Supreme Court Criminal Law Decisions: 2019

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SUMMARY

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Supreme Court Criminal Law Decisions: 2019

In 2019, the Supreme Court issued a sizeable number of criminal law decisions, which addressed several topics, including sentencing, pretrial, statutory construction, and ineffective assistance of counsel. This report discusses the following Supreme Court holdings in greater detail:

Racially Discriminatory Jury Selection: "[T]he trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of [a] black prospective juror … was not motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

Execution of the Mentally Incompetent: "First, under *Ford* and *Panetti*, the Eighth Amendment may permit executing Madison even if he cannot remember committing his crime. Second, under those same decisions, the Eighth Amendment may prohibit executing Madison even though he suffers from dementia, rather than delusions. The sole question on which Madison's competency depends is whether he can reach a 'rational understanding' of why the State wants to execute him." *Madison v. Alabama*, 139 S. Ct. 718 (2019).

Execution of the Intellectually Disabled: Texas Court of Criminal Appeals erred in assessing and denying a death-row inmate's claim of intellectual disability. *Moore v. Texas*, 139 S. Ct. 666 (2019).

Habeas Jurisdiction: Federal courts may not grant state prisoners habeas relief based on Supreme Court precedent established after the completion of state proceedings. *Shoop v. Hill*, 139 S. Ct. 504 (2019).

Method of Execution: A death row inmate challenging the state's method of execution must show that the state's method involves a risk of severe pain and that a feasible, readily available alternative method will significantly reduce the risk of pain. "[E]ven if execution by nitrogen hypoxia were a feasible and readily implemented alternative to the State's chosen method, Mr. Bucklew has still failed to present any evidence suggesting that it would significantly reduce his risk of pain." *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

Violent Crime Sentencing:

- The Armed Career Criminal Act's (ACCA) Section 924(c) residual clause purporting to provide an alternative definition for "crime of violence" is constitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019).
- Conviction under Florida robbery statute qualifies as a crime of violence under ACCA elements clause. *Stokeling v. United States*, 139 S. Ct. 544 (2019).
- Under the ACCA's specific crimes clause, the generic crime of "burglary" covers unlawfully entering, or remaining in, a building or structure, including mobile homes, trailers, tents, or vehicles, if they are designed, adapted, or customarily used for overnight accommodations of individuals. *United States v. Stitt*, 139 S. Ct. 399 (2018).
- Under the ACCA's specific crimes clause, the generic burglary definition includes entering with an intent to commit a crime or remaining in a building or structure after forming an intent to commit a crime. *Quarles v. United*, 139 S. Ct. 1872 (2019).

Excessive Fines: The Eighth Amendment's Excessive Fines Clause is incorporated in the Fourteenth Amendment's Due Process Clause and is therefore binding on the States. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

Supervised Release:

- Imposing a mandatory term of imprisonment after revoking supervised release, based on finding by a preponderance of the evidence that Haymond had breached the conditions of his supervised release, violated the Sixth Amendment's jury trial guarantee and the Fifth Amendment's Due Process beyond-a-reasonable doubt standard for criminal cases. The lower court will decide, at least initially, whether the error was harmless and, if not, the appropriate remedy. *United States v. Haymond*, 139 S. Ct. 2369 (2019).

- A federal supervised release term does not run for a convict held in state pretrial detention if the time in state pretrial detention counts as time served for state conviction purposes. *Mont v. United States*, 139 S. Ct. 1826 (2019).

Mens Rea: Conviction of an alien unlawfully present in the United States for unlawful firearms possession requires proof that the alien knew both that (1) he was in possession of a firearm and (2) he was unlawfully present. *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Nondelegation: Authorizing the Attorney General to issue regulations governing registration requirements under the Sex Offender Registration and Notification Act (SORNA) for pre-Act offenders as soon as feasible did not violate the nondelegation doctrine. *Gundy v. United States*, 139 U.S. 2116 (2019).

Double Jeopardy: The dual sovereign doctrine of the Fifth Amendment's Double Jeopardy Clause permits successive state and federal prosecutions for the same misconduct. *Gamble v. United States*, 139 S. Ct. 1960 (2019).

Drunk Driving: A suspect's loss of consciousness following his probable cause arrest for drunk driving will almost always qualify for the exigent circumstances exception to the Fourth Amendment's warrant requirement. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (plurality).

Section 1983 Litigation:

- Probable cause to arrest precludes a Section 1983 civil liability claim based on alleged First Amendment retaliation unless "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." *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).
- The statute of limitations for a Section 1983 cause of action alleging falsification of evidence "began to run when criminal proceedings against him terminated in his favor." *McDonough v. Smith*, 139 S. Ct. 2149 (2019).
- In assessing a Section 1983 qualified official immunity claim, "[t]he Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established." *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019).

Ineffective Assistance of Counsel: A defense attorney's failure to honor his client's request to appeal is presumptively prejudicial ineffective assistance of counsel "even when the defendant has signed an appeal waiver." *Garza v. Idaho*, 139 S. Ct. 738 (2019).

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Introduction

This report discusses twenty criminal law cases the United States Supreme Court decided during its 2018 term (Term).[1] Twelve of the cases addressed sentencing issues: capital punishment, violent crime enhancements, supervised release, and excessive fines. Five featured the Court's analysis of pretrial questions associated with drunk driving, double jeopardy, and suits against law enforcement officers. Two decisions sought to discern congressional intent in cases involving firearms and sex offenders. An ineffective of assistance of counsel decision rounded out the Term.

Sentencing

Capital Punishment

The High Court largely relied on existing case law to dispense with capital punishment cases on its 2018 docket. Thus, it held: (1) The prosecution's repeated, racially motivated misconduct during the defendant's six trials for the same murders precluded a creditable *Batson* finding that the prosecutor's challenge of an African-American prospective juror was based on race-neutral factors (*Flowers v. Mississippi*); (2) *Ford* and *Panetti* barred executing a death row inmate with a deteriorating mental condition that prevented him from understanding that he was being punished for his misconduct, regardless of the cause of his condition, but not if he could merely no longer remember the facts surrounding his offense (*Madison v. Alabama*); (3) A state's resubmission of previously rejected intellectual-disability analysis did not change the result (*Moore v. Texas*); (4) The "clearly established Supreme Court precedent" exception to the bar on federal habeas relief for state inmates only applies to precedents in place at the time of state proceedings (*Shoop v. Hill*); and (5) The *Baze-Glossip* standards apply with equal force both to a general challenge to a method of execution and to an "as-applied" challenge based on an inmate's individual circumstances (*Bucklew v. Precythe*).

Flowers v. Mississippi, 139 S. Ct. 2228 (2019)

Holding: "[T]he trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of [a] black prospective juror … was not motivated in substantial part by discriminatory intent."[2]

Background: State authorities prosecuted Flowers six times for an offense in which a furniture store owner and three employees were shot to death.[3] The state supreme court reversed Flowers' first and second convictions "due to numerous instances of prosecutorial misconduct."[4] The state supreme court overturned Flowers' third conviction on the grounds of discriminatory jury selection.[5] The fourth and fifth trials ended in hung juries.[6] A sixth jury convicted Flowers of

[1] Cases in which the Court denied a petition for a writ of certiorari during its 2018 term are beyond the scope of this report.

[2] Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019).

[3] Flowers v. State, 158 So.3d 1009, 1022 (Miss. 2014).

[4] *Flowers*, 139 S. Ct. at 2235 (quoting Flowers v. State, 773 So.2d 309, 327 (Miss. 2000) and referring to Flowers v. State, 842 So.2d 531 (Miss. 2003)).

[5] Flowers v. State, 947 So.2d 910, 935 (Miss. 2007) ("The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.").

[6] *Flowers*, 158 So.3d at 1023 ("Flowers's fourth and fifth trials also were on all four counts of capital murder. Both

murder and sentenced him to death.[7] Flowers argued that the prosecutor in his sixth trial used peremptory challenges in a racially discriminatory manner.[8]

Peremptory challenges allow prosecutors to have prospective jurors dismissed without having to explain the reason for the challenge.[9] A prosecutor may not exercise peremptory challenges in a racially discriminatory manner.[10] The Supreme Court in *Batson v. Kentucky* established a three-part test to assess claims of racially discriminatory use of peremptory challenges. First, the accused must make a prima facie showing that the challenge was made for discriminatory reasons.[11] Second, the prosecutor has the burden of proving a race-neutral justification for the challenge.[12] Third, the trial court must determine whether the prosecutor has satisfied his burden.[13]

The Mississippi Supreme Court considered the prosecutor's peremptory challenges to be race neutral based on valid and not pretextual reasons.[14] The U.S. Supreme Court initially returned *Flowers* to the state courts for reconsideration in light of its decision in *Foster v. Chatman*.[15] In *Foster*, the High Court held that the record demonstrated that the state judiciary had failed the third *Batson* test—determining whether the state had satisfied the standard that its peremptory strikes be race-neutral.[16] On remand, the Mississippi Supreme Court maintained its earlier assessment—Flowers' trial court had not erred in finding that the prosecution's peremptory challenges were race-neutral.[17]

Supreme Court: The U.S. Supreme Court again reversed and returned the case to the Mississippi courts. The Court, speaking through Justice Kavanaugh, declared "[f]our critical facts, taken together, require reversal:

> *First*, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck. … *Second*, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. *Third*, at the sixth trial, in an apparent attempt to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. *Fourth*, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.[18]

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resulted in mistrials when the jury was unable to reach a unanimous verdict during the culpability phase. The State did not seek the death penalty in the fourth trial but did seek it in the fifth trial.").

[7] *Flowers*, 139 S. Ct. at 2235.

[8] *Id.*

[9] *Challenge › peremptory challenge*, BLACK'S LAW DICTIONARY (10th ed. 2009).

[10] Batson v. Kentucky, 476 U.S. 79, 100 (1986).

[11] *Id.* at 97.

[12] *Id.*

[13] *Id.* at 99.

[14] Flowers v. State, 158 So.3d 1009, 1058 (Miss. 2004).

[15] Flowers v. Mississippi, 136 S. Ct. 2157 (2016).

[16] Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) ("The State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.").

[17] Flowers v. State, 240 So.2d 1082, 1092 (Miss. 2017) ("After review and further consideration in light of *Foster*, we discern no Batson violation and reinstate and affirm Flowers's convictions and death sentence.").

[18] Flowers, 139 S. Ct. at 2335 (emphasis of the Court).

Justice Alito concurred because of the "unique combinations of circumstances present."[19] Justices Thomas and Gorsuch dissented on the grounds that the prosecutor had presented sufficient race-neutral reasons for the challenges.[20]

Madison v. Alabama, 139 S. Ct. 718 (2019)

Holding: "First, under *Ford* and *Panetti*, the Eighth Amendment may permit executing Madison even if he cannot remember committing his crime. Second, under those same decisions, the Eighth Amendment may prohibit executing Madison even though he suffers from dementia, rather than delusions. The sole question on which Madison's competency depends is whether he can reach a 'rational understanding' of why the State wants to execute him."[21]

Background: The Supreme Court's *Ford* and *Panetti* decisions lie at the heart of the Court's decision in *Madison*. In *Ford v. Wainwright*, the Court held that the Eighth Amendment prohibits executing a defendant who is insane.[22] In *Panetti v. Quarterman*, the Court held that the state may not execute a death-row inmate "whose mental illness deprives him of 'the mental capacity to understand that [he] is being executed as a punishment for crime."[23]

During a dispute with his former girlfriend, Madison murdered a police officer.[24] He was convicted and sentenced to death.[25] As his case passed through the various stages of state and federal review, Madison suffered a series of strokes leaving him with a continuously eroding mental condition that he asserted precluded his execution.[26]

After Alabama set Madison's execution date, he petitioned the state court for a stay on the grounds of his mental health.[27] The state court denied his petition.[28] Madison then sought federal habeas corpus relief.[29] The district court concluded that the state court had correctly interpreted federal law.[30] The U.S. Court of Appeals for the Eleventh Circuit, however, held that if Madison could not remember the facts of his crime, he could not understand the link between his crime and the decision to execute him.[31] The Supreme Court reversed and remanded the case with the observation that "[n]either *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case."[32]

Back in state court, the government contended that: (1) neither Madison's memory loss nor any dementia barred his execution and (2) he had failed to prove that he was either delusional or

[19] *Id.* at 2252 (Alito, J., concurring).

[20] *Id*. (Thomas and Gorsuch, JJ., dissenting).

[21] Madison v. Alabama, 139 S. Ct. 718, 731 (2019) (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)).

