. Ct. 517 (2021).
78. Justices Breyer, Sotomayor, and Kagan dissented without issuing an opinion.
79. 466 U.S. 668 (1984).
80. 28 U.S.C. § 2254(d).
81. *Kayer*, 141 S. Ct. at 523 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).
82. 141 S. Ct. 1145 (2021).
83. Justice Sotomayor dissented without issuing an opinion.
84. *Mays,* 141 S. Ct. at 1146 (quoting *Kayer*, 141 S. Ct. at 520).
85. 141 S. Ct. 2405 (2021).
86. *Id.* at 2418 (Sotomayor, J., dissenting) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)).
87. *Id.* at 2419 (Sotomayor, J., dissenting).

execution."[88] She accused the majority of using the shadow docket to turn AEDPA deference "into a rule that federal habeas relief is never available to those facing execution."[89]

HABEAS CORPUS CUSTODY

In *Alaska v. Wright*,[90] the Court issued a unanimous per curiam opinion to inform lower courts that a state conviction that later serves as a predicate for a federal conviction does not render an individual "in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2254(a). Sean Wright was convicted in 2009 of sexual abuse of a minor. After serving his full state-court sentence, he was released and subsequently charged with failure to register under the federal Sex Offender Notification and Registration Act. At that point, Mr. Wright petitioned for federal habeas relief, alleging constitutional defects in his 2009 Alaska convictions. The federal district court denied the motion on the ground that Mr. Wright was no longer in custody pursuant to the state court judgment. The Court of Appeals reversed, finding that Mr. Wright was in custody on his federal conviction for failing to register and noting that the state convictions provided the necessary predicate for the federal conviction.

The Supreme Court summarily reversed, citing its prior decision in *Maleng v. Cook*,[91] which established that "a habeas petitioner does not remain 'in custody' under a conviction 'after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes."[92] The Court vacated and remanded the case, limiting the decision to only the question of custody on the original state court conviction.

QUALIFIED IMMUNITY

Although the Supreme Court did not directly address calls to eliminate or significantly curtail qualified immunity this Term, the Court used its shadow docket to summarily reverse a couple of qualified immunity grants. First, in *Taylor v. Riojas*,[93] the Court reversed the Fifth Circuit Court of Appeals's grant of qualified immunity in a per curiam opinion, emphasizing that an individual alleging that his prison conditions violated the Eighth Amendment's ban on Cruel and Unusual Punishment does not need a prior factually similar case if any reasonable officer would know that the conditions were illegal. Trent Taylor alleged that correctional officers confined him for four days in a cell covered in "massive amounts of feces: all over the floor, the ceiling, the windows, the walls, and even packed inside the water faucet."[94] Then, prison officials moved him to a second, frigidly cold cell for two additional full days, where the only toilet was a clogged drain in the floor, and Taylor was left to sleep in sewage as the cell lacked a bunk. According to seven members of the Court,[95] "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[96]

"[T]he Court used its shadow docket to summarily reverse a couple of qualified immunity grants."

The Court sent another message to the Fifth Circuit Court of Appeals when it summarily reversed a grant of qualified immunity in *McCoy v. Alamu*.[97] Prince McCoy, a Texas prisoner with asthma, alleged that correctional officer Alamu got angry when another incarcerated person threw liquids on Alamu, and Alamu then took his anger out on Mr. McCoy by pepper-spraying him for no reason.[98] Even though there was no Supreme Court case directly on point, the Court remanded the case to be reconsidered in light of *Taylor*. Through *Taylor* and *McCoy*, the Court has revived its instruction to lower courts in *Hope v. Pelzer*[99] that a prior decision on the same facts is unnecessary when a violation is particularly obvious.[100] These decisions may suggest that the Court is willing to review qualified immunity grants more rigorously and send a signal to lower courts to be more careful when relying on the doctrine going forward.

