

**The Criminal Justice Section
of the
American Bar Association**

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**ANNUAL REVIEW
of the
SUPREME COURT'S TERM,
CRIMINAL CASES
(2018-2019)**

Summaries of all Opinions (including Concurrences and Dissents),
in argued and non-argument cases and Orders;
certiorari grants for the upcoming Term;
a chart of “Who Wrote What;”
and a brief Overview of the Term,
regarding all
Criminal Law and related cases before the U.S. Supreme Court
October Term 2018 (Oct. 2018-July 2019)
(with [clickable links to the cases](#))

**Prepared by: Professor Rory K. Little
UC Hastings College of the Law and
Of Counsel, McDermott Will & Emery
Ava Agree (UC Hastings '21)
200 McAllister Street
San Francisco CA 94102
415-225-5190 (24/7 cell)
little@uchastings.edu**

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**CRIMINAL LAW (and related) DECISIONS
of the U.S. Supreme Court
2018 Term (Oct. 2018- Aug. 2019)**

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The ABA's Criminal Justice Section proudly presents a panel discussion:

**Annual Review of the
Criminal Law (and Related) Opinions of the
United States Supreme Court
Issued During the October 2018 Term**

**2019 Annual Meeting Panelists
(San Francisco, CA – August 9, 2019)**

The Honorable Haywood S. Gilliam, Jr.
U.S. District Court Judge for the
Northern District of California
San Francisco, CA

Michael Dreeben
Former U.S. Deputy Solicitor General and
Counsel to Special Counsel Robert Mueller
Washington, D.C.

Mary McNamara
Swanson & McNamara, LLP
San Francisco, CA

Professor Rory K. Little (Panel Moderator)
U.C. Hastings College of the Law, and
of Counsel, McDermott Will & Emery
San Francisco, CA

Brief Overview of the 2018-19 Term, Criminal Cases

As far as criminal cases go, there are two “big stories” from the past Term, one descriptive and the other substantive impact of the Term’s “big” cases. Let’s do the descriptive first.

This was the first Term in which two new Justices appointed by President Trump served together. Justice Gorsuch was appointed at the end of the Term before last, so this was his second full Term. Justice Kavanaugh served almost all of this Term; his confirmation was slightly delayed (as you may recall), so he actually first took the bench on Monday, October 8, the second week of the Term. Still, the big question was, how would these two new Justices affect the Court?

What we now know is that, contrary to the general picture of the prior Term, the Justices divided in a remarkably large number of different variations. Overall, there were 67 argued cases, plus 5 summary reversals, for a total of 72. I count 26 of the 72 as “criminal law and related,” or 24 of the 67 argued. Of the 72, there were 20 decisions decided by a 5-4 vote – and of these, there were **10 different variations of which Justices made up the five**. This is an unusually high number. It seems that the current Justices are still trying to find their way, and (happily) are not cemented to always-predictable results. I count 10 of the 5-4 decisions as criminal; in five of those the “liberal” bloc prevailed. If we think of the four liberal Justices as Ginsburg, Breyer, Sotomayor and Kagan, the question becomes: who was the fifth Justice? Interestingly, it was Gorsuch in three, Roberts in one, and Alito in one. (Kavanaugh was not the fifth vote in any 5-4 liberal criminal win, but he did write the strong majority opinion in [Flowers](#), see below, a pro-defendant *Batson* death penalty decision.)

Justice Gorsuch's pro-defense votes in at least four cases ([Davis](#) and [Haymond](#), plus dissents in [Gamble](#) and [Mitchell](#)) indicate that he continues the "libertarian" streak that his predecessor Justice Scalia sometimes exhibited. At the same time, Justice Gorsuch's majority opinion in [Bucklew](#), a death penalty case in which he boldly wrote that "last-minute stays should be the extreme exception," demonstrates a strong pro-government position on capital punishment. Interestingly, despite their common appointment source, Justices Gorsuch and Kavanaugh did not always agree (they had only a 56-70% overall agreement rate), and were on opposite sides in six or more criminal cases. Is there a lesson here? Wait and see, is my advice.