[22] 477 U.S. 399, 410 (1986).

[23] 551 U.S. 930, 954 (2007).

[24] Madison v. State, 620 So.2d 62, 63-4 (Ala. Crim. App. 1992).

[25] This was after Madison's first conviction and sentence had been overturned and returned for retrial. Madison v. State, 545 So.2d 94, 100 (Ala. Crim. App. 1988).

[26] Madison v. Alabama, 139 S. Ct. 718, 723 (2019).

[27] Dunn v. Madison, 138 S. Ct. 9, 10 (2017).

[28] *Id*. at 11.

[29] *Id*.

[30] *Id.*

[31] *Id.*

[32] *Id*. at 11-12.

psychotic which might have provided the grounds to stay his execution.[33] The state court agreed and Madison asked the Supreme Court for review.[34]

Supreme Court: Speaking for the Court, Justice Kagan emphasized that the critical question was whether Madison lacked the mental capacity to "reach a 'rational understanding' of why the State wants to execute him."[35] The Court returned the case to state court to determine with a reminder that Madison's loss of memory, alone, does not bar his execution but a want of mental capacity would bar to execution regardless of whether the incapacity resulted from dementia or delusion.[36]

In dissent, Justice Alito, joined by Justices Gorsuch and Thomas, objected that the case should be resolved solely on the basis for which certiorari was granted: "Does the Eighth Amendment prohibit the execution of a murderer who cannot recall committing the murder for which the death sentence was imposed?"[37]

Moore v. Texas, 139 S. Ct. 666 (2019) (*Moore II*)

Holding: The Texas Court of Criminal Appeals again erred in assessing and denying a death-row inmate's claim of intellectual disability.[38]

Background: In 1980, a Texas state court convicted Moore and sentenced him to death for a murder committed during an attempted robbery.[39] In 2002, the Supreme Court held in *Atkins* that the Eighth Amendment bars executing an intellectually-disabled death row inmate.[40] In 2014, the Court in *Hall* held unconstitutional a "rigid rule" under which no one with an IQ above 70 could be considered "intellectually-disabled" for death penalty purposes.[41] In the same year, a Texas state habeas court found Moore to be intellectually disabled and recommended that he be declared ineligible for the death penalty.[42] The Texas Court of Criminal Appeals declined to do this in *Moore I*.[43]

Moore I: The Texas Court of Criminal Appeals faulted the state habeas court for failing to apply the Texas appellate court's *Briseno* standard for intellectual disability[44] and applying the American Association on Intellectual and Developmental Disabilities' [AAIDD] standards instead.[45] The Supreme Court vacated and remanded the case, faulting the Texas Court of

[33] *Madison*, 139 S. Ct. at 725-26.

[34] *Id*. at 726.

[35] *Id*. at 731.

[36] *Id.* at 726-27.

[37] *Id*. at 731 (Alito, J., with Thomas and Gorsuch, JJ. dissenting).

[38] Moore v. Texas, 139 S. Ct. 666, 672 (2019) (*Moore II*) ("We conclude that the appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. … We consequently agree with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectual disability.").

[39] Moore v. Johnson, 194 F.3d 586, 599-600 (5th Cir. 1999).

[40] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[41] Hall v. Florida, 572 U.S. 701, 704 (2014).

[42] *Ex parte* Moore, 470 S.W.3d 481, 484-85 (2014).

[43] *Id*. at 485-86.

[44] In *Ex parte* Briseno, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals observed, among other things, that in determining whether a death row inmate's intellectual disability precluded his execution, the court should seek "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.").

[45] *Ex parte* Moore, 470 S.W.3d at 486. "In *Ex parte Briseno*, citing the absence of legislation to implement *Atkin's*

Criminal Appeals' for, among other things, relying on unadjusted IQ scores in spite of the Court's *Hall* decision[46] and using a lay assessment of intellectual disability in its *Briseno* standard.[47]

Moore II: On remand, the Texas Court of Criminal Appeals again concluded that Moore was not intellectually disabled for capital punishment purposes.[48] The Supreme Court reversed and remanded the case to the Texas Court of Criminal Appeals with a per curiam opinion, which reiterated the standard that the lower court should use and identified instances in which the Texas court had applied the standard improperly.[49]—

The Supreme Court explained that to designate a death row inmate to be ineligible for execution, "a court must see: (1) deficits in intellectual functioning—primarily a test related criterion; (2) adaptive deficits, 'assessed using both clinical evaluation and individualized … measures;' and (3) the onset of these deficits while the defendant was still a minor."[50] The Supreme Court cited "at least" five instances of the lower court misapplying the standard:

> First, the Texas Court of Criminal Appeals "overemphasized Moore's perceived adaptive strengths. But the medical community," we said, "focuses the adaptive-functioning inquiry on adaptive deficits."
>
> Second, the appeals court "stressed Moore's improved behavior in prison." But "[c]linicians … caution against reliance on adaptive strengths developed "in a controlled setting," as a prison surely is.
>
> Third, the appeals court "concluded that Moore's record of academic failure … childhood abuse [,] and suffering … detracted from a determination that his intellect and adaptive deficits were related." But "in the medical community," those "traumatic experiences" are considered "'*risk factors' for* intellectual disability."
>
> Fourth, the Texas Court of Criminal Appeals required "Moore to show that his adaptive deficits were not related to 'a personality disorder.' But clinicians recognize that the "existence of a personality disorder or mental-health issue … is 'not evidence that a person does not also have intellectual disability.'"
>
> Fifth, the appeals court directed state courts, when examining adaptive deficits, to rely upon certain factors set forth in a Texas case called *Ex parte Briseno*. … We criticized the use of these factors both because they had no grounding in prevailing medical practice, and because they invited "lay stereotypes" to guide assessment of intellectual disability. Emphasizing the *Briseno* factors over clinical factors, we said, "creat[es] an unacceptable risk that person with intellectual disability will be executed."[51]

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mandate, we adopted the definition of intellectual disability stated in the ninth edition of the AAMR [American Association of Mental Retardation] manual, published in 1992, and the similar definition of intellectual disability contained in [the Texas statute]. … The habaes judge therefore erred by disregarding our case law and employing the definition intellectual disability presently used by AAIDD.").

[46] *Moore I*, 137 S. Ct. at 1049 ("The CCA's [Court of Criminal Appeals'] conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*.").

[47] *Id*. at 1051 (emphasis of the Supreme Court) (quoting *Briseno*, 135 S.W.3d at 6) ("[T]he CCA defined its objective as identifying the 'consensus of *Texas citizens*' on who 'should be exempted from the death penalty.' … Skeptical of what it viewed as 'exceedingly subjective' medical and clinical standards, the CCA in *Briseno* advanced lay perceptions of intellectual disability.").

[48] *Ex parte* Moore, 548 S.W.3d 552, 573 (Tex. Crim. App. 2018).

[49] *Moore II*, 139 S. Ct. at 668-69.

[50] *Id.* at 668.

[51] *Id*. at 668-69 (emphasis of the Supreme Court) (quoting *Moore*, 137 S. Ct. at 1050-51).

Chief Justice Roberts, who had dissented earlier, concurred in the decision as the arguments the Court rejected earlier were no more persuasive when presented a second time.[52] Justice Alito, joined by Justices Thomas and Gorsuch, contended that the Court had given the lower court insufficient guidance in *Moore I* and that the case should be returned with clearer instructions.[53]

Shoop v. Hill, 139 S. Ct. 504 (2019)

Holding: Federal courts may not grant state prisoners habeas relief based on "clearly established" Supreme Court precedent when the precedent is established after the state proceedings concluded.

Background: In 1986, an Ohio state court convicted Hill, and sentenced him to death, for kidnaping, raping, and murdering a 12-year old.[54] Hill petitioned for federal habeas corpus relief following his unsuccessful state court appeals. In 2002, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) returned Hill's habeas case to state court to address Hill's claim that his mental retardation prevented his execution in light of *Atkins*.[55] The state courts found Hill competent for execution, and Hill again filed for federal habeas relief.[56]

Ordinarily, a federal court may not grant a state prisoner habeas relief unless the state courts have failed to follow clearly established Supreme Court precedent.[57] Although *Moore I*[58] occurred after the state court proceedings, the Sixth Circuit thought *Moore I* showed that *Atkins* was "clearly established."[59]

Supreme Court: The Sixth Circuit's reasoning did not convince the Supreme Court.[60] The Court's per curiam opinion noted that following *Atkins*, the Supreme Court continued to elaborate on *Atkins* in both *Hall* and *Moore I*.[61] In addition, the Court noted the Sixth Circuit's use of *Moore I*'s analysis in its proceedings and opinion,[62] concluding that, "[b]ecause the reasoning of the Court of Appeals leans so heavily on *Moore [I]*, its decision must be vacated."[63]

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[52] *Id.* at 672-73 (Roberts, C.J., concurring).

[53] *Id.* at 673 (Alito, J., with Thomas and Gorsuch, JJ., dissenting).

[54] Hill v. Anderson, 300 F.3d 679, 680-81 (6th Cir. 2002).

[55] *Id.* at 683.

[56] Hill v. Anderson, 881 F.3d 483, 486 (6th Cir. 2018).

[57] 28 U.S.C. § 2254(d) (emphasis added) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

[58] Moore v. Texas, 137 S. Ct. 1039, 1053 (2017) (summarized above).

[59] *Hill*, 881 F.3d at 487 (internal citations omitted) ("We recognize that *Moore* was decided after the Ohio Court of Appeals rejected Hill's *Atkins* claim in 2008. Ordinarily, Supreme Court decisions that post-date a state court's determination cannot be 'clearly established law' … However … we find that *Moore's* holding regarding adaptive strengths is merely an application of what was clearly established by *Atkins*.").

[60] Shoop v. Hill, 139 U.S. 504, 509 (2019).

[61] *Id.* at 507.

[62] *Id.* at 507-509 (internal citations omitted) ("In this case, no reader of the decision of the Court of Appeals can escape the conclusion that it is heavily based on *Moore [I]*, which came years after the decisions of the Ohio courts. … The centrality of *Moore [I]* in the Court of Appeals' analysis is reflected in the way in which the intellectual-disability issue was litigated below. … It appears that it was not until the Court of Appeals asked for supplemental briefing on *Moore [I]* that Hill introduced the § 2254(d)(1) argument that the Court of Appeals adopted."].

[63] *Id.* at 509.

Bucklew v. Precythe, 139 S. Ct. 1112 (2019)

Holding: A death-row inmate challenging the state's method of execution must show that the state's method involves a risk of severe pain and that a feasible, readily available alternative method will significantly reduce the risk of pain. The Supreme Court reasoned, "[E]ven if execution by nitrogen hypoxia were a feasible and readily implemented alternative to the State's chosen method, Mr. Bucklew has still failed to present any evidence suggesting that it would significantly reduce his risk of pain."[64]

Background: In 1996, Bucklew stole a car; kidnapped, beat, and raped his former girlfriend; murdered a man from whom she had sought refuge; attacked her mother with a hammer; and wounded an officer during the shootout that lead to his capture. Having exhausted his direct appeals and opportunities for collateral review, Bucklew sought a preliminary injunction at the eleventh hour to block his execution, claiming that an unusual medical condition would render the state's method of execution particularly painful and therefore uniquely cruel and unusual in violation of the Eighth Amendment. The federal district court granted the state's motion for summary judgment and the U.S. Court of Appeals for the Eighth Circuit affirmed.[65]

Supreme Court: The Supreme Court agreed. A decade earlier, Chief Justice Roberts and two colleagues in *Baze v. Rees* identified an Eighth Amendment standard governing challenges to methods of execution.[66] First, the state's method must involve a risk of severe pain. Second, "[t]o qualify, the [proffered] alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[67] Third, the state must unjustifiably persist in using its more painful method.[68] Justices Thomas and Scalia had concurred in the result, reasoning that "a method of execution only violates the Eighth Amendment if it is deliberately designed to inflict pain."[69] Several years later in *Glossip v. Gross*, when a second method of execution became more common, the Court applied the same standard (the "inmates did not show that the risks they identified were substantial and imminent … and … they did not establish the existence of a known and available alternative method of execution that would entail significantly less severe risk.").[70]

In 2019, Justice Gorsuch, writing for the Court, rejected Bucklew's contention that his unique situation warranted applying a standard other than that formulated in *Baze* and *Glossip*. From Justice Gorsuch's perspective, *Baze-Glossip* established that an Eighth Amendment analysis always involves comparing alternative levels of suffering.[71] Bucklew failed to present evidence of

[64] Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019).