EXCESSIVE FORCE

Body camera and cell phone footage documenting instances of police use of force against communities of color, and Black communities in particular, has become ubiquitous. Calls to end qualified immunity, abolish police, and hold police forces accountable have increased.[101] And although the Supreme Court did not grant certiorari to revisit or clarify any aspects of its excessive force jurisprudence, it did use the shadow docket this Term to summarily vacate an Eighth Circuit Court of Appeals grant of summary judgment to officers who were alleged to have used excessive force.[102] Nicholas Gilbert was arrested for trespassing and failing to appear in court for a traffic ticket. At the St. Louis police station, the officers saw Mr. Gilbert attempt suicide, and in response, the officers entered his cell and handcuffed him behind his back as he struggled. He continued resisting the officers, who shackled his legs, forced him face-down on the floor, and pressed down on his shoulders, biceps,

88. *Id.* at 2420 (Sotomayor, J., dissenting).
89. *Id.* at 2421 (Sotomayor, J., dissenting).
90. 141 S. Ct. 1467 (2021).
91. 490 U.S. 488 (1989).
92. *Wright*, 141 S. Ct. at 1468 (quoting *Maleng*, 490 U.S. at 492).
93. 141 S. Ct. 52 (2020).
94. *Id.* at 53.
95. Justice Barrett did not take part in consideration of this case, and Justice Thomas dissented without writing an opinion.
96. *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
97. 141 S. Ct. 1364 (2021) (Mem.).
98. McCoy v. Alamu, 950 F.3d 226, 229 (5th Cir. 2020).
99. 536 U.S. 730 (2002).
100. *See, e.g.*, Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, ATLANTIC (Mar. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193/.
101. *See, e.g.*, Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition.
102. Lombardo v. St. Louis, 141 S. Ct. 2239 (2021).

"The Supreme Court interpreted three federal criminal statutes this Term."

legs, back, and torso. He tried to raise his chest to breath and told the officers, "It hurts. Stop."[103] The officers continued to use the restraint for fifteen minutes. Gilbert suffocated and died as a result. His parents sued, alleging the officers used excessive force, and the Eighth Circuit affirmed the district court's grant of summary judgment to the officers. In *Lombardo v. St. Louis*,[104] the Court summarily reversed, suggesting that the Eighth Circuit may have improperly held that the use of a prone restraint is *per se* constitutional when an individual seems to resist the officers. The Court remanded the case for the lower court to apply the excessive force test outlined in *Kingsley v. Hendrickson*.[105] Although the Court did not decide whether the force used was excessive, it emphasized that there was evidence in the record, including in St. Louis training and police guidance, which warned officers to remove an individual from the prone position once handcuffed because of the high risk of suffocation.[106]

STATUTORY INTERPRETATION

The Supreme Court interpreted three federal criminal statutes this Term. In each case, it narrowed the scope of criminal liability.

THE ARMED CAREER CRIMINAL ACT (ACCA)

Borden v. United States[107] held that felony convictions requiring only a *mens rea* of recklessness are not "violent felonies" under the ACCA and, as such, cannot be used as predicate offenses to trigger application of the ACCA's 15-year minimum sentence for persons found guilty of illegally possessing a gun after having been convicted of three or more violent felonies.[108] Charles Borden pled guilty to a felon-in-possession charge, and the prosecution sought an ACCA sentencing enhancement. Because one of his prior convictions was for reckless aggravated assault, Mr. Borden argued that his reckless offense did not satisfy the ACCA's definition of a violent felony as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[109] The Supreme Court, in a 5-4 decision, agreed.

Justice Kagan wrote a plurality opinion, joined by Justices Breyer, Sotomayor, and Gorsuch. She interpreted the phrase "against another" in the ACCA's definition of a violent felony as incorporating a *mens rea* requirement of intentional action directed at another individual. Looking at the text as a whole, the plurality explained that the phrase "use of force" denotes volitional conduct, and "the pairing of volitional action with the word 'against' supports that word's oppositional, or targeted, definition."[110] Therefore, the clause incorporates knowing and purposeful actions, but does not cover reckless ones. A person who acts recklessly has not explicitly directed force at another.

The plurality emphasized that its decision was consistent with its prior holding in *Leocal v. Ashcroft*.[111] In *Leocal*, the Court interpreted the federal definition of a "crime of violence" in 18 U.S.C. § 16(a) as excluding offenses requiring only a negligent *mens rea*. In doing so, the Court emphasized that § 16(a) defined a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" and held that the use of the phrase "against the person or property of another," when coupled with "use" of force, imposed a *mens rea* requirement.[112] The *Borden* plurality emphasized that the definition of a "violent felony" in the ACCA has almost identical language and should be interpreted in a consistent way.