Substantively, because **23 of the 67 argued cases (or 25 of the 72 total) were criminal law-or-related decisions**, we can see that over a third of the docket is "criminal." This is about normal for the Supreme Court's docket. With 25 criminal-and-related decisions, of which I'd say 17 were "pure criminal," there is a lot to digest (as the following 38 pages demonstrate). Only a few highlights can be summarized here.

What was the "**biggest**" criminal law decision of the Term? Of course it depends on your interests, and perhaps your ideology. Certainly the [Gamble](#) case, affirming the "separate sovereigns" exception to the Sixth Amendment's Double Jeopardy Clause despite calls for overruling it, was big news. Meanwhile, the *Timbs* decision makes it clear that the Eighth Amendment's "no Excessive Fines" Clause applies fully to the States. (In a similar vein, next Term the Court will decide whether the Sixth Amendment's unanimous jury requirement is similarly "incorporated," in [Ramos v. Louisiana](#)). Meanwhile, the Fourth Amendment decision in [Mitchell](#) suggests that a majority is ready to broaden the concept of "exigent circumstances" as a categorical exception. And finally, the [Haymond](#) decision extends *Apprendi* to the revocation of supervised release, which Justice Alito in dissent calls "revolutionary;" and the decision in [Rehaif](#) demonstrates a strong commitment to requiring *mens rea* for every factual element of an offense (in that case, knowledge that one belongs to a class of persons prohibited from possessing firearms).

Two other decisions deserve special attention (and I'm not even mentioning *Gundy*). First, I think [Garza](#) is the "sleeper" decision of the Term. It addresses the effect of "waivers of appeal" when agreed to as a condition of a guilty plea, and says that "**no appeal waiver serves as an absolute bar to all appellate claims.**" Appeal waivers have become standard practice for plea bargains in all jurisdictions that I know of (and well over 90% of all criminal cases are resolved by guilty plea bargains). *Garza* is likely to have widespread impact on how such waiver clauses are construed, applied, and written.

Meanwhile, the Court's opinion in [Flowers v. Mississippi](#), written by Justice Kavanaugh (as assigned by the chief Justice), is **one of the most powerful majority decisions in recent memory**. The facts are outrageous, and you should read the opinion in full. Justice Kavanaugh not only strongly reaffirms and applies *Batson*, but also provides a powerful history of racial discrimination in jury selection, one that he did not have to write. Kavanaugh clerked for Justice Kennedy, who wrote *Batson* and strongly applied it over time. No doubt Justice Kavanaugh had that in mind as he wrote *Flowers* – while Justice Gorsuch, who also worked for Justice Kennedy (while actually clerking for retired Justice Byron White), joined the dissent. *Flowers* is also (like *Garza*) likely to have widespread impact, on criminal jury selection practices and the exercise of peremptory strikes.

Finally, **three decisions addressing the elements of "burglary" and "robbery"** in the statutory context of the federal Armed Career Criminal Act are sure to take you back to your first-

year of law school (whether for better or for worse). Meanwhile, the Court extended its “void for vagueness” doctrine to another “crime of violence” statutory definition ([Davis](#)). The combination of striking down the enhanced sentencing statute in *Davis* for using a gun during a crime of violence, and the extension of standard *mens rea* principles to gun prohibition statutes in [Rehaif](#), can stimulate an interesting discussion of gun control statutes in the current national concern about mass shootings and firearms regulations. (But a Second Amendment case in which review was granted for next Term is now likely to be dismissed as moot because New York has quickly amended the statute.)

Our fantastic panelists will have more to say about these cases, as well as others not mentioned here. A video of the session may also be available on the Criminal Justice Section’s [website](#). Stylistically, I hope that the “clickable” links in the electronic version of this booklet are useful to you: to get an electronic copy, please email Professor Little or the staff at the Criminal Justice Section. I am always grateful to the ABA and the Criminal Justice Section -- and most prominently to its hard-working and unheralded staff – for the opportunity to organize this panel every year. Kevin Scruggs, our Executive director, is an active thinker as well as doer; feel free to email him with any questions or concerns. Meanwhile, Carol Rose has been staffing this panel for, I think, about 20 years. Please thank her if you have occasion to see her at any number of great Criminal Justice Section events. The [website](#) for the Criminal Justice Section can give you a wealth of information.