[65] Bucklew v. Precythe, 883 F.3d 1087, 1097 (8th Cir. 2018)

[66] Baze v. Rees, 553 U.S. 35 (2008)

[67] *Id*. at 52.

[68] *Id.*

[69] *Id*. at 94.

[70] 135 S. Ct. 2726, 2737 (2015). Here Justices Scalia and Thomas joined the opinion for the Court rather than only concur in the result. *Id.* at 2747 (Scalia, J. and Thomas, J., concurring).

[71] Bucklew v. Precythe, 139 S. Ct. 1112, 1126 (2019) ("The first problem with this argument is that it's foreclosed by precedent. *Glossip* expressly held that identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims alleging cruel pain.' … Mr. Bucklew's argument fails for another independent reason: It is inconsistent with the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest … At common law, the ancient and barbaric methods of execution Mr. Bucklew cites were understood to be cruel precisely because—by comparison to other available methods—they went so far beyond what was needed to carry out a death sentence that they could only be explained as reflecting the infliction of pain for pain's sake.").

a feasible, readily available alternative execution method[72] or to establish that any such alternative would significantly reduce the risk of severe pain.[73]

The four dissenters argued that *Glossip's* sweeping language regarding its standard's applicability in all cases must be put in context and subject to the kind of exceptions that Bucklew raised.[74]

Violent Crime Cases

Among other things, the Supreme Court's 2019 violent crime cases explored what constitutes a violent crime[75] with respect to three statutes: 18 U.S.C. § 924(e) (The Armed Career Criminal Act (ACCA)), 18 U.S.C. § 924(c) (the firearm-in-furtherance statute), and 18 U.S.C. § 16 (the general definition statute). These provisions are similar with each having an elements clause and a residual clause.

The ACCA defines the term "violent felony" as a felony that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the elements clause]; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives [the specific offense clause], or
>
> otherwise involves conduct that presents a serious potential risk of physical injury to another [the residual clause].[76]

Section 924(c) defines the term "crime of violence" to be "an offense that is a felony and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) 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 committing the offense.[77]

Section 16 defines the term "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and 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 committing the offense.[78]

In 1990, the Supreme Court addressed an ACCA case in *Taylor v. United States*.[79] Under the ACCA, courts must sentence defendants convicted of federal unlawful possession of a firearm to

[72] *Id*. at 1129 ("Through much of this case and despite many opportunities, Mr. Bucklew refused to identify any alternative methods of execution, choosing instead to stand on his argument that *Baze* and *Glossip's* legal standard doesn't govern as-applied challenges like his…").

[73] *Id*. at 1133.

[74] *Id*. at 1139-40 (Breyer, J., with Ginsburg, Sotomayor, and Kagan, JJ., dissenting).

[75] For a more extensive discussion see, CRS Legal Sidebar LSB10128, *High Court Strikes Down Provision of Crime of Violence Definition as Unconstitutionally Vague*, by Hillel R. Smith.

[76] 18 U.S.C. § 924(e)(2)(B).

[77] *Id*. § 924(c)(3).

[78] *Id*. § 16.

[79] 495 U.S. 575 (1990).

prison for at least 15 years if the defendant has three or more prior violent felony convictions.[80] Taylor had a prior state burglary conviction in addition to other offenses.[81] The ACCA defines violent felony to include "burglary,"[82] which the Court found to mean "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[83] To decide whether Taylor's state burglary conviction constituted an ACCA burglary conviction, the Court examined the state burglary statute to determine whether a jury would have to find each element of an ACCA burglary offense.[84] The Court held that Taylor's state burglary conviction did not qualify as an ACCA predicate because his state conviction might not have required proof of each element of the ACCA offense (*e.g.*, the state statute covered burglarizing a vehicle, while the ACCA limited burglaries to "building[s] or structure[s]").[85]

Following *Taylor*, the Court declared the ACCA residual clause ("*otherwise involves conduct that presents a serious potential risk of physical injury*") unconstitutionally vague in *Johnson v. United States*.[86] Three years later in *Sessions v. Dimaya*, the Court found the residual clause in 18 U.S.C. § 16(b) ("*any offense 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 committing the offense*") to be unconstitutionally vague.[87] In 2019, the Court found that Section 924(c)'s language ("*involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*") to be unconstitutionally vague in *United States v. Davis*.[88] At the same time, the High Court endorsed penalties under the elements and specific offenses clauses of the ACCA in *Stokeling v. United States*,[89] *United States v. Stitt*,[90] and *Quarles v. United States*.[91]

United States v. Davis, 139 S. Ct. 2319 (2019)

Holding: Section 924(c)'s residual clause is constitutionally vague.[92]

Background: In *Davis*, the government argued that the vagueness issue that permeated the residual clauses in the ACCA and Section 16(b) cases could be avoided if the courts abandoned the categorical approach and examined the facts underlying a particular conviction to determine whether the offense actually involved a substantial risk of injury to another.[93]

[80] 18 U.S.C. § 924(e).

[81] *Taylor*, 495 U.S. at 578.

[82] 18 U.S.C. § 924(e)(2)(B)(ii).

[83] *Taylor*, 495 U.S. at 598.

[84] *Id.* at 602.

[85] *Id.* (emphasis added) ("In Taylor's case, *most but not all* the former Missouri statutes defining second-degree burglary included all elements of generic burglary.").

[86] 135 S. Ct. 2551, 2563 (2015).

[87] 138 S. Ct. 1204, 1210 (2018).

[88] 139 S. Ct. 2319, 2336 (2019).

[89] 139 S. Ct. 544 (2019).

[90] 139 S. Ct. 399 (2018).

[91] 139 S. Ct. 1872 (2019).

[92] *Davis*, 139 S. Ct. at 2336.

[93] *Id.* at 2337.

Davis committed a series of gas station robberies armed with a sawed off shotgun. He was convicted and sentenced for multiple Hobbs Act robbery offenses,[94] possession of a firearm by a felon,[95] and under Section 924(c)'s residual clause. The U.S. Court of Appeals for the Fifth Circuit held the residual clause to be unconstitutionally vague and vacated the Section 924(c) conviction.[96]

Supreme Court: The Supreme Court affirmed the Fifth Circuit's conclusion and returned the case to the lower courts for resentencing.[97] The government had urged the Supreme Court to analyze the case using a "case-specific" approach rather than the "categorical" approach, conceding that the residual clause is unconstitutionally vague under the categorical standard.[98] The Court acknowledged that a case-specific standard would alleviate at least some constitutional concerns.[99]

Justice Gorsuch, writing for the majority, explained that Section 924(c)'s text, context, and history preclude a case-specific approach.[100] First, the residual clause refers to an "offense" that risks the use of physical force "by its nature." As Justice Gorsuch stated, "[I]n plain English, when we speak of the nature of an offense, we're talking about 'what an offense normally … entails, not what happened to occur on one occasion.'"[101] Second, in the federal criminal code, statutes may refer to one of the twin definitions of a "crime of violence" in Sections 16 and 924(c). Justice Gorsuch stated: "To hold, as the government urges, that § 16(b) [the section's residual clause] requires the categorical approach while § 924(c)(3)(B) [that section's residual clause] requires the case-specific approach would make a hash of the federal criminal code."[102] Third, Congress initially created the two sections within the same statute.[103] At first, relying on the Section 16 definition for Section 924(c), and soon thereafter copying Section 16's definition into Section 924(c)(3).[104] The Court stated: "What's more, when Congress copie[d] § 16(b)'s language into § 924(c) in 1986, it proceeded on the premise that the language required a categorical approach. By then courts had, as the government puts it, 'beg[u]n to settle' on the view that § 16(b) demanded a categorical analysis."[105]

[94] 18 U.S.C. § 1951.

[95] *Id.* §§ 922(g)(1), 924(a)(2).

[96] United States v. Davis, 903 F.3d 483, 486 (5th Cir. 2018) ("Because the language of the residual clause here and in § 16(b) [in *Dimaya*] are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same.").

[97] *Davis*, 139 S. Ct. at 2336.

[98] *Id*. at 2326-27 ("For years, almost everyone understood § 924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and § 16. Today, the government acknowledges that, if this understanding is correct, then § 924(c)(3)(B) must be held unconstitutional too.").

[99] *Id.* at 2327 ("[W]e begin by acknowledging that the government is right about at least two things. First, a case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*. … Second, a case-specific approach wouldn't yield the same practical and Sixth Amendment complications under § 924(c) that it would have under the ACCA or § 16.").

[100] *Id*.

[101] *Id*. at 2329 (quoting *Dimaya*, 138 S. Ct. at 1217).

[102] *Id*. at 2330.

[103] Pub. L. No. 98-473, §§ 1001(a), 1005, 98 Stat. 2136, 2138 (1984).

[104] Pub. L. No. 99-308, § 104(a)(3), 100 Stat. 457 (1986).

[105] *Davis*, 139 S. Ct. at 2331.

Writing for the four dissenting Justices, Justice Kavanaugh favored a case-specific approach as consistent with Section 924(c)'s language and the principle of constitutional avoidance.[106]

United States v. Stitt, 139 S. Ct. 399 (2018)

Holding: Under the ACCA's specific crimes clause,[107] the generic crime of "burglary" covers unlawfully entering, or remaining in, a building or structure, including mobile homes, trailers, tents, or vehicles, if they are designed, adapted, or customarily used for overnight accommodations of individuals.[108]

Background: In *Stitt,* the Supreme Court expanded on *Mathis v. United States*[109] in which it had held that merely breaking into a plane, boat, or truck may not constitute burglary under the ACCA.[110] In *Stitt*, the Court said that breaking into a plane, boat, or truck that is designed or adapted for overnight accommodation is ACCA burglary.[111]

A federal jury convicted Stitt, who had six previous Tennessee aggravated burglary convictions, on a charge of being a felon in possession of a firearm.[112] The Tennessee aggravated burglary statute outlaws "burglary of a habitation and defines 'habitation' as 'any structure … which is designed or adapted for the overnight accommodation of persons.' The term 'habitation' includes 'mobile homes, trailers, and tents,' as well as any 'self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant.'"[113] The U.S. Court of Appeals for the Sixth Circuit concluded that the Tennessee statute was broader than the ACCA generic burglary definition and consequently could not serve as an ACCA predicate.[114]

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[106] *Id*. at 2343 (Justice Kavanaugh, with Roberts, C.J., and Thomas & Alito, JJ., dissenting) ("For three reasons, I disagree with the Court's analysis. First, the Court's justifications in *Johnson* and *Dimaya* for adopting the categorical approach do not apply in the context of § 924(c). Second, the text of § 924(c)(3)(B) is best read to focus on the actual defendant's actual conduct during the underlying crime, not on a hypothetical defendant's imagined conduct during an ordinary case of the underlying crime. Third, even if the text were ambiguous, the constitutional avoidance canon requires that we interpret the statute to focus on the actual defendant's actual conduct.").

[107] 18 U.S.C. § 924(e)(2) ("As used in this subsection …(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that … (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.").

[108] United States v. Stitt, 139 S. Ct. 399, 403-404 (2019).

[109] Mathis v. United States, 136 S. Ct. 2243 (2016).

[110] *Id.* at 2250 (emphasis of the Court) (internal citations omitted) ("Iowa's burglary statute, all parties agree, covers more conduct than generic burglary does. The generic offense requires unlawful entry into a 'building or structure.' Iowa's statute, by contrast, reaches a broader range of places: any building, structure, *[or] land, water, or air vehicle*. … In short, the statute defines one crime, with one set of elements, broader than generic burglary—while specifying multiple means of fulfilling its location element, some but not all of which … satisfy the generic definition.").

[111] *Stitt,* 139 S. Ct. at 403-404 ("And the question here is whether the statutory term 'burglary' [in the ACCA] includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. We hold that it does.").

[112] United States v. Stitt, 860 F.3d 854, 856 (6th Cir. 2017).

[113] *Id*. at 857.

[114] *Id*. ("The issue before us, then, is whether a burglary statute that covers vehicles or movable enclosures only if they are habitable fits within the bounds of generic burglary. We hold that it does not.").