The plurality also distinguished its prior decision in *Voisine v. United States*[113] in which it interpreted a federal statute barring individuals who had been convicted of misdemeanor crimes of domestic violence from possessing firearms and held that offenses predicated on reckless conduct could qualify as misdemeanor crimes of domestic violence. The plurality explained that the statute at issue in *Voisine* defined a "misdemeanor crime of domestic violence" as a misdemeanor committed by a person in a specified domestic relationship with the victim that "has, as an element, the use or attempted use of physical force."[114] Because that statute did not incorporate the "against" language in the ACCA and in § 16(a), it did not incorporate a *mens rea* requirement. "Use" only demanded volition and was indifferent to mental state.

The plurality then explained that its holding was consistent with the ACCA's purpose, which was to impose heightened penalties on individuals who illegally possess guns and pose "an uncommon danger" due to their past "'purposeful, violent, and aggressive'" crimes.[115] The plurality highlighted the kinds of ordinary crimes—such as reckless crimes resulting from unsafe driving—that would trigger a 15-year mandatory minimum were it to hold that recklessness sufficed, and argued that inclusion of these crimes as predicates would not serve the statute's aims.

Justice Thomas concurred in the judgment but based his decision on independent reasoning. He interpreted the "use of physical force" language in the ACCA's definition of "violent

103. *Id.* at 2240.
104. *Id.*
105. 576 U.S. 389, 397 (2015) (emphasizing that the Court must ask whether the officers' actions were "objectively reasonable" in light of the facts and circumstances confronting them, including "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting").
106. Justices Alito, Thomas, and Gorsuch dissented from the summary disposition arguing that the Court should have scheduled full briefing and argument on the question.
107. 141 S. Ct. 1817 (2021).
108. 18 U.S.C. § 924(e).
109. *Id.*
110. *Borden*, 141 S. Ct. at 1826.
111. 543 U.S. 1 (2004).
112. *Id.* (quoting the statute and discussing the *Leocal* Court's reasoning).
113. 136 S. Ct. 2272 (2016).
114. *Borden*, 141 S. Ct. at 1825 (quoting 18 U.S.C. § 921(a)(33)(A)).
115. *Borden*, 141 S. Ct. at 1830 (quoting Begay v. United States, 553 U.S. 137, 145 (2008)).

felony" as "well-understood" to apply "only to intentional acts designed to cause harm."[116] As a result, he did not believe that reckless crimes could serve as predicates under the elements clause definition of violent felonies. But he parted ways with the plurality on whether Mr. Borden was an armed career criminal under the statute. He would have held that Mr. Borden's prior conviction was a predicate offense under the residual clause in the ACCA, which further categorized prior felonies as violent if they "involve[] conduct that presents a serious potential risk of physical injury to another."[117] But the Supreme Court invalidated the ACCA's residual clause on vagueness grounds in *Johnson v. United States*.[118] Despite his disagreement with *Johnson*, Justice Thomas concurred in the judgment to avoid confusion and division in the lower courts about the proper interpretation of the ACCA's elements clause.

Justice Kavanaugh, joined by Chief Justice Roberts, Justice Alito, and Justice Barrett, dissented, arguing first that the phrase "against the person of another" is a term of art that traditionally distinguishes offenses against the person from offenses against property and has nothing to do with *mens rea*. Second, the dissenters argued that the ordinary meaning of "use of force against the person of another" includes a reckless *mens rea*, because criminal laws typically impose criminal liability for a reckless *mens rea*; there is a thin line between acting recklessly and knowingly; the Model Penal Code treats recklessness as the default mental state; and the ACCA did not explicitly exclude reckless offenses. Third, the dissenters disagreed with the plurality's interpretation of precedent, arguing that the statute in *Voisine* addressed conduct that was "against" a domestic relation, but the Court still held that a person there could recklessly use force. Addressing *Leocal*, the dissenters wrote that the line between recklessness and negligence "is much more salient."[119] While reckless behavior is volitional, "[a]ccidents or negligence do not involve the *use of force* because such conduct is not volitional."[120] Finally, the dissenters critiqued the plurality's context and purpose argument, emphasizing the potential dangerousness of individuals who have three prior reckless felonies.