I look forward to sharing more fascinating and significant rulings with you next summer. Meanwhile, remember to “Do Justice” in whatever you do!

– Professor Rory K. Little
[U.C. Hastings College of the Law](#)
San Francisco -- little@uchastings.edu
[@RoryLittle](#); 415-225-5190 (cell)

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Explanatory Notes for these Materials

In the pages that follow, we provide detailed summaries of all of the U.S. Supreme Court’s criminal law decisions (and civil cases that the author deems “related”) that were issued during the most recent Term of the Court, grouped by subject matter. (For a quick review of the Term’s work, the “Detailed Table of Contents” above provides one-sentence descriptions for each decision and the later page number where its more detailed summary is located.) Some decisions address more than one subject, and the lead author has placed them in the category that, in his view, best fits. Within subject categories, the cases are presented in chronological order, which can sometimes help demonstrate how doctrine and the Justices’ thinking develop as a Term progresses.

The goal of these summaries is to be broadly inclusive for the fully-informed criminal law practitioner. For this reason, civil cases that even mildly relate to criminal law topics or fact-areas are included. For example, we include civil “qualified immunity” cases, securities law cases, and immigration law decisions, because such “civil” issues often arise in a criminal context, or they can be useful for applying the criminal law (if not immediately, then in the future). The similarities between civil securities fraud and criminal fraud are (or should be) well-known to the competent criminal lawyer.

Each summary below begins with the case name, its date and publication cite, the Justices' votes, who wrote what type of decision within the case, and citation to the lower court's opinion. A "**Headline**" description of the holding is then immediately provided. Then follows a somewhat detailed summary of the case's facts, majority opinion(s), and any separate opinions (concurrences as well as dissents). We believe that all the opinions in any case, including concurrences and dissents, are necessary to have a sophisticated understanding of what the case does, or does not, hold – as well as to see what issues are reserved or are likely to be addressed in future cases.

In each summary, the name of the majority writing Justice is **bolded**; concurring Justices are *italicized*, and dissenting Justices are underlined. While we try to be succinct, providing an accurate representation of each opinion's content is the goal, rather than "sound-bite" brevity. Sometimes we **bold certain important phrases** in the summaries, to aid the time-pressed "skimming" reader. We also try to use quotes from the decisions (not just paraphrases) wherever possible, because we firmly believe that the words of the Justices themselves best reflect the substance of their opinions. Finally, comments that appear in [brackets] are the (sometimes opinionated) thoughts of Professor Little, not the Court's. We signal these with a bolded "[**Ed. note...**]," unless it interferes too much with the "flow" of the summary.

Following the Summaries of Opinions in argued cases, we provide brief descriptions of interesting dissents or concurrences regarding Orders issued this Term (most often, dissents from denial of *certiorari* or from stays of executions).

At the end of this booklet, we provide a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, so that you can get a preview of what may be coming. Finally, the last page of this booklet is a chart showing what Justices wrote which opinions this Term (including separate concurring and dissenting opinions) in criminal and related cases. This can provide a useful "snapshot" of which Justices are writing, what sort of opinions they are spending their time on, and how much work they are devoting, in the field of criminal law.

These materials are the product of Professor Little alone (with drafting assistance from his research assistant). Professor Little, not the ABA or the panelists, bears full responsibility for any errors, and opinions expressed. Please be aware that even in "quoted" sentences, minor changes from the Court's original opinion may have been made for ease of reading or understanding. For example, emphasis in quotations may sometimes be added or omitted without indication; footnotes and citations may be omitted; and changes in capitalization and punctuation and even verb tenses or singular-plurals, as well as other non-substantive changes, may have been made. Finally, remember that these are merely summaries. Readers should always review the actual opinions in full and arrive at their own interpretations, rather than rely on the Editor's.

The Detailed Summaries follow on the next page.