Sims, whose case the Supreme Court joined with Stitt's, pleaded guilty to a felon-in-possession charge.[115] His record included two ACCA predicate drug convictions and two convictions under the Arkansas residential burglary statute,[116] which provides that residential burglary occurs when an individual "enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing … any offense punishable by imprisonment." A "'residential occupiable structure' means a vehicle, building, or other structure: (i)[i]n which any person lives; or (ii) [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present."[117] The U.S. Court of Appeals for the Eighth Circuit "conclude[d] that Arkansas residential burglary categorically sweeps more broadly than [ACCA] generic burglary. Accordingly, Sims's Arkansas residential burglary convictions do not qualify as ACCA predicate offenses."[118]

Supreme Court: The Supreme Court unanimously overturned both appellate court decisions.[119] In the opinion for the Court, Justice Breyer pointed out that the ACCA generic burglary definition represented an assumption of Congress's understanding of state law at the time of ACCA's enactment.[120] In 1986, a majority of the states included vehicles, designed or adapted for overnight occupancy, within burglary's location element.[121] He also noted that Congress crafted the ACCA with an eye to the risk of violent confrontations between an intruder and an occupant, a risk little altered by the physical characteristics of the lodging where the clash occurs.[122]

Quarles v. United States, 139 S. Ct. 1872 (2019)

Holding: Under the ACCA's specific crimes clause,[123] the generic burglary definition includes entry or remaining in a building or structure with the intent to commit a crime formed while remaining unlawfully present.[124]

Background: Grand Rapids, Michigan police officers arrested Quarles after he assaulted his girlfriend and threatened her with a gun.[125] Quarles had previously committed third-degree home invasion and on two occasions committed assault with a deadly weapon. Third-degree home invasion occurs when an individual "breaks and enters a dwelling or enters a dwelling without permission, and, at any time while he or she is entering, present in, or existing the dwelling, commits a misdemeanor."[126] Quarles argued that his home invasion conviction could not count as an ACCA predicate offense because the Michigan statute permitted conviction for conduct that

[115] United States v. Sims, 854 F.3d 1037, 1038 (8th Cir. 2017).

[116] *Id.*

[117] *Id*. at 1039 (citing Ark. Code Ann. §§ 5-39-201(a)(1), 5-39-101(4)(A), respectively).

[118] *Id.* at 1040.

[119] *Stitt*, 139 S. Ct. at 408.

[120] *Id*. at 406.

[121] *Id.*

[122] *Id*.

[123] 18 U.S.C. § 924(e)(2) ("As used in this subsection …(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that … (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.").

[124] Quarles v. United States, 139 S. Ct. 1872, 1875 (2019).

[125] *Id*. at 1875-76.

[126] *Id*. at 1876 (quoting MICH. COMP. LAWS ANN. § 750.110a(4)(a)).

the ACCA did not cover under its generic definition of burglary,[127] which is "unlawful or privileged entry into, or remaining in, a building or structure, with intent to commit a crime."[128] Neither the federal district court nor the U.S. Court of Appeals for the Sixth Circuit accepted Quarles' contention.[129]

Supreme Court: The Supreme Court affirmed.[130] Writing for a unanimous Court, Justice Kavanaugh noted that, because "remaining" is continuous, the generic definition by condemning unlawfully *remaining-in* refutes "that burglary only occurs when the defendant has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure."[131] Justice Kavanaugh encapsulated the Court's view, stating:

> The Armed Career Criminal Act does not define the term "burglary." In *Taylor*, the Court explained that 'Congress did not wish to specify an exact formulation that an offense must meet in order to count as "burglary" for enhancement purposes. And the Court recognized that the definitions of burglary "vary" among the States. The *Taylor* Court therefore interpreted the generic term "burglary" in § 924(e) in light of: the ordinary understanding of burglary as of 1986 [when the ACCA was enacted]; the States' laws at that time Congress' recognition of the dangers of burglary; and Congress' stated objective of imposing increased punishment on armed career criminals who had committed prior burglaries. Looking at those sources, the *Taylor* Court interpreted generic burglary under § 924(e) to encompass remaining-in burglary. Looking at those same sources, we interpret remaining in-in burglary under § 924(e) to occur when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure.[132]

Stokeling v. United States, 139 S. Ct. 544 (2019)

Holding: Conviction under Florida robbery statute qualifies as a crime of violence under the ACCA elements clause.[133]

Background: Police discovered a firearm in Stokeling's possession while investigating a burglary of a restaurant where he worked.[134] At the time, he had already been convicted of home invasion, kidnapping, and robbery.[135] At sentencing for the federal firearms charge, Stokeling challenged application of the ACCA. He argued that the Florida robbery statute under which he was convicted included "sudden snatch" robbery. Robbery under the ACCA's element clause reached only robberies that had "as an element the use, attempted use, or threatened use of physical force."[136] Thus, he contended the broader Florida robbery statute did not qualify as a crime of

[127] United States v. Quarles, 850 F.3d 836, 838 (6th Cir. 2017) (quoting inter alia Mathis v. United States, 136 S. Ct. 2243, 2247 (2016)) ("When determining whether a particular crime qualifies as a violent felony, we start with the 'categorical approach.' We look 'to the fact of conviction and the statutory definition of the prior offense.' We then 'compare the elements of the 'generic' version of the listed offense—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate offense only if its 'elements are the same as, or narrower than, those of the generic offense.'").

[128] *Quarles*, 139 S. Ct. at 1876 (quoting Taylor v. United States, 495 U.S. 575, 599 (1990)).

[129] *Quarles*, 850 F.3d at 840.

[130] *Quarles*, 139 S. Ct. at 1880.

[131] *Id*. at 1877.

[132] *Id*. at 1879 (internal citations omitted).

[133] Stokeling v. United States, 139 S. Ct. 544, 555 (2019).

[134] *Id*. at 549.

[135] *Id*.

[136] United States v. Stokeling, 684 F. App'x 870, 871 (11th Cir. 2017).

violence under the ACCA's element clause. The district court agreed, but the U.S. Court of Appeals for the Eleventh Circuit reversed based on its earlier decisions.[137]

Supreme Court: The Supreme Court affirmed the Eleventh Circuit's opinion.[138] Writing for the Court, Justice Thomas concluded "that the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance."[139] He noted that, as originally crafted, the ACCA recognized only prior robbery and burglary predicate convictions and defined "robbery" in terms that "mirrored the elements of the common-law crime of robbery, which has long required force or violence. At common law, an unlawful taking was merely larceny unless the crime involved 'violence.' And 'violence' was 'committed if sufficient force [was] exerted to overcome the resistance encountered.'"[140]

"Thus," Justice Thomas explained, "the application of the categorical approach to the Florida robbery statute is straightforward. Because the term 'physical force' in [the] ACCA encompasses the degree of force necessary to commit common-law robbery, and because Florida robbery requires the same degree of 'force,' Florida robbery qualifies as an ACCA-predicate offense under the elements clause."[141]

Joined by three members of the Court, Justice Sotomayor dissented, writing that the Florida statute allowed conviction based on a minimal level of force while the elements clause did not.[142]

Excessive Fines

Timbs v. Indiana, 139 S. Ct. 682 (2019)

Holding: The Eighth Amendment's Excessive Fines Clause is incorporated in the Fourteenth Amendment's Due Process Clause and therefore binds the States.[143]

Background:

The Eighth Amendment denies federal officials authority to require excessive bail, impose excessive fines, or inflict cruel and unusual punishments.[144] The Due Process Clause of the Fourteenth Amendment imposes on states many Bill of Rights limits on the federal government.[145] The Supreme Court has held that the Due Process Clause incorporates the Eighth Amendment's Cruel and Unusual Punishment Clause.[146]

[137] *Id.* (citing United States v. Fritts, 841 F.3d 937, 943-44 (11th Cir. 2016)).

[138] *Stokeling*, 139 S. Ct. at 555.

[139] *Id.* at 550.

[140] *Id.* (citing 2 JOEL PRENTISS BISHOP, CRIMINAL LAW § 1156 (1923 ed,)).

[141] *Id.* at 555.

[142] *Id.* at 564 (Sotomayor, J., with Roberts, Ch. J. and Ginsburg & Kagan, JJ., dissenting).

[143] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019). For additional discussion see CRS Legal Sidebar LSB10196, *Are Excessive Fines Fundamentally Unfair?*, by Charles Doyle.

[144] U.S. Const. amend. VIII.

[145] U.S. Const. amend. XIV, § 1 ("… nor shall any State deprive any person of life, liberty, or property, without due process of law …"). The Supreme Court discussed Fourteenth Amendment incorporation extensively in McDonald v. Chicago, 561 U.S. 742 (2010).

[146] Robinson v. California, 370 U.S. 660 (1962).

With insurance policy proceeds,[147] Timbs bought a new Land Rover to use in his drug trafficking enterprise.[148] Following his conviction, the state trial court did not order confiscation of the Land Rover, reasoning that the vehicle's forfeiture would violate the Eighth Amendment's Excessive Fines Clause as applied to the state through the Fourteenth Amendment.[149] The Indiana Court of Appeals concurred.[150] The Indiana Supreme Court, however, reversed the trial court's decision because it "decline[d] to find or assume incorporation until the [U.S.] Supreme Court decides the issue authoritatively,"[151] which the U.S. Supreme Court did in *Timbs v. Indiana*.[152]

Supreme Court: Writing for the Court, Justice Ginsburg traced the concept of excessive fines from the Magna Carte to the English Bill of Rights to the laws of a majority of the original thirteen states at the Constitution's ratification and finally to the laws of a vast majority of the states at the Fourteenth Amendment's ratification.[153] Justice Ginsburg wrote:

> Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.[154]

While the Justices agreed that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause, Justices Thomas and Gorsuch viewed this as resulting from the Privileges and Immunities Clause rather than the Due Process Clause.[155]

In the Supreme Court, the State unsuccessfully challenged a feature of Eighth Amendment law, rather than incorporation itself. In *Austin v. United States*, the Court had held that forfeitures, authorized at least in part with punitive intent and effect, constitute fines for purposes of the Excessive Fines Clause, regardless of whether confiscation occurs by criminal trial or a civil *in*

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[147] State v. Timbs, 62 N.E.3d 472, 473 (Ind. App. 2016).

[148] *Id*.

[149] *Id.* at 474 "The trial court … entered an order in favor of Timbs, which provided in relevant part: '… 8. The Court finds that the judgment of forfeiture sought by the State violates the Excessive fines Clause of the Eighth Amendment of the United States Constitution. The amount of the forfeiture is excessive and is grossly disproportional to the gravity of the Defendant's offense. 9. While the negative impact on our society of trafficking in illegal drugs is substantial, a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the defendant's illegal conduct.'").

[150] *Id*. at 477.

[151] State v. Timbs, 84 N.E.3d 1179, 1183 (Ind. 2017).

[152] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[153] *Id*. at 687-89

[154] *Id*. at 686-87.

[155] *Id.* at 691 (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges and Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."); *id.* (Thomas, J., concurring in the judgment) (I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with 'process,' I would hold that the right to be free from excessive fines is one of the 'privileges and immunities of citizens of the United States protected by the Fourteenth Amendment."). U.S. Const. amend. XIV, § 1 ("… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law …").

rem proceeding.[156] The Court declined to re-examine *Austin* or to endorse less than full incorporation.[157]

Supervised Release

United States v. Haymond, 139 S. Ct. 2369 (2019)

Holding: By imposing a mandatory term of imprisonment after revoking supervised release based on finding by a preponderance of the evidence that Haymond had breached his conditions of supervised release, a federal court violated the Sixth Amendment's jury trial guarantee and the Fifth Amendment Due Process proof beyond-a-reasonable doubt standard for criminal cases. The Court left for the lower court to determine whether the error was harmless and, if not, the appropriate remedy.[158]

Background: Haymond involved the federal supervised release statute, 18 U.S.C. § 3583, which subjects federal inmates on their release from prison to certain conditions usually for a maximum of five years.[159] For certain sex offenses, however, the supervised release term is at least five years and may be for the sex offender's entire life.[160] Under the statute, a court may revoke an individual's supervised release and return him to prison if, by a preponderance of the evidence, the court finds that the individual has violated a condition of his release.[161] Ordinarily, when a court revokes supervised release, it re-imprisons the individual for no longer than his remaining time of supervised release and, in any event, for no longer than five years.[162] Under Subsection 3583(k), a court must sentence a sex offender registrant to re-imprisonment for at least five years when the court revokes his supervised release based on a sex offense.[163]

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[156] Austin v. United States, 509 U.S. 602, 622 (1993) ("We therefore conclude that forfeiture under these [civil forfeiture] provisions constitutes 'payment to a sovereign as punishment for some offense' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.").

[157] *Timbs*, 139 S. Ct. at 689-91.

[158] For a more extensive discussion see, CRS Legal Sidebar LSB10221, *Which Punishment Fits Which Crime?: Supreme Court to Consider Whether Portion of Supervised Release Statute is Unconstitutional*, by Michael A. Foster.