Both the plurality and the dissent noted that this case did not decide whether crimes with a *mens rea* of extreme recklessness fall under the ACCA violent felony provision, so that is one question that lower courts will have to address going forward.

THE COMPUTER FRAUD AND ABUSE ACT OF 1986 (CFAA)

The CFAA makes it a crime to "intentionally access[] a computer without authorization" or to "exceed [one's] authorized access" and thereby obtain computer information.[121] It defines the phrase "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[122] In *Van Buren v. United States*,[123] the Supreme Court limited criminal liability under the "exceeds authorized access" clause by interpreting it to apply only when an individual "accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him."[124] It does not apply when individuals access folders that they have permission to access with the intent to use the material for improper purposes.

"[T]he statutory language applies to information that one is not permitted to obtain but obtains through authorized computer access."

Nathan Van Buren, a former police sergeant, used his access to the police department's license plate database to look up and obtain information for a friend even though he was only permitted to use the computer for work reasons. He was subsequently prosecuted and convicted under 18 U.S.C. § 1030(a)(2). Justice Barrett reversed the conviction in a 6-3 majority decision, joined by Justices Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh. Looking first to the text of the statute, the majority focused on the phrase "entitled *so* to obtain," noting that the use of the word "so" referred back to "whether one has the right, 'in the same manner as has been stated,' to obtain the relevant information."[125] Because the manner previously stated in the statute is "via a computer [one] is authorized to access," the statutory language applies to information that one is not permitted to obtain but obtains through authorized computer access.[126] The majority noted that this interpretation also makes sense of the statute's structure. Subsection (a)(2) first protects computer systems against outside hackers by making it a crime to "access[] a computer without authorization."[127] It then protects against inside hackers by making it a crime for authorized users to go into unauthorized areas of the computer. According to the majority, "liability under both clauses stems from a gates-up-or-down inquiry—one either can or cannot access a computer system, and one either can or cannot access certain areas within the system."[128] Finally, the majority warned that a broader, purpose-based view of criminal liability under the CFAA "would attach criminal penalties to a breathtaking amount of commonplace computer activity,"[129] including minor workplace misconduct such as checking a personal email account or browsing the news when not permitted to do so.

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented, arguing that the text, ordinary principles of

116. *Id.* at 1835 (Thomas, J., concurring in judgment) (quoting *Voisine*, 136 S. Ct. at 2279, 2290 (Thomas, J., dissenting)). Justice Thomas had dissented in *Voisine* for this reason.
117. *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)).
118. 576 U.S. 591 (2015).
119. *Borden*, 141 S. Ct. at 1852 (Kavanaugh, J., dissenting).
120. *Id.*
121. 18 U.S.C. § 1030(a)(2).
122. 18 U.S.C. § 1030(e)(6).
123. 141 S. Ct. 1648 (2021).
124. *Id.* at 1652.
125. *Id.* at 1654 (quoting BLACK'S LAW DICTIONARY 1246 (5th ed. 1979)).
126. *Id.* at 1654.
127. 18 U.S.C. § 1030(e)(6).
128. *Van Buren*, 141 S. Ct. at 1659–60.
129. *Id.* at 1661.

"Van Buren adopts a trespass-based approach to the CFAA."

property law, and the statutory history support an interpretation of the statute that applies it to individuals who obtain computer information for a prohibited purpose. Rather than focus on the word "so" in the statute, the dissenters focused on the word "entitled" and noted that entitlements are necessarily circumstance-specific. Even under the majority's "gates-up-or-down" approach, Justice Thomas argued, "discerning whether the gates are up or down requires considering the circumstances that cause the gates to move."[130] As for policy arguments about the statute criminalizing too much behavior, Justice Thomas argued that that other provisions, such as *mens rea* requirements, would have narrowed its potential scope.

Van Buren adopts a trespass-based approach to the CFAA, focusing lower courts on whether an individual bypassed a gate that they were not permitted to bypass. But it never defines what constitutes an impermissible "gate." In a footnote, the majority avoided addressing whether the inquiry turns on technological, "code-based" limitations or on contract and policy-based ones.[131] Lower courts will have to determine when someone has bypassed a closed gate.