**DETAILED SUMMARIES of the COURT'S
CRIMINAL LAW (and related) OT 2018 OPINIONS**

I. CONSTITUTIONAL DECISIONS

A. ARTICLE I, The “Non-Delegation” Doctrine

[Gundy v. United States](#), 139 S.Ct. 2116 (June 20, 2019), 5 (4-1) to 3 (**Kagan**; *Alito* concurring in the judgment; *Gorsuch* dissenting with Roberts and Thomas; Kavanaugh not participating because not yet confirmed on date of argument), affirming 695 Fed. Appx. 639 (2d Cir. 2017).

Headline: Congress’s delegation to the Attorney General to determine how best to feasibly apply federal sex offender registration requirements to offenders convicted before the statute’s enactment (i.e., “retroactively”) **“easily passes constitutional muster” under the non-delegation doctrine.**

Facts: In 2006, Congress enacted its third statute in 12 years to “make more uniform and effective” the “patchwork” of various State sex offender registration systems. The Federal SORNA (“Sex Offender Notification and Registration Act”) created a federal offense of “knowingly” failing to register, punishable by up to 10 years in prison. The Act stated that **“the Attorney General shall have the authority to specify the applicability of the requirements” to persons “convicted before the enactment” and to prescribe rules** for such offenders. Many such offenders were unable to comply with another SORNA provision that required registration “before completing a sentence,” because their sentences were completed before the Act existed. After SORNA’s enactment, the Attorney General issued a rule requiring such persons to also register under SORNA. Herman Gundy was then convicted for violating SORNA, because “he never registered as a sex offender” under the AG’s rule. The Second Circuit (and every other Circuit) rejected the argument that SORNA’s delegation to the Attorney General violated the non-delegation doctrine. “We nonetheless granted certiorari,” and “today we join the consensus.”

Kagan (joined by Ginsburg, Breyer and Sotomayor): “The non-delegation doctrine bars Congress from transferring its legislative power to another branch of Government,” because Article I says that “All legislative Powers herein granted shall be vested in a Congress of the United States.” Our precedents say, though, that Congress “may confer substantial discretion on executive agencies to implement and enforce” federal laws, so long as Congress provides an “intelligible principle” to “guide the delegee’s discretion.” **So the initial task for a court is to “determine a challenged statute’s meaning,” to see what principle, if any, it provides.**

We have previously interpreted SORNA, in *Reynolds* (2012) and we reaffirm what we said there: read “reasonably” and “in context,” SORNA clearly **“require[d] the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible.** It “does not give the AG anything like the ‘unguided’ and ‘unchecked’ authority that Gundy” claims. In context and in light of legislative history, “the lonesome phrase ‘specify the applicability’” in the statute clearly meant “specify *how* to apply SORNA to pre-Act offenders,” not “specify *whether* to apply SORNA.” The AG did not have discretion to decide on whether the statute was retroactive, “he had to order their registration as soon as feasible.” On that statutory-interpretation reading, **the constitutional non-delegation “question is easy. Its answer is no.”** This delegation, “as compared to the delegations we have upheld in the past, is distinctly **small-bore.** ... Indeed, **if SORNA’s delegation is unconstitutional, then most of Government is unconstitutional.**” With “wisdom and humility alike ... this Court has always upheld such ‘necessities of government’” (quoting *Mistretta* (1989), a case in which Scalia was the

lone dissenter, saying that the federal Sentencing Commission was a constitutional problem, a “junior varsity Congress,” setting policy without guidance).

Alito, concurring (the necessary fifth vote): I concur in the judgment because “I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years.” “It would be freakish to single out” this statute “for special treatment.” However, **“if a majority ... were willing to reconsider the approach ... I would support that effort.”**

Gorsuch dissenting, joined by Roberts and Thomas: [A lengthy opinion, almost twice the length of Kagan’s – only a brief summary here]. “The plurality reimagines the terms of the statute.” It does not mean what the plurality says; Congress clearly could not decide on retroactivity so punted to the AG. Particularly when criminal penalties attach, Congress cannot delegate the authority to define crimes to the executive branch; “it may authorize another branch [only] to ‘fill up the details’” (quoting Chief Justice Marshall in *Wayman* (1825)). The “intelligible principle” doctrine was just a dictum that “took on a life of its own” and “mutated.” We cannot “look the other way” in light of our own Constitutional duty. “In a future case with a full panel, I remain hopeful that the Court” will reexamine the doctrine. **Congress “may never hand off to the nation’s chief prosecutor the power to write his own criminal code. That ‘is delegation running riot’”** (quoting Scalia (whose seat Gorsuch now holds) dissent in *Reynolds*).