[159] 18 U.S.C. § 3583(b).

[160] *Id.* § 3583(k) ("Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252 [possession of child pornography], 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. . . .").

[161] *Id.* § 3583(e) (emphasis added) ("The court *may* … (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.").

[162] *Id.*

[163] *Id.* §3583(k) (emphasis added) ("…. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A [sexual abuse], 110 [child pornography], or 117 [interstate travel for unlawful sexual purposes], or section 1201 [kidnaping] or 1591 [commercial sex trafficking], for which imprisonment for a term longer than 1 year can be imposed, the court *shall* revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term *shall* be not less than 5 years.").

A federal jury convicted Haymond of possessing child pornography, which is punishable by imprisonment for not more than 10 years.[164] The district court sentenced him to 38 months in prison and supervised release for 10 years thereafter.[165] The court conditioned Haymond's supervised release on him committing no further crimes, submitting to periodic polygraph examinations, and consenting to searches by his probation officer. Haymond passed several polygraph tests, suggesting he had neither viewed nor possessed child pornography since his release.[166] Yet, when Haymond's probation officer seized Haymond's cell phone, he found images of child pornography cached there. At his revocation hearing, Haymond presented expert testimony that the material could have been put on his cell phone without his knowledge. Nevertheless, the court concluded that it was more likely than not that Haymond had knowingly possessed child pornography in violation of a condition of his release. The court "with reservations" ordered him returned to prison for the mandatory minimum five years.[167] The U.S. Court of Appeals for the Tenth Circuit reversed holding the mandatory minimum feature of the sentencing revocation procedure violates the Fifth and Sixth Amendments.[168]

Supreme Court: While five Justice agreed that Subsection 3583(k) is unconstitutional, they did not agree why. Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Gorsuch concluded that the subsection, which increased Haymond's term of imprisonment, applied a preponderance of the evidence standard, rather than providing for a jury to find guilt beyond a reasonable doubt:

> Based on the facts reflected in the jury's verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years… But then a judge—acting without a jury and based only on a preponderance of the evidence—found that Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release. Under § 3583(k), that judicial factfinding triggered a new punishment in the form of a prison term of at least five years and up to life. So … the facts the judge found here increased 'the legally prescribed range of allowable sentences in violation of the fifth and Sixth Amendments. In this case, that meant Mr. Haymond faced a minimum of five years in prison instead of a little as none.[169]

Justice Breyer concurred in the judgment but not the rationale. For Justice Breyer, Subsection 3583(k) has three characteristics that together suggest the punishment is for a new crime rather than a continuation of punishment for the crime for which the jury convicted him:

> *First*, §3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. *Second*, §3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. *Third*, §3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of 'not less than 5 years' upon a judge's finding that a defendant 'has commit[ted] any' listed 'criminal offense.' Taken together, these features of §3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights including the jury right, that attend a new criminal prosecution.[170]

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[164] *Id.* §2252.

[165] United States v. Haymond, 869 F.3d 1153, 1156 (10th Cir. 2017).

[166] United States v. Haymond, 139 S. Ct. 2369, 2374 (2019).

[167] *Id.* at 2375.

[168] *Haymond*, 869 F.3d at 1160 ("[W]e conclude that § 3583(k) is unconstitutional because it changes the mandatory sentencing range to which a defendant may be subject, based on facts found by a judge, not by a jury, and because it punishes defendants for subsequent conduct rather than for the original crime of conviction.").

[169] *Haymond*, 139 S. Ct. at 2378 (Gorsuch, J., with Ginsburg, Sotomayor, & Kagan, JJ., concurring).

[170] *Id* at 2386 (Breyer, J., concurring in the judgment).

The plurality agreed to remand the case to the lower court to address whether the issue could be resolved by requiring that Subsection 3583(k) revocation hearings be conducted before a jury using the standard of proof beyond a reasonable doubt.

Joined by Justices Thomas and Kavanaugh, Justice Alito wrote a dissent maintaining that a jury and "proof beyond a reasonable doubt" are not constitutionally required for supervisory release revocation proceedings and that to suggest otherwise has serious implications.[171]

Mont v. United States, 139 S. Ct. 1826 (2019)

Holding: Time served in state pretrial detention while on federal supervised release tolls the running of the term of federal supervised release if time in state pretrial detention counts as time served for state conviction purposes.[172]

Background: On March 6, 2012, U.S. prison officials released Mont and he began serving a five-year term of federal supervised release, conditioned on not committing any new federal or state crimes.[173] On June 1, 2016, state authorities arrested Mont on drug trafficking charges and held him in pretrial detention.[174] On March 21, 2017, 15 days after Mont's term of supervised release was scheduled to expire, a state trial court sentenced him to six years in prison on state charges with credit for the 10 months he had served in state pretrial detention. On March 30, 2017, the U.S. District Court scheduled a supervisory release revocation hearing. Although Mont argued his term of supervised release had expired, the court revoked his supervised release and sentenced him to an addition 42 months in federal prison to be served upon completing his state sentence.[175] The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) affirmed on the basis of Sixth Circuit precedent interpreting the law governing supervised release.[176] The statute stated, "[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 unless the imprisonment is for a period of less than 30 consecutive days."[177] An earlier Sixth Circuit decision had concluded that, "[1] when a defendant is held for thirty days or longer in pretrial detention, and [2] he is later convicted for the offense for which he was held, and [3] his pretrial detention is credited as time served toward his sentence, then the pretrial detention is 'in connection with' a conviction and tolls the period of supervised release under § 3624."[178]

Supreme Court: In *Mont,* interpreting Section 3624 divided both the federal courts of appeals[179] and the Supreme Court*,* a majority of which sided with the Sixth Circuit.[180] Writing for the Court,

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[171] *Id.* (Alito, J., with Roberts, C.J., and Justices Thomas & Kavanaugh) ("I do not think that there is a constitutional basis for today's holding …which is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications.").

[172] Mont v. United States, 139 S. Ct. 1826, 1829 (2019).

[173] United States v. Mont, 723 F. App'x 325, 326 (6th Cir. 2018).

[174] *Id.*at 327.

[175] *Id*. at 329.

[176] *Id*. at 331 (referring to United States v. Goins, 516 F.3d 416 (6th Cir. 2008)).

[177] 18 U.S.C. § 3624(e).

[178] *Goins*, 516 F.3d at 417.

[179] *Mont*, 723 F. App'x at 330 (citing cases on either side of the divide).

[180] Mont, 139 S. Ct. at 1832 ("We hold that pretrial detention later credited as time served for a new conviction is 'imprison[ment] in connection with a conviction' and thus tolls the supervised-release term under § 3624(e). This is so even if the court must make the tolling calculation after earning whether the time will be credited. In our view, this reading is compelled by the text and statutory construction of § 3624(e)."). Perhaps this leaves undecided whether

Justice Thomas explained that a person in pretrial detention is "imprisoned," and such imprisonment may be "in connection with a conviction," albeit after the fact. Justice Thomas also noted that Section 3624 does not qualify imprisonment with "*after* conviction."[181] While the statute identifies a precise point at which supervised release begins, it is less clear where it ends.[182] Referring to the section's statutory setting and purpose,[183] Justice Thomas recognized supervised release to be a "conditional liberty" during time of good behavior, but punishment nonetheless.[184] Justice Thomas stated: "[I]t would be an exceedingly odd construction of the statute to give a defendant the windfall of satisfying a new sentence of imprisonment and an old sentence of supervised release with the same period of pretrial detention."[185]

Joined by Justices Breyer, Kagan, and Gorsuch, Justice Sotomayor dissented, observing, "I cannot agree that a person 'is imprisoned in connection with a conviction' before any conviction has occurred."[186]

U.S. Substantive Offense Statutes

The Supreme Court examined the scope of federal statutes that establish various criminal offenses in two cases. In the first, the Court held that, in order to convict a foreign national unlawfully present in the United States with knowingly possessing a firearm, the government must prove that the defendant knew both that he was in possession of a firearm and that he was unlawfully present in the country (*Rehaif v. United States*). In the second, the Justices held that Congress had validly authorized the Attorney General to apply the Sex Offender Registration and Notification Act (SORNA) to offenders convicted before SORNA's enactment (*Gundy v. United States*).

Firearms

Rehaif v. United States, 139 S. Ct. 2191 (2019)

Holding: Conviction of an alien unlawfully present in the United States for unlawful firearms possession requires proof that the alien knew both that he was in possession of a firearm and that he was unlawfully present.[187]

Background: Rehaif entered the United States on a student visa.[188] When the university to which he was admitted dismissed him for poor performance, it advised him that he would lose his

credit for time served is a prerequisite for stopping the supervised release clock without which the clock continues to run even if the defendant is convicted of the offense that led to pretrial detention. But see *id*. at 1834 (emphasis added) ("Under our view, in contrast, time in pretrial detention constitutes supervised release *only* if the charges against the defendant are dismissed or the defendant is acquitted.").

[181] *Id*. at 1833 (emphasis in the original).

[182] *Id*. ("Whereas § 3624(e) instructs courts precisely when the supervised-release clock begins—'on the day the person is released'—the statute does not require courts to make a tolling determination as soon as a defendant is arrested on new charges or to continually reassess the tolling calculation throughout the period of his pretrial detention.").

[183] *Id.*

[184] *Id*. at 1833, 1834.

[185] *Id*. at 1834.

[186] *Id*. at 1836 (Sotomayor, J., with Ginsburg, Breyer, and Gorsuch, JJ., dissenting).

[187] For a more extensive discussion see, CRS Legal Sidebar LSB10290, *What You Don't Know Can't Hurt You: Supreme Court to Address Knowledge Requirement for Firearm Offenses*, by Michael A. Foster.

[188] *Rehaif*, 139 S. Ct. at 2194.

immigration status unless he enrolled elsewhere, which he did not do. He went to a shooting range where he purchased ammunition and practiced using the range's firearms. The ammunition he bought came from out-of-state and the firearms he used were from Austria.[189] Federal law declares it unlawful for an individual, unlawfully present in the United States, to possess a firearm or ammunition that has been transported or shipped in interstate or foreign commerce.[190] A second statute makes it a federal crime to knowingly engage in such unlawful possession.[191]

At his trial, the U.S. district court advised the jury that the government did not have to prove that Rehaif knew that he was in the U.S. unlawfully.[192] The jury convicted Rehaif, and the court sentenced him to prison for 18 months. The U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) affirmed Rehaif's conviction on several grounds. The Eleventh Circuit noted that conviction requires proof of three elements: "(1) the defendant falls within one of the categories [of disqualified possessors] … ('the status element'); (2) the defendant possessed a firearm or ammunition ('the possession element'); and (3) the possession was 'in or affecting [interstate or foreign] commerce [(the jurisdictional element)].'"[193] With regard to the status element, binding Eleventh Circuit case law dispensed with a *mens rea* requirement (sometimes referred to as a scienter, state of mind, or knowledge requirement).[194]

Supreme Court: The Supreme Court held that "the Government therefore must prove both that the defendant knew he possessed a firearm and also that he knew he belonged to the relevant category of persons barred from possessing a firearm," and reversed Rehaif's conviction.[195] Speaking for a majority of the Court, Justice Breyer pointed out that *mens rea* questions are first and foremost a matter of congressional intent.[196] He noted that the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent

[189] United States v. Rehaif, 888 F.3d 1138, 1141 (11th Cir. 2018).

[190] 18 U.S.C. § 922 (g) (emphasis added) ("*It shall be unlawful for any person* - (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) who is a fugitive from justice; (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); (4) who has been adjudicated as a mental defective or who has been committed to a mental institution; (5) *who, being an alien - (A) is illegally or unlawfully in the United States*; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))); (6) who has been discharged from the Armed Forces under dishonorable conditions; (7) who, having been a citizen of the United States, has renounced his citizenship; (8) who is subject to a court order that - (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or *to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce*.").

[191] *Id*. § 924(a)(2) ("Whoever knowingly violates subsection (a)(6), (d), (g) … of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.").

[192] *Rehaif*, 888 F.3d at 1141.

[193] *Id.* at 1143.

[194] *Id*. at 1144 (citing United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997)).

[195] Rehaif, 139 S. Ct. at 2200.