THE FIRST STEP ACT OF 2018

In *Terry v. United States*,[132] the Court held that the First Step Act of 2018, which made the Fair Sentencing Act's sentencing reductions retroactive, only applied to individuals sentenced pursuant to mandatory minimums. Justice Thomas wrote the majority opinion, joined by all except Justice Sotomayor who concurred in part and in the judgment.

Justice Thomas began with the history of the criminal laws that Congress passed in the 1980s, which applied mandatory minimum penalties to many drug offenses and created a sentencing disparity of 100:1 between powder and crack cocaine. Under those laws, possession of five grams of crack or 500 grams of powder triggered a five-year mandatory minimum and possession of 50 grams of crack or five kilograms of powder triggered a 10-year mandatory minimum. Possession with the intent to distribute an unspecified amount of crack or powder cocaine did not carry a mandatory minimum penalty. Tarahrick Terry was convicted of possession with intent to distribute. Because he had two prior drug offenses as a teenager, he was sentenced as a "career offender" under the Sentencing Guidelines and given 188 months in prison.

In 2010 Congress passed the Fair Sentencing Act,[133] which lowered the powder/crack disparity to 18:1 and increased the quantity thresholds for mandatory minimums. The Sentencing Commission altered its sentencing recommendations to reflect this change, but individuals sentenced to mandatory minimums before 2010 could not obtain sentences below those mandatory minimums. In 2018 Congress passed the First Step Act[134] to rectify this problem and made the Fair Sentencing Act's changes retroactive to prisoners sentenced before 2010.

But Mr. Terry was not sentenced to a mandatory minimum sentence, and the Supreme Court interpreted the First Step Act as not applying to his case. As Justice Thomas explained, the First Step Act defined "a covered offense" under the Act as a "'violation of a Federal criminal statute, the statutory penalties for which were modified by certain provisions in the Fair Sentencing Act."[135] The Court found that the Fair Sentencing Act did not modify the statutory penalties for Terry's offense because the possession-with-intent-to-distribute offense was not modified by the 2010 Act. According to the Court, the goal of the Fair Sentencing Act was to address cocaine-sentencing disparities. Because Mr. Terry's offense had never attached different sentences to crack and powder offenses, it did not qualify.

All nine justices agreed that Terry's offense was not covered by the text of the statute, but Justice Sotomayor concurred to emphasize the racial bias that animated the 100:1 ratio and to implore Congress to adopt a legislative fix that would permit resentencing for individuals like Mr. Terry whose sentences were likely affected by the existence of the 100:1 ratio even if they were not given mandatory minimums.

PLAIN ERROR

In *Rehaif v. United States*,[136] the Supreme Court interpreted the felon-in-possession-of-a-firearm crime in 18 U.S.C. § 922(g) as requiring the Government to prove not only that the defendant knew that he possessed a firearm, but also that he knew that he had been convicted of a felony at the time of possession. In the consolidated cases of *United States v. Gary* and *United States v. Greer*,[137] the Court held that a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not know that he was a felon.

At Gregory Greer's felon-in-possession trial, the judge did not instruct the jury that it must find that Mr. Greer knew of his felon status when he possessed the firearm. And Michael Gary pled guilty at trial to two counts under § 922(g) after a plea colloquy in which the judge never advised him that, if he went to trial, the jury would have to find beyond a reasonable doubt that he knew about his felony status. Neither Mr. Greer nor Mr. Gary objected at trial to these errors, because *Rehaif* was decided after their trial proceedings while their cases were on appeal. On appeal, they both argued that their convictions should be vacated, because the government failed to prove that they knew about their status as felons.

Justice Kavanaugh, writing for everyone except Justice Sotomayor, rejected the petitioners' claims, noting that, because they had not objected and preserved their *Rehaif* claims, they were subject only to plain-error review. Although there were clear *Rehaif* errors in both cases, the majority found that neither Mr.

130. *Id.* at 1666 (Thomas, J., dissenting).
131. *Id.* at 1659 n.9.
132. 141 S. Ct. 1858 (2021).
133. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).
134. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).
135. *Terry*, 141 S. Ct. at 1862 (quoting § 404(a), 132 Stat. 5222).
136. 139 S. Ct. 2191 (2019).
137. 141 S. Ct. 2090 (2021).