B. ARTICLE I, §8 (the “Dormant Commerce Clause”) and the 21st AMENDMENT

[Tennessee Wine & Spirits Retailers Association v. Blair](#), 139 S.Ct. 2449 (June 26, 2019), 7-2 (**Alito**; **Gorsuch** dissent with Thomas), **affirming** 883 F.3d 608 (6th Cir. 2018).

Headline: A two-year state residency requirement for retail liquor sales licenses for individuals violates the “Dormant Commerce Clause” (found silently in Article I, §8 of the Constitution), and is not saved by the Twenty-first Amendment.

Facts: The Tennessee legislature has imposed “onerous durational-residency requirements for all persons and companies” seeking licenses to sell liquor for off-premises consumption at the retail level. When the Tennessee Attorney General opined in 2012 that the residency requirements violated the Dormant Commerce Clause and would not be enforced, the legislature responded by expressing the intent that such laws were necessary for the “health, safety and welfare” of Tennesseans to ensure “a higher degree of oversight, control and accountability.” The Attorney General, however, continued non-enforcement. Then two companies with out-of-state owners applied for licenses. [**Ed. note:** apparently “big box” liquor retailers with national operations; presumably threatening to Tennessee’s local liquor retailers.] A Tennessee trade association threatened suit, and the Tennessee Alcohol & Beverage Commission filed a suit to settle the question. The district court struck down the residency requirements, and the Sixth Circuit affirmed, but split 2-1 (Sutton J. dissenting) on whether the two-year residency requirement for individuals might be saved by the 21st Amendment (which repealed nationwide Prohibition).

Alito (for 7): Article I, Section 8 of the Constitution grants a list of legislative powers to Congress, including the power to “regulate Commerce ... among the several States.” “We have **long held that this Clause also prohibits state laws that unduly restrict interstate commerce.**” Some “Members of this Court have authored vigorous and thoughtful critiques of this” doctrine, the “negative aspect” of the Commerce Clause, “generally known as “the dormant Commerce Clause.”

But it is “deeply rooted in our caselaw” and without it, “those who framed and ratified the Constitution would surely find” the national economy “surprising ... because removing state barriers to trade was a principal reason for the adoption of the Constitution.” While other constitutional Clauses have been proposed, “it would grossly distort the Constitution to hold that it provides no protection against a broad swath of state protectionist measures.” So today “we reiterate” the doctrine.

Under that doctrine, state laws that are facially discriminatory against out-of-state commerce must be struck down unless “narrowly tailored to advance a legitimate local purpose.” No one defends a two-year residency requirement for goods other than alcohol. So the 21st Amendment must be analyzed since only that could save this law. The broad language of §2 of the Amendment (“The ... importation into any State ... of intoxicating liquors, in violation of the laws thereof, is hereby prohibited”) cannot mean “*any*” state laws, or absurd results would follow. “§2 does not confer limitless authority to regulate the alcohol trade.” Instead, the intent was to return the country to the pre-Eighteenth Amendment regulatory structure. [Ed. note: An interesting footnote fact: “between 1780 and 1830, Americans consumed more alcohol than at any other time, ... double that of the modern era.”]. After a long historical and precedent analysis, the bottom line is: **“Protectionism is not a” legitimate state interest, and the two-year residency requirement here serves no other legitimate interests that could not be achieved through non-protectionist means.** There is “no sound basis” for distinguishing state laws “that regulate in-state alcohol distribution.” While a “three-tiered model” for regulating alcohol (producers, wholesalers, and retailer) is okay, not “every discriminatory feature” of such a system is constitutionally okay – “each variation must be judged based on its own features.” [Ed. note: uh-oh. Here’s comes future Dormant Commerce Clause litigation on “features.”]