[196] *Id*. at 2195 (citing Staples v. United States, 511 U.S. 600, 605 (1994)).

conduct.'"[197] Nevertheless, he explained that the presumption does not necessarily apply to all of a crime's elements. For example, it rarely attaches to jurisdictional elements, such as interstate shipment or use of the mail, that "do not describe the 'evil Congress seeks to prevent,' but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct."[198]

Justice Breyer acknowledged that the Court has "typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties."[199] Public welfare offenses generally involve a regulatory regime designed to protect the public from some exceptionally harmful product or device, such as mislabeled drugs, sulfuric acid, or hand grenades.[200] These offenses ordinarily expose to criminal liability only those, such as manufacturers or shippers, who have placed themselves in a responsible relationship to such a public danger.[201] Qualified regulatory statutes usually proscribe conduct that was innocent at common law and punish offenders relatively lightly.[202] Here, Justice Breyer emphasized, the public welfare exception did not apply because the "firearms provisions before us are not part of a regulatory or public welfare program, and they carry a potential penalty of 10 years in prison that we have previously described as 'harsh.'"[203]

Consequences: On remand, the Court left the Eleventh Circuit to determine whether the erroneous jury instruction constituted harmless error.[204] The Court left unresolved what is required to show that a defendant knew of his status. Federal law bars firearm possession by classes of individuals other than illegal aliens, *i.e*., (1) convicted felons; (2) fugitives; (3) drug addicts; (4) the mentally disabled; (5) those dishonorably discharged from the armed services; (6) those who have denounced their U.S. citizenship; (7) those under certain restraining orders; and (8) those convicted of misdemeanor domestic violence.[205] The Court "express[ed] no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status" in the case of these other instances of disqualifying status.[206]

Justice Alito's dissent, which Justice Thomas joined, may have influenced the Court to limit the opinion's scope. Among other criticisms, Justice Alito focused on unlawful possession by others in addition to unlawfully present foreign nationals, stating:

> It [the unlawful possession statute] probably does more to combat gun violence than any other federal law. It prohibits the possession of firearms by, among others, convicted felons, mentally ill persons found by a court to present a danger to the community, stalkers, harassers, perpetrators of domestic violence, and illegal aliens. Today's decision will make it significantly harder to convict persons falling into some of these categories, and the

[197] *Id.* (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

[198] *Id*. at 2196 (quoting Luna Torres v. Lynch, 136 S. Ct. 1619, 1630-31 (2016).

[199] *Id.* at 2197 (citing *Staples*, 511 U.S. at 606).

[200] *Staples*, 511 U.S. at 607 (citing United States v. Dotterweich, 320 U.S. 277, 281 (1943); United States v. Int'l Minerals Corp., 402 U.S. 558, 564-65 (1971)); *see also* United States v. Freed, 401 U.S. 601, 609 (1971).

[201] *Staples*, 511 U.S. at 607 (citing United States v. Balint, 258 U.S. 250, 254 (1922)).

[202] *Id.* at 511 U.S. at 617-18 (citing Morissette v. United States, 342 U.S. 246, 256 (1952)).

[203] *Rehaif*, 139 S. Ct. at 2197 (citing X-Citement Video, Inc., 513 U.S. at 72).

[204] *Id*. at 2200.

[205] 18 U.S.C. § 922(g).

[206] *Rehaif*, 139 S. Ct. at 2197.

> decision will create a mountain of problems with respect to the thousands of prisoners currently serving terms for [unlawful possession] convictions.[207]

SORNA

Gundy v. United States, 139 U.S. 2116 (2019)

Holding: Authorizing the Attorney General to issue regulations, as soon as feasible, governing the registration requirements under the Sex Offender Registration and Notification Act (SORNA) for pre-Act offenders did not violate the nondelegation doctrine.[208]

Background: In *Gundy v. United States*, the defendant argued unsuccessfully that the federal statute featured an unconstitutional delegation of Congress's legislative authority.[209] The alignment of the Justices, however, suggests that the Court may revisit the issue in the near future. Four Justices considered the delegation proper;[210] three did not;[211] one joined the Court too late to participate fully;[212] and one voted with the four based on precedents that he considered occasionally marked by "extraordinarily capacious standards" and would have voted to reexamine.[213]

SORNA: Congress passed SORNA in 2006.[214] Congress designed SORNA in order to provide a publicly available, online gateway to federal, state, tribal, and territorial registration systems that met certain minimum federal standards.[215] It authorized the Attorney General to promulgate implementing regulations including provisions concerning SORNA's retroactive application.[216] An individual with a qualifying state offense, who fails to follow SORNA's registration and updating requirements and subsequently travels interstate, is guilty of a federal crime.[217] An individual with a qualifying federal, tribal, or territorial sex offense conviction, who fails to follow SORNA's registration and updating requirements, is also guilty of a federal offense.[218]

Second Circuit: While Gundy was on federal supervised release, a Maryland state court convicted him of a state sex offense and a federal court determined that he had violated the terms of his supervised release as a consequence.[219] The federal court sentenced him to prison for two years to be served when he completed his Maryland sentence.[220] While Gundy was serving time in Maryland, Congress passed SORNA and the Attorney General activated its retroactive application.[221] Maryland prison authorities subsequently transferred Gundy to a federal

[207] Id. at 2201 (Alito & Thomas, JJ., dissenting).

[208] Gundy v. United States, 139 U.S. 2116, 2121 (2019).

[209] *Id.*

[210] *Id.* at 2120 (Kagan, J., joined by Justices Ginsburg, Breyer and Sotomayor).

[211] *Id*. at 2131 (Gorsuch, J., with Roberts, C.J. and Thomas, J., dissenting)

[212] *Id*. at 2130 (announcing that Kavanaugh, J., took no part in the case).

[213] *Id.* at 2130-31 (Alito, J., concurring in the judgment).

[214] Pub. L. No. 109-248, 120 Stat. 590, 34 U.S.C. §§ 20901-20932.

[215] 34 U.S.C. §§ 20901, 20920.

[216] *Id*. § 20913(d).

[217] 18 U.S.C. § 2250(a)(2)(B).

[218] *Id*. § 2250(a)(2)(A).

[219] United States v. Gundy, 804 F.3d 140, 143 (2d Cir. 2015).

[220] *Id*.

[221] Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).

correctional facility in Pennsylvania to serve his federal sentence.[222] Gundy did not register under SORNA either while in state or federal custody.[223]

Towards the end of his sentence, federal authorities transferred him to a federal half-way house in New York and approved his request to travel unescorted from Pennsylvania to the half-way house.[224] Thereafter, federal authorities charged him with interstate travel while failing to register as a sex offender.[225] The district court dismissed the indictment under the misimpression that Gundy was not required to register.[226] The U.S. Court of Appeals for the Second Circuit (Second Circuit) reversed.[227] On remand from the Second Circuit, the district court convicted Gundy on the failure to register charge.[228] The Second Circuit rejected his statutory interpretation arguments and observed that Gundy's other arguments on appeal were without merit "includ[ing] Gundy's argument—… made only for preservation purposes—that SORNA violates antidelegation principles."[229]

Supreme Court: Gundy asked the Court to review four questions:

> (1) Whether convicted sex offenders are 'required to register' under the federal Sex Offender Notification and Registration Act ('SORNA') while in custody, regardless of how long they have until release.
>
> (2) Whether all offenders convicted of a qualifying sex offense prior to SORNA's enactment are 'required to register' under SORNA not later than August 1, 2008.
>
> (3) Whether a defendant violates 18 U.S.C. § 2250(a), which requires interstate travel, where his only movement between states occurs while he is in the custody of the Federal Bureau of Prisons and serving a prison sentence.
>
> (4) Whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) [now 34 U.S.C. § 20913(d)] violates the nondelegation doctrine.[230]

The Justices addressed only the nondelegation question.[231] While a majority agreed on the result, they did not agree on a rationale. Joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan declared that the "delegation easily passes constitutional muster" and voted to affirm the Second Circuit's pronouncement. [232] Justice Alito also voted to affirm but did not join Justice Kagan's opinion, perhaps to avoid a 4-4 split on the Court. He explained that he thought the result was consistent with the Court's earlier cases, although he would prefer to reconsider them.[233]

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[222] United States v. Gundy, 695 F. App'x 639, 640 (2d Cir. 2017).

[223] *Gundy*, 804 F.3d at 144.

[224] *Gundy*, 695 F. App'x at 640.

[225] *Gundy*, 804 F.3d at 144.

[226] *Id*. at 145.

[227] *Id*. at 148.

[228] *Gundy*, 695 F. App'x at 640-41.

[229] *Id*. at 641.

[230] Petition for Writ of Certiorari at i, Gundy v. United States, 139 S Ct. 2116 (2019) (No. 17-6086).

[231] United States v. Gundy, 138 S. Ct. 1260 (2018).

[232] *Id.* at 2120 (Kagan, J., joined by Justices Ginsburg, Breyer and Sotomayor).

[233] *Id.* at 2130-31 (Alito, J., concurring in the judgment).

Justice Gorsuch, joined by the Chief Justice and Justice Thomas, dissented.[234] Justice Kavanaugh, who was seated late in the Court's term, did not participate in the case.[235]

The participating Justices read the Court's earlier cases differently. Justice Kagan pointed to the low bar the Court's earlier delegation decisions had set but conceded that the decisions had required a guiding "intelligible principle" or limiting policy statement to accompany the delegation.[236] Justice Kagan noted, however, that the Court had only held a delegation to be invalid twice and then only because Congress had failed to provide "'*any* policy or standard' to confine discretion."[237] She concluded that SORNA's direction to the Attorney General "to require pre-Act offenders to register as soon as feasible" was a far more confining policy statement than the "very broad delegations" the Court had approved in the past.[238]

Justice Gorsuch disputed the comparison, stating: "SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. . . . In the end, there isn't … a single other case where we have upheld executive authority over matters like these on the ground they constitute mere 'details.'"[239] He found none of the executive fact-finding or overlapping legislative-executive powers in SORNA's delegation to the Attorney General that he discerned in the Court's precedents.[240]

Justices Kagan and Alito's opinions looked only at Court precedents. Examining these, Justice Gorsuch declared that, as least in the case of SORNA, his colleagues should have been more demanding. He stated: "[W]hile Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[241]

Pretrial

Five decisions in the Supreme Court's most recent term dealt with pre-trial matters. One confirmed the continued validity of the double jeopardy dual sovereign doctrine (*Gamble v. United States*). A second addressed circumstances under which the Fourth Amendment permits the warrantless performance of a blood alcohol test on an individual suspected of drunk driving (*Mitchell v. Wisconsin*). Three others discussed the obstacles individuals face when they seek to sue officers for the manner in which the officers performed their law enforcement duties (*Nieves v. Bartlett*; *McDonough v. Smith*; and *City of Escondido v. Emmons*).

[234] *Id*. at 2131 (Gorsuch, J., with Roberts, C.J. and Thomas, J., dissenting).

[235] *Id*. at 2130 (announcing that Kavanaugh, J., took no part in the case).

[236] *Id*. at 2123.

[237] *Id*. at 2129 (emphasis of the Court) (quoting Mistretta v United States, 488 U.S. 361, 416 (1989).

[238] *Id*.

[239] *Id*. at 2143 (Gorsuch, J., with Roberts, C.J. and Thomas, J., dissenting).

[240] *Id.*

[241] *Id*. at 2148 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (Cardozo, J., concurring) (1935)).

Double Jeopardy

Gamble v. United States, 139 S. Ct. 1960 (2019)

Holding: The dual sovereign doctrine of the Fifth Amendment's Double Jeopardy Clause, which permits successive state and federal prosecutions for the same misconduct, remains in force.[242]

Background: Police stopped Gamble for a traffic violation, smelled marijuana, and searched his car,[243] uncovering a handgun.[244] State authorities prosecuted him for unlawful firearm possession under state law.[245] Federal authorities also prosecuted him for unlawful firearm possession under federal law based on the same incident.[246] Gamble challenged his federal indictment on double jeopardy grounds.[247] In light of the Double Jeopardy Clause's dual sovereignty doctrine, the district court refused to dismiss the indictment and the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) affirmed.[248] Gamble petitioned the Supreme Court to reconsider the validity of the dual sovereignty doctrine, and the Court agreed.[249]

Supreme Court: *Gamble* continues the status quo. All but two members of the Court voted to continue the dual sovereignty doctrine. Writing the majority opinion, Justice Alito noted that the Double Jeopardy Clause's reference to the "same offence" implies a ban only on prosecution under the laws of the same sovereign.[250] Justice Alito reviewed a continuous line of cases beginning in the early Nineteenth Century that endorsed the dual sovereignty doctrine.[251] These precedents pose an obstacle to rejecting the doctrine because *stare decisis* counsels against abandoning earlier precedents,[252] which the majority declined to do.[253]

[242] 139 S. Ct. 1960, 1964 (2019). For additional discussion see CRS Legal Sidebar LSB10188, *When Does Double Prosecution Count as Double Jeopardy?*, by JD S. Hsin.