Greer nor Mr. Gary had shown that the error affected substantial rights, because neither of them demonstrated that there was a "reasonable probability" that the results of their proceedings would have been different.[138] Justice Kavanaugh emphasized that "the defendant faces an uphill climb in trying to satisfy the substantial rights prong," because "[i]f a person is a felon, he ordinarily knows he is a felon."[139]

Justice Sotomayor concurred in *Greer* and dissented in *Gary*. She agreed that Mr. Greer could not show that trial error affected his substantial rights, but she would have remanded Mr. Gary's case to give him a chance to make that showing since the lower court had erroneously held that he was automatically entitled to relief and did not therefore make an individualized determination.

MILITARY PROSECUTIONS

In the consolidated cases of *United States v. Briggs* and *United States v. Collins*,[140] the Supreme Court held that there is no statute of limitations for filing rape charges under Article 120(a) in the Uniform Code of Military Justice (UCMJ). The Court of Appeals for the Armed Forces (CAAF) had held that the five-year statute of limitations in the UCMJ that typically applies to non-capital offenses[141] should apply to rape offenses, because rape is a non-capital offense under the Supreme Court's precedent. Justice Alito, writing for a unanimous eight-member Court, disagreed.[142]

The majority began by explaining that Article 120(a) in the UCMJ stated that rape was "punishable by death" and Article 43(a) further provided that an offense "punishable by death" could be tried and punished "at any time without limitation." The majority recognized that it had held in *Coker v. Georgia*[143] that the Eighth Amendment prohibits capital punishment for a rape offense, but the justices did not think *Coker* should affect the statute of limitations provisions in the UCMJ. First, the Court felt that the most "natural referent for a statute of limitations provision within the UCMJ is other law in the UCMJ itself," and the UCMJ had made it clear that rape offenses would not have a statute of limitations.[144] Second, the Court noted that it is unclear whether *Coker* applies to military prosecutions, so any interpretation of "punishable by death" that incorporated the Supreme Court's Eighth Amendment jurisprudence would make the statute of limitations for rape unclear and subject to evolving standards. Finally, the Court opined that legislators were likely aware of "the difficulty of assembling evidence and putting together a [rape] prosecution" when they crafted the laws.[145] Because "the ends served by statutes of limitations differ sharply from those served by … the Eighth Amendment,"[146] the Court thought it unlikely that the lawmakers would tie the statute of limitations to the Court's Eighth Amendment jurisprudence.[147]

"The majority began by explaining that Article 120(a) in the UCMJ stated that rape was 'punishable by death'…"

IMMIGRATION

In *Pereida v. Wilkinson*,[148] the Supreme Court held that nonpermanent immigrants seeking relief from a lawful removal order bear the burden of demonstrating under the Immigration and Nationality Act (INA) that they have not been convicted of a "crime involving moral turpitude."[149] The Court further held that if an individual has been convicted of a divisible crime with multiple subsections that criminalize conduct for different reasons and some of the subsections involve moral turpitude and others do not, that person bears the burden of producing evidence that he was convicted under a subsection that does not involve moral turpitude.

When the government brought removal proceedings against Clemente Pereida for entering the country unlawfully, Mr. Pereida sought to establish that he was eligible for discretionary relief under the INA. Mr. Pereida had a conviction for attempted criminal impersonation in Nebraska—a divisible crime with four subsections, each of which criminalized different behavior. Nothing in the record showed under which subsection Mr. Pereida had been convicted. Some subsections involved crimes of moral turpitude, while at least one did not. In a 5-3 decision,[150] Justice Gorsuch, joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh, held that Mr. Pereida had failed to carry his burden to demonstrate his eligibility for discretionary relief because he did not present evidence showing that he was convicted under a subsection of the Nebraska law that was not a crime of moral turpitude.

The majority started with the text of the INA, which states that "[a]n alien applying for relief or protection from removal has the burden of proof to establish" that he "satisfies the applicable eligibility requirements" and "merits a favorable exercise of discretion."[151] One of the eligibility requirements is that the applicant "has not been convicted" of a crime involving moral turpitude, so the majority read the statute as putting a burden on Mr. Pereida. Because Mr. Pereida presented no evidence that he was convicted under a subsection of the Nebraska criminal impersonation statute that did not involve moral turpitude, the majority felt he had not carried his burden.