Gorsuch dissenting with Thomas: First sentence: “Alcohol occupies a complicated place in this country’s history.” [Ed. note: **Gorsuch seems to love startling or dramatic first sentences.**] Residency requirements have been enacted “for at least 150 years,” and Tennessee’s “has stood since 1939.” This is the first time the Court has struck one down. “Respectfully, I do not see it.” While §2 does not permit laws that violate other textual parts of the Constitution, the dormant commerce clause is not textual. (Justice Thomas has long made this argument.) If Congress does not like state protectionism, it has the power under Art. I §8 to regulate and pre-empt. Meanwhile, “ours is a vast and diverse Nation,” and the 21st Amendment textually “ended nationwide prohibition ... and authorized local control.” And it was intended to constitutionalize the Webb-Kenyon Act of 1913, which (I argue) allowed residency laws. This was understood, and 18 States enacted residency requirements for liquor sales within 15 years of §2’s ratification. Only “in recent years” has the Court “begun flexing its dormant Commerce Clause muscles” to strike down state alcohol laws. But not residency requirements, which are “surely one reasonable way” to evaluate liquor retailers. The Court offers no more than “delphic” guidance about other alcohol laws. **A desire for us to implement our own policy views for “free-trade rules” and achieve “symmetry” is hard for “the professional experts who make up the lawyer class” to resist** (quoting Cardozo). But “I would enforce the Twenty-First Amendment as [its Framers] wrote it and originally understood it.”

C. FIRST AMENDMENT

Nieves v. Bartlett, 139 S.Ct. 1715 (May 28, 2019), 8 (5-1-1-1) to 1 (**Roberts**; Thomas joining all but one part; **Gorsuch** concurring in part and dissenting in part; **Ginsburg** concurring in the judgment in part and dissenting in part; **Sotomayor** dissenting), reversing 712 Fed. Appx 613 (9th Cir. 2018).

Headline: A 42 U.S.C. § 1983 claim that officers violated the First Amendment because they arrested plaintiff in retaliation for plaintiff's speech (a **"retaliatory arrest" claim**), **cannot succeed as a matter of law when there was also probable cause to arrest, unless** the plaintiff can present "objective evidence that ... otherwise similarly-situated individuals not engaged in the same sort of ... speech" were not arrested.

Facts: Russel Bartlett, at "one of the largest and most raucous" events in Alaska (the weeklong "extreme winter sports 'Arctic Man'" festival) was arrested by police officers Nieves and Weight. At 1:30am, before the arrest, Bartlett was either loudly telling other attendees not to speak with Officer Nieves, or he refused to speak with Nieves ("the parties dispute certain details"). Either way, Bartlett's speech/nonspeech is assumed to be protected by the First Amendment. A few minutes later, Bartlett closely approached Officer Weight. Weight pushed Mr. Bartlett away and Nieves arrested him. Bartlett alleges that Nieves said "bet you wish you would have talked to me now." Charges against Bartlett were later dismissed, and Bartlett sued the officers under § 1983, alleging that his arrest was in retaliation for his exercising his First Amendment speech rights. The District Court granted summary judgment for the officers, but the Ninth Circuit reversed, ruling that Nieves' post-arrest statement to Bartlett, if true, could show that Bartlett's speech was a "but-for cause" of the arrest.

Roberts (for 5, plus Thomas in all but the "exceptions" part): [Ed. note: These simple, and not good for the plaintiff, facts, yield **five opinions**, turning on subtle but important distinctions about how courts should evaluate § 1983 "retaliatory arrest" First Amendment claims.] **"Probable cause to make an arrest" will "generally defeat a [constitutional] retaliatory arrest claim."** The Court has granted cert on this issue twice in the past seven years; this case [supposedly] finally answers the question. Only a **"narrow qualification"** is warranted [this is the Part that Justice Thomas does not join]: "when a plaintiff presents objective evidence that he was arrested when otherwise similarly-situated individuals not engaged in the same sort of protected speech had not been," then a claim can go forward even if there was probable cause for an arrest.