[243] *Gamble*, 139 S. Ct. at 1964.

[244] *Id.*

[245] ALA. CODE §§ 13A-11-72(a), 13A-11-70(2).

[246] 18 U.S.C. §§ 922(g)(1), 924(a)(2).

[247] U.S. CONST. amend. V ("… [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb….").

[248] United States v. Gamble, 694 F. App'x 750 (11th Cir. 2017).

[249] Gamble v. United States, 138 S. Ct. 2707 (2018).

[250] Gamble v. United States, 139 S. Ct. US. 1960, 1965 (2019) ("As originally understood, then, an 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'").

[251] *Id.* at 1966-67.

[252] *Id*. at 1969 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'").

[253] *Id*. at 1964.

Justices Ginsburg and Gorsuch dissented separately because they considered the doctrine "misguided"[254] and "wrong."[255]

Drunk Driving

Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019)

Holding: A suspect's loss of consciousness following a probable cause arrest for drunk driving will almost always qualify for the exigent circumstances exception to the Fourth Amendment's warrant requirement. (Plurality).

Background: *Mitchell* is the latest case in which the Court has wrestled with Fourth Amendment requirements in drunk driving cases. In the 1966 decision *Schmerber v. California*,[256] the defendant hit a tree while drunk and was taken to the hospital. There, the arresting police officer directed a doctor to take a sample of Schmerber's blood for a blood alcohol test. The Supreme Court recognized that the Fourth Amendment protects against warrantless bodily intrusions in drunk driving cases, but it held admissible the test results based on the circumstances.[257] In 2013, the Court held that the natural dissipation of alcohol in blood, without more, does not justify warrantless blood alcohol tests in drunk driving cases.[258] Three years later, the Court decided that officers with probable cause might conduct warrantless breath tests incident to an arrest[259] but they could not administer warrantless blood tests incident to an arrest for drunk driving or under an implied consent theory.[260]

In *Mitchell*, officers, acting on a complaint, discovered the defendant stumbling around the edge of a lake with his van parked nearby. They arrested him after he failed a preliminary field breath test and took him to the police station for a more exacting breath test. Along the way, Mitchell became unconscious. When the officers were unable to administer a second breath test at the station because Mitchell had passed out, they took him to a hospital for a blood test. As a result of the test, officials charged him with drunk driving. Mitchell sought unsuccessfully to suppress the

[254] *Id.* at 1989 (Ginsburg, J., dissenting) (quoting Puerto Rico v. Sánchez Valle, 136 S. Ct.1863, 1877 (2016) (Ginsburg, J., concurring) ("Apparently regarding Alabama's sentence as too lenient, federal prosecutors pursued a parallel charge…. [T]he Federal Government was able to multiple Gamble's time in prison because of the doctrine that, for double jeopardy purposes, identical criminal laws enacted by 'separate sovereigns' are different 'offence[s].' I dissent from the Court's misguided doctrine. … I would hold that the Double Jeopardy Clause bars 'successive prosecutions [for the same offense] by parts of the whole USA.'").

[255] *Id.* at 2009 (Gorsuch, J., dissenting) ("When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is the poor and the weak, and the unpopular and controversial who suffer first—and there is nothing to stop them from being the last. The separate sovereigns exception was wrong when it was invented, and it remains wrong today.").

[256] Schmerber v. California, 384 U.S. 757 (1966).

[257] *Id.* at 770-71 (We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops… Particularly in a case such as this, where time had to be taken to bring the [injured] accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest. Similarly, we are satisfied that the test chosen to measure petitioner's blood alcohol level was a reasonable one… Finally, the record shows that the test was performed in a reasonable manner.").

[258] Missouri v. McNeely, 569 U.S. 141, 165 (2013).

[259] Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016).

[260] *Id.* at 2184-85.

results of the blood tests. Wisconsin appellate courts affirmed his conviction,[261] as did a divided U.S. Supreme Court.

Supreme Court: For four of the Justices, the issue was a matter of balance. Justice Alito, speaking for the four, listed a series of factors documenting the states' compelling interest in access to a reliable test to determine the extent of a suspect's intoxication:

- Highway safety is a legitimate public interest;
- In a good year, alcohol-related deaths occur at the rate of no more than one per hour;
- States rely heavily on blood alcohol limits as an effective means of promoting highway safety;
- Enforcing blood alcohol limits depends on reliable testing methods;
- Alcohol in the blood dissipates rapidly so speed is of the essence;
- When a reliable breathalyzer test cannot be administered, a blood test is the only comparable alternative; and
- Drivers who cannot remain conscious represent an even greater threat.[262]

In the eyes of the four, "the only question left, under our exigency doctrine, is whether this compelling need justifies a warrantless search because there is, furthermore, 'no time to secure a warrant.'"[263] And they concluded, "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC [blood alcohol content] without offending the Fourth Amendment."[264] Justice Alito acknowledged that the case should be remanded to the Wisconsin courts to permit Mitchell to offer any evidence that the "police could not have reasonably judged that a warrant application would interfere with other pressing need or duties."[265]

Justice Thomas concurred in the result because he would have recognized a per se rule under which the dissipation of alcohol in blood would always justify a warrantless, probable cause test.[266]

With Justices Ginsburg and Kagan, Justice Sotomayor noted that, because Wisconsin admitted there was time to get a warrant, she would have held that "the Fourth Amendment … requires police officers seeking to draw blood from a person suspected of drunk driving to get a warrant if possible."[267] Because the lower courts had not addressed the exigent circumstance exception, Justice Gorsuch dissented on the grounds that the decision should have been postponed until the issue had been more fully developed below.[268]

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[261] State v. Mitchell, 914 N.W.2d 151, 154 (Wis. 2018).

[262] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2537 (2019)

[263] Id. at 2537 (quoting *McNeely*, 569 U.S. at 149).

[264] *Id*. at 2539.

[265] *Id.*

[266] *Id*. (Thomas, J., concurring in the judgment).

[267] *Id*. at 2550 (Sotomayor, J., with Ginsburg & Kagan, JJ., dissenting).

[268] *Id*. at 2551 (Gorsuch, J., dissenting) ("We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute….But the Court today declines to answer the question presented. Instead, it

Section 1983

Section 1983 establishes a cause of action for those deprived, under color of law, of some right under the U.S. Constitution or other federal law.[269] The successful plaintiff must overcome at least three hurdles: He must (1) establish that he has been deprived of a right under color of law, *e.g.*, *Nievers v. Bartlett*; (2) satisfy Section 1983's procedural requirements, *e.g.*, *McDonald v. Smith*; and (3) overcome any claim of qualified immunity, *e.g., City of Escondido v. Emmons*.

Nieves v. Bartlett, 139 S. Ct. 1715 (2019)

Holding: The existence of probable cause to arrest precludes a Section 1983 civil liability claim based on an alleged First Amendment retaliatory arrest, unless "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."[270]

Background: Officers arrested Bartlett at a raucous "Arctic Man" sports festival and "beer blast" in a remote area of Alaska. In an earlier encounter with Officer Nieves, Bartlett had refused to speak to Officer Nieves. Bartlett and the officers disputed whether Bartlett: (1) was drunk; (2) was loud and belligerent on two occasions; (3) got into Officer Wright's face to provoke a confrontation, or spoke closely to the officer in order to be heard over the loud music; and (4) refused to back away from Officer Wright, or was slow to back away because of a bad back.[271]

Charges against Bartlett were later dismissed, and he sued the officers under Section 1983 on several grounds, including a retaliatory arrest claim.[272] Bartlett alleged that, at the time of his arrest, Officer Nieves said: "[B]et you wish you would have talked to me now."[273] The U.S. District Court dismissed the complaint because it found that the officers had probable cause to arrest Bartlett.[274] The U.S. Court of Appeals for the Ninth Circuit reversed based on *Ford v. City of Yakima* in which the Ninth Circuit had ruled that probable cause does not preclude a Section 1983 retaliatory arrest claim.[275]

Supreme Court: The Supreme Court disagreed, stating: "Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law."[276] Writing for the Court, Chief Justice Roberts, acknowledged that, as a general rule, a First Amendment retaliatory arrest claim will survive in the face of probable cause to arrest, if the arrestee demonstrates that similarly

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upholds Wisconsin's law on an entirely different ground—citing the exigent circumstances doctrine…. [T]he application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question.").

[269] 42 U.S.C. § 1983. Exception when faithfully replicating a quotation, this report refers to Section 1983 as either "Section 1983" or simply "1983."

[270] Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).

[271] *Id.* at 1720-21 (2019).

[272] *Id.* at 1721.

[273] *Id.* (Bartlett "claimed that the officers violated his First Amendment rights by arresting him in retaliation for his speech. The protected speech, according to Bartlett, was his refusal to speak with Nieves earlier in the evening and his intervention in Wright's discussion with an underage partygoer.").

[274] Bartlett v. Nieves, 712 F. App'x 613, 616 (9th Cir. 2017).

[275] *Id.* ("[W]e have previously held that a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013.").

[276] *Nieves*, 139 S. Ct. at 1728.

situated, but silent, individuals had not been arrested.[277] The case triggered four individual opinions. Justice Thomas concurred in part and in the judgment, disagreeing with the majority's disparate-application exception.[278] Justice Gorsuch and Justice Ginsburg concurred in part and dissented in part. Justice Gorsuch's position was that "the absence of probable cause is not an absolute requirement of such a claim, and its presence is not an absolute defense."[279] Justice Ginsburg questioned whether the case was the appropriate vehicle for the rule the majority announced.[280] Justice Sotomayor, in dissent, took the position that probable cause does not always doom a Section 1983 First Amendment retaliatory arrest claim.[281]

McDonough v. Smith, 139 S. Ct. 2149 (2019)

Holding: Statute of limitations for a Section 1983 cause of action alleging falsification of evidence "began to run when criminal proceedings against him terminated in his favor."[282]

Background: McDonough was a commissioner on a local board of elections when allegations of forged absentee ballots surfaced.[283] A grand jury indicted McDonough.[284] He was arrested and held for bail.[285] His first trial ended in a mistrial.[286] The jury acquitted him in a second trial.[287] Just short of three years after his acquittal, McDonough sued the special prosecutor in federal court under Section 1983,[288] claiming denial of due process in the form of malicious prosecution and fabrication of evidence.[289] The U.S. District Court dismissed the malicious prosecution claim

[277] *Id.* at 1727 ("[W]e conclude 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 same sort of protected speech had not been.").

[278] *Id*. at 1728-29 (Thomas, J., concurring in part and in the judgment) (quoting *id*. at 1727) ("… I do not agree that 'a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.'").

[279] *Id*. at 1734 (Gorsuch, J., concurring in part and dissenting part).

[280] *Id.* at 1734-35 (Ginsburg, J., concurring in part and dissenting in part) ("In any event, I would not use this thin case to state a rule that will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech.").

[281] *Id.* at 1735 (Sotomayor, J., dissenting)

[282] McDonough v. Smith, 139 S. Ct. 2149, 2161 (2019).

[283] McDonough v. Smith, 898 F.3d 259, 260 (2d Cir. 2018), *rev'd and rem'd*, 139 S. Ct. 2149 (2019) ("During the 2009 Working Families Party primary election in the City of Troy, New York, several individuals associated with Democratic and Working Families Parties forged signatures and provided false information on absentee ballot applications and absentee ballots in order to affect the outcome of that primary. Those individuals then submitted the forged absentee ballot applications to McDonough. McDonough, as a commissioner of the Rensselaer County elections board, was responsible for processing those applications. McDonough approved the forged applications, but subsequently claimed he did not know that they had been falsified.").

[284] *Id*. at 264.

[285] *McDonough*, 139 S. Ct. at 2154.

[286] *McDonough*, 989 F.3d at 264.

[287] *Id*.

[288] 42 U.S.C. § 1983. Section 1983 provides a cause of action for anyone deprived, under color of law, of their constitutional or other federal rights.