138. *Id.* at 2097 (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904–05 (2018)).
139. *Id.* at 2097.
140. 141 S. Ct. 467 (2020).
141. *See* 10 U.S.C. § 843(b)(1).
142. Justice Barrett did not participate in consideration of the case.
143. 433 U.S. 584 (1977).
144. *Briggs*, 141 S. Ct. at 470.
145. *Id.* at 473.
146. *Id.*
147. Justice Gorsuch wrote a brief separate concurrence to highlight his view that the Supreme Court lacked jurisdiction to hear appeals directly from the CAAF, but he agreed with the Court's decision on the merits.
148. 141 S. Ct. 754 (2021).
149. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), 1229b(b)(1)(C).
150. Justice Barrett did not participate in consideration of this case.
151. 8 U.S.C. § 1229a(C)(4)(A).

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented, arguing that this case "has little or nothing to do with burdens of proof."[152] Under the categorical approach that the Court takes when interpreting the INA, it does not look at the facts underlying the conviction and ask if they involve moral turpitude. Instead, the court looks to the elements of the offense of conviction and asks if the crime necessarily involves moral turpitude. And in cases involving divisible crimes, the Court adopts a modified categorical approach under which the judge looks to a limited set of court records—charging papers, jury instructions, and plea agreements or plea colloquy records—to see if they indicate which subsection the individual was convicted of violating. In this case, those records did not indicate under which subsection Mr. Pereida was convicted. Because at least one subsection did not involve a crime of moral turpitude, the dissenters argued that the categorical approach meant that Mr. Pereida was not necessarily convicted of a crime involving moral turpitude and was therefore eligible for discretionary relief.

The majority responded that, when an individual is "convicted under a divisible statute containing some crimes that qualify as crimes of moral turpitude, the alien must prove that his actual, historical offense of conviction isn't among them" and noted that the individual can present evidence beyond mere charging papers and plea colloquy records to satisfy that burden.[153] In this respect, the majority noted, the INA is different from the ACCA where the categorical approach is limited to certain documents to protect a defendant's Sixth Amendment rights. In response to arguments that its approach will cause practical difficulties due to the unavailability of many court records and the difficulty that noncitizens have in getting access to court records, the majority responded that "[i]t is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair."[154]

It remains to be seen if the Court will further abandon the categorical approach in future immigration cases. For now, an immigration judge's discretion to grant relief from deportation to long-time immigrants who have family in this country will be eliminated in some cases where evidence about the nature of an underlying conviction is missing or unavailable.

LOOK AHEAD

The 2021–22 Term will address a broad range of criminal law and procedure issues. In addition to high-profile cases involving the scope of the Second Amendment right to bear arms[155] and consideration of the First Circuit Court of Appeals's reversal of Dzhokhar Tsarnaev's death sentence for his involvement in the Boston Marathon bombing,[156] the Court will also address some important Sixth Amendment issues. In *Hemphill v. New York*,[157] the Justices will determine whether and when a defendant can "open the door" to evidence that would otherwise be barred by the Confrontation Clause. The Justices' approach to the Confrontation Clause has been quite fractured since its decision in *Crawford v. Washington*,[158] and this will be the first opportunity that some of the newest Justices will have to weigh in with their views.

Additionally, the Court will decide a habeas case that has important implications for the Sixth Amendment right to effective assistance of trial counsel. In *Shinn v. Ramirez*,[159] the Court will decide whether habeas petitioners whose first real opportunity to present an ineffective-assistance-of-trial-counsel claim is in federal court will be able to present new evidence to support their claims.

And, of course, it remains to be seen how active the Court's shadow docket will be in the coming year and whether it will continue to use that docket to send signals to the lower courts about AEDPA deference, excessive force, and qualified immunity. It should be an interesting term.

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152. *Pereida*, 141 S. Ct. at 767 (Breyer, J., dissenting).
153. *Id.* at 763.
154. *Id.* at 766.
155. New York State Rifle & Pistol Association Inc. v. Bruen, No. 20-843.
156. United States v. Tsarnaev, No. 20-443.
157. Hemphill v. New York, No. 20-637.
158. 541 U.S. 36 (2004).
159. Shinn v. Ramirez, No. 20-1009.