The Court is unanimous that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." But **"but-for" causation must be proved:** the "retaliatory animus ... the motive must *cause* the injury, ... **meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.**" The Court also agrees that a unanimous precedent written by Justice Rehnquist (CJ Roberts' old boss) generally governs: *Mt. Healthy* (1977). That decision often "shifts the burden" to the defendant, once a plaintiff offers evidence that a retaliatory motive played "a part" in the government official's action.

But in *Hartman* (2006), we said that probable cause defeats a claim for a retaliatory prosecution, largely because the arresting officer and the prosecutor are different and a "presumption of regularity" supports the prosecution decision. In the present retaliatory arrest situation, we find that similar "causal complexity" requires a similar result, particularly because **"protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest."** [Ed. note: !!!] When probable cause to arrest exists, "for both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." In the Fourth Amendment we have said that an officer's subjective intent is "almost always ... irrelevant," and we think that must be true here as well. Otherwise "even doubtful retaliatory arrest suits" would be allowed to proceed. "Police officers conduct approximately 29,000 arrests every day," and we need objective standards "to ensure that officers may go about their work without undue apprehension of being sued." So while *Mt. Healthy* will

apply when there is no probable cause [**Ed. note:** duh! – what else is left?], when there is probable cause, “a retaliatory arrest claim fails.” This is true for analogous common-law claims as well.

Finally [Justice Thomas does not join here], a “narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise the discretion not to do so.” When the plaintiff offers such proof, then regardless of probable cause, there is sufficient objective support that but-for the targeted speech, the arrest would not have been made. [**Ed. note:** thus the disagreement among the Justices seems really to be all about burdens of proof: where to place them and what, exactly, they are, for these § 1983 claims.] This “qualification” is needed because far more warrantless arrests, for misdemeanors, is allowed today than when § 1983 was enacted (roughly 1870?). So immunizing all arrests for, say “jaywalking,” is “insufficiently protective of First Amendment rights.”

Finally, there was plainly probable cause to arrest Bartlett here, and there is simply no evidence of unconstitutional motive against Officer Weight. As for Nieves, the case is remanded for “further proceedings consistent with this opinion,” which could possibly include consideration of the majority’s exception to its “probable cause defeats” rule.

Thomas (*concurring and dissenting in part*): Probable cause defeats a First amendment retaliatory arrest claim, but I would not have any exception. I said this last Term in *Lozman* (2018). The majority’s “policy” exception has no support in the common law, and its “discomfort with the number of warrantless arrests that are privileged today is an issue for state legislatures,” not the Court.

Gorsuch (*concurring and dissenting in part*): Noting that “**almost anyone can be arrested for something**,” Justice Gorsuch says that “probable cause can’t erase a First Amendment violation.” The § 1983 statute has no such exception in it. And “the point isn’t to guard against officers who *lack* lawful authority to make an arrest. Rather, it’s to guard against officers who *abuse* their authority.” We should (maybe) employ the *Armstrong* decision (1996) which allows evidence such as “direct admissions” from government actors to support a constitutional discrimination claim, but also requires “clear evidence” of such discrimination. I don’t read the majority opinion to foreclose this, and “I would reserve decision” on other questions.

Ginsberg (*concurring and dissenting in part*): We should just apply the normal *Mt. Healthy* analysis here, and not put an additional proof burden on retaliatory arrest plaintiffs. “I would not use this thin [for Bartlett] case to state a rule that will leave press members and others ... with little protection against police suppression of their speech.”

Sotomayor (*dissenting*): Noting (as is her typical style) contemporary claims against police from journalists, Black Lives Matter protectors, and others engaging in protected speech, Sotomayor objects to the majority’s rule, “no matter how trivial or obviously trivial” a probable cause arrest may be, while “letting flagrant violations go unremedied.” There is much quotable rhetoric here. The majority has crafted a “**Frankenstein-like constitutional tort** that may do more harm than good.” Sotomayor agrees with much of what Gorsuch writes. [**Ed. note:** Note that Gorsuch and Sotomayor currently sit next to each other (see [drawing](#)) during oral arguments. I think this is a meaningful fact.] Among other things, the majority “fetishizes one specific type of motive evidence – treatment of comparators – at the expense of other modes of proof,” such as direct statements of animus (which we will have more of due to “ubiquitous” cameras). Instead, Sotomayor, like Ginsberg and perhaps like Gorsuch, would apply *Mt. Healthy* without adjustment to these cases. Perhaps a few “dubious claims” will go forward (although district judges, like Sotomayor in the past, possess “helpful tools to

minimize the burdens of litigation,” and “police officers are virtually always indemnified”). But “no legal standard bats a thousand.” Meanwhile the majority’s opinion will “shield willful misconduct from accountability.”

A. FOURTH AMENDMENT

[City of Escondido, California v. Emmons](#), 139 S.Ct. 500 (Jan. 7, 2019), 9-0 (**per curiam, summary reversed**), reversing 716 Fed. Appx. 724 (9th Cir. 2018).

Facts: Two officers responded to a residence on a domestic violence call and were told children were present and that fighting had been heard. When they got there no one would answer the door. Then a man (Emmons) came out, shut the door (contrary to a police order) and tried to walk past the officers. “Police body camera video ... is in the record.” “Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon.” Officer Toth did just stood by. Emmons sued both officers for “excessive force” under the Fourth Amendment. The district court granted summary judgment, finding that the “video shows that the officers acted professionally and respectfully in their encounter.” But the Ninth Circuit reversed and remanded, saying only that a right to be free of excessive force is clearly established.

Unanimous (per curiam): We summarily reverse. First, the judgment against officer Toth is “quite puzzling,” since “only officer Craig was involved in the excessive force claim.” As for Officer Craig, “as we have explained many times” [and specifically to the Ninth Circuit], **for an excessive force claim, “the clearly established right must be defined with specificity,” and not “at a high level of generality.”** *Kisela* (2018). “Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus **police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue**” (quoting from *Kisela*). “The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances.”

[Mitchell v. Wisconsin](#), 139 S.Ct. 2525 (June 27, 2019), 5 (4-1) to 4 (3-1), (**Alito** for 4; *Thomas* concur in judgment; *Sotomayor* dissenting for 3; *Gorsuch* dissenting), vacating 914 N.W.2d 151 (Wisc. 2018).

Headline: A statute authorizing a **warrantless blood draw from an unconscious motorist** does not violate the Fourth Amendment because it is **“almost always” an exigency**.

Facts: Mitchell, “appearing to be very drunk,” was arrested after being observed driving and blowing .24 on a field breath test. The officers drove Mitchell toward the police station for a “more reliable breath test,” but “Mitchell lost consciousness on the ride” so they drove him to the hospital for a blood alcohol test (BAC). Wisconsin state law says that drivers are deemed to have consented to breath and BAC tests, but must be advised and can withdraw their consent (with consequences) if conscious. But a **“person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have” withdrawn consent**. Under that provision, Mitchell’s blood was drawn without a warrant, and tested at .22. He moved to suppress and Wisconsin opposed, invoking its implied-consent statute. The Wisconsin Supreme Court, in response to two certified questions, affirmed Mitchell’s conviction for drunk driving.

Alito (for four): “Over the last 50 years,” starting with *Schmerber* (1966), the Court has addressed a number of aspects of statutory schemes enacted “to combat drunk driving.” In *Birchfield* (2016), “we held that ... drunk driving arrests ... justify warrantless breath tests but not blood tests;” and in *McNeely* (2013) we held that “the fact that blood-alcohol evidence is always dissipating” is not automatically “exigent” allowing a warrantless BAC test. [Ed. note: Justices Alito and Sotomayor have long been opponents in these cases, on opposite sides. Alito wrote *Birchfield*; Sotomayor wrote *McNeely*.] Here, “Mitchell’s medical condition ... heightened urgency,” because his unconsciousness “deprived officials of a reasonable opportunity to administer a [reliable] breath test” with “evidence-grade breath testing machinery.” It is true that “a blood draw is a search.” But we think that, in general, **when a person suspected of drunk driving is unconscious**, “the need for a blood test is compelling” and **“an officer’s duty to attend to more pressing needs”** generally (**“almost always”**) **create an exigency for