[289] *McDonough*, 139 S. Ct. at 2153-54 ("McDonough's complaint alleges that Smith [the special prosecutor] then set about scapegoating McDonough (against whose family Smith harbored a political grudge), despite evidence that McDonough was innocent. Smith leaked to the press that McDonough was his primary target and pressured him to confess. When McDonough would not, Smith allegedly fabricated evidence in order to inculpate him. Specifically, McDonough alleges that Smith falsified affidavits, coached witnesses to lie, and orchestrated a suspect DNA analysis to link McDonough to relevant ballot envelopes.").

against the special prosecutor on the grounds of absolute prosecutorial immunity.[290] The court also ruled that the three-year statute of limitations on McDonough's fabrication claim began to run when McDonough became aware of the fabrication not when he was acquitted.[291] Thus, the statute of limitations had expired by the time McDonough filed his Section 1983 complaint.[292] The U.S. Court of Appeals for the Second Circuit (Second Circuit) affirmed.[293]

Supreme Court: The Second Circuit noted a circuit split over whether the statute of limitations on due process fabrication claims begins to run with the claimant's exoneration or with his knowledge of the fabrication and its improper use.[294] The Supreme Court agree to hear the case in order to resolve the issue.[295]

Writing for the Court, Justice Sotomayor explained that state law governs the length of the statute of limitations in Section 1983 cases.[296] Federal law, however, determines when the statute of limitations begins to run based on "common-law principles governing analogous torts."[297] The inquiry starts with identifying the constitutional or other federal right said to have been abridged under color of law.[298] Justice Sotomayor accepted the Second Circuit's presumption that the Due Process Clause was the basis for McDonough's fabrication claim.[299]

While the Second Circuit had decided that common-law malicious prosecution, with its "end-of-game" exoneration requirement, did not match McDonough's fabrication claim,[300] the Court ruled that common-law malicious prosecution was the most closely analogous tort to McDonough's fabrication claim. Justice Sotomayor pointed out that one involves a malice-driven, groundless prosecution, the other a thrust for conviction slaked by the use of fabricated evidence.[301] "At

[290] *McDonough*, 898 F.3d at 264.

[291] *Id.* ("McDonough's complaint had alleged 'that all of the fabricated evidence was either presented at grand jury proceedings or during his two trials, all of which occurred' more than three years before he filed suit.").

[292] *Id*.

[293] *Id*. at 270.

[294] *Id*. at 267 (citing Mondragon v. Thompson, 519 F.3d 1078 (10th Cir. 2008); Bradford v. Scherschlight, 803 F.3d 382, 388-89 (9th Cir. 2015); Floyd v. Att'y Gen., 722 F. App'x 112 (3d Cir. 2018)) ("We acknowledge that the Third, Ninth, and tenth Circuits have held that the due process fabrication cause of action accrues only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought.").

[295] McDonough v. Smith, 139 S. Ct. 915 (2019).

[296] McDonough v. Smith, 139 S. Ct. 2149, 2155 (2019).

[297] *Id*. at 2156 (citing Wallace v. Kato, 549 U.S. 384, 388 (2007) and Heck v. Humphrey, 512 U.S. 477, 483 (1994)).

[298] *Id*. at 2155 (citing *Wallace*, 549 U.S. at 388).

[299] *Id*. at 2155. Justices Thomas, Kagan, and Gorsuch, in dissent, would not have proceeded without identification of the right upon which the claim was asserted. *Id*. at 2161 (internal citations omitted) ("We granted certiorari to decide when 'the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run.' McDonough, however, declined to take a definitive position on the 'threshold inquiry in a §1983 suit: identify[ing] the specific constitutional right at issue.' Because it is only '[a]fter pinpointing that right' that courts can proceed to 'determine the elements of, and rules associated with, an action seeking damages for its violation,' we should have dismissed this case as improvidently granted.").

[300] *McDonough*, 898 F.3d at 267 ("Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the causes of action accrues. Indeed, the harm—and the due process violation—is the use of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.").

[301] *McDonough*, 139 S. Ct. at 2156 (internal citations omitted) ("Common-law malicious prosecution requires showing, in part that a defendant instigated a criminal proceeding with improper purpose and without probable cause. The

bottom," she declared, "both claims challenge the integrity of criminal prosecutions undertaken 'pursuant to legal process.'"[302] Moreover, she noted, the Second Circuit's approach would mean starting the statute of limitations clock when use of the fabricated evidence became obvious—at trial or the return of the indictment. Either alternative presents the risk of parallel criminal and civil proceedings, and worse yet, the risk of inconsistent results.[303]

City of Escondido v. Emmons, 139 S. Ct. 500 (2019)

Holding: "The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established."[304]

Background: Ametria Douglas shared an apartment with Maggie Emmons and Emmons' two children.[305] Douglas' mother called 911 after hearing the sounds of fighting and a plea for help during an interrupted telephone conversation with her daughter.[306] When officers arrived they found Douglas outside in the pool with the children.[307] She assured them it was a false alarm.[308] Nevertheless, the officers went to the apartment in order to conduct a "welfare check" (to make sure no one inside was injured or in danger).[309] Emmons, who had charged her husband with domestic violence a month earlier, refused to let them in without a warrant.[310] Then, Marty Emmons, who had been visiting his daughter, came out of the apartment and closed the door behind him.[311] Officer Craig, who had instructed him to leave the door open, threw Marty Emmons to the ground.[312] Marty Emmons subsequently sued Officer Craig and his fellow officers for unlawful search and seizure and the use of excessive force.[313]

Each of the parties moved for summary judgment in federal district court.[314] Police officers and other public officials "performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

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essentials of McDonough's claim are similar: His claim requires him to show that the criminal proceedings against him—and consequent deprivations of his liberty—were cause by Smith's malfeasance in fabricating evidence.").

[302] *Id*.

[303] *Id*. at 2156-57 (citing Heck v. Humphrey, 512 U.S. 477, 484-85 (1994)) (internal citation omitted) ("As *Heck* explains, malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation.").

[304] City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019).

[305] *Id*. at 501.

[306] *Id.*

[307] Emmons v. City of Escondido, 168 F. Supp. 3d 1265, 1268 (S.D. Cal. 2016).

[308] *Id.*

[309] *Id*. at 1271-72.

[310] *Id.* at 1268.

[311] *Emmons*, 139 S. Ct. at 502.

[312] *Id.*

[313] Mr. Emmons' daughter joined her father in his suit under 42 U.S.C. § 1983, against the officers as well as the City of Escondido and current and former chiefs of police, alleging "(1) unlawful seizure, arrest, and detention; (2) excessive force; (3) unreasonable search without a warrant; (4) municipal liability under *Monell*; (5) failure to train; and (6) failure to supervise and discipline." *Emmons*, 168 F. Supp. 3d at 1268.

[314] *Id*. at 1267.

constitutional rights of which a reasonable person would have known."[315] The district court granted Officer Craig's motion of summary judgment on the excessive use of force claim because it concluded that "relevant legal authorities do not establish that the underlying conduct violate[d] clearly established law."[316] The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reversed and held that Officer Craig was not entitled to qualified immunity because the "right to be free of excessive force was clearly established at the time of the events in question."[317]

Supreme Court: The Supreme Court reversed and sent the case back to the Ninth Circuit.[318] As it has done in a number of recent cases,[319] the Court reminded the Ninth Circuit that the circumstances of the cases that "clearly establish" a constitutional right must be closely analogous to the circumstance of the case at issue. The Court stated: "This Court has repeatedly told courts … not to define clearly established law at a high level of generality."… 'An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have under that he was violating it.'"[320] Rather than ask whether the right to be free of excessive force was clearly established, the Ninth Circuit "should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances."[321] On remand, the Ninth Circuit concluded that Officer Craig was entitled to qualified immunity, since it could find no case "so precisely on point with this one as to satisfy the Court's demand for specificity."[322]

Appeals

Ineffective Assistance of Counsel

Garza v. Idaho, 139 S. Ct. 738 (2019)

Holding: A defense attorney's failure to appeal in spite of a client request is presumptively prejudicial ineffective assistance of counsel "even when the defendant has signed an appeal waiver."[323]

Background: Garza entered into plea agreements covering state aggravated assault and possession of controlled substance charges. Garza waived his right to appeal in the agreements and his counsel did not file a notice of appeal. Thereafter, Garza sought post-conviction review (state

[315] Harlow v. Fitzgrald, 457 U.S. 800, 818 (1982); *see also* Kisela v. Hughes, 138 S. Ct. 1148, 152 (2018) ("Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[316] *Emmons*, 168 F. Supp. 3d at 1274.

[317] Emmons v. City of Escondido, 716 F. App'x 724, 726 (9th Cir. 2018).

[318] *Emmons*, 139 S. Ct. at 504.

[319] *E.g.*, Kisela v. Hughes, 138 S. Ct. 1148 (2018); District of Columbia v. Wesby, 138 S. Ct. 577 (2018); White v. Pauly, 137 S. Ct. 548 (2017); Mullenix v. Luna, 136 S. Ct. 305 (2015).

[320] *Emmons*, 139 S. Ct. at 503 (internal citations omitted) (quoting *Kisela*, 138 S. Ct. at 1153).

[321] *Id.*

[322] Emmons v. City of Escondido, 921 F.3d 1172, 1175 (9th Cir. 2019).

[323] Garza v. Idaho, 139 S. Ct. 738, 744 (2019).

habeas corpus) asserting his trial attorney had ignored his request to appeal and claiming ineffective assistance of counsel.[324]

The Sixth Amendment provides the criminally accused the right to "reasonably effective" assistance of counsel for his defense.[325] Appellate courts overturn convictions or sentences when the defense counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" if "the deficient performance prejudiced the defense."[326] Prejudice occurs when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[327] The Court has held that prejudice may be assumed, stating: "[W]hen counsel's deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal."[328]

Denying Garza's petition for relief, the trial court stated that Garza's waiver precluded him being a victim of ineffective assistance.[329] The Idaho Court of Appeals and the Idaho Supreme Court affirmed.[330] The U.S. Supreme Court reversed and remanded.[331]

Supreme Court: In the opinion, Justice Sotomayor focused on two concepts—notice of appeal and waiver of appeal—to rebut that Garza's filing a notice of appeal would breach his plea agreements and deny him their benefits. She explained that a notice of appeal is ministerial being "a simple, nonsubstantive act that is within the defendant's prerogative."[332] She noted: (1) any "waiver of appeal" is limited to the language of the particular agreement;[333] (2) some appellate issues cannot be waived;[334] and (3) matters that are within the scope of the waiver are only binding if the prosecution elects to stand on its rights.[335] Thus, she concluded, "simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope. And in any event, the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make."[336]

Justice Sotomayor further found that Idaho's approach was inconsistent with precedent. Justice Sotomayor recalled the *Flores-Ortega* holding that "'a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally

[324] *Id.* at 742.

[325] U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687 (1984).

[326] *Id.*

[327] *Id.*

[328] Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000).

[329] Garza v. State, 405 P.3d 576, 579 (2017).

[330] *Id.* at 583 ("[T]o show ineffective assistance of counsel for failing to appeal in light of the waiver, Garza needed to show both deficient performance and resulting prejudice. The district court concluded that Garza was unable to show both any non-frivolous grounds for appeal, and therefore could not show prejudice.").

[331] *Garza*, 139 S. Ct. at 743 (2019).

[332] *Id.* at 746.

[333] *Id.* at 744 (internal citations omitted) ("As courts widely agree, '[a] valid and enforceable appeal waiver … only precludes challenges that fall within its scope.").

[334] *Id.* at 744, 745 ("[N]o appeal waiver serves as an absolute bar to all appellate claims. … [A]ll jurisdictions appear to treat at least some claims as unwaivable.").

[335] *Id.* at 744-45 ("Additionally, even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver.").

[336] *Id.* at 746.

unreasonable.'"[337] She stated: "*Flores-Ortega's* reasoning shows why an appeal waiver does not complicate [a] straightforward application"[338] and further commented: "As the Court explained, given that past precedents call for a presumption of prejudice whenever 'the accused is denied counsel at a critical state' it makes even greater sense to presume prejudice when counsel's deficiency forfeits an 'appellate proceeding altogether.'"[339] She noted, "[a]fter all, there is no disciplined way to 'accord any presumption of reliability … to judicial proceedings that never took place,'"[340] concluding "[t]hat rationale applies just as well here because … Garza retained a right to appeal at least some issues despite the waivers he signed. In other words, Garza had a right to a proceeding and he was denied that proceeding altogether as a result of counsel's deficient performance."[341]

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Disclaimer

[337] *Id*. (quoting *Flores-Ortega*, 528 U.S. at 477).

[338] *Id*. at 747.

[339] *Id*. (quoting *Flores-Ortega*, 528 U.S. at 483).

[340] *Id.* (quoting *Flores-Ortega*, 528 U.S. at 483).

[341] *Id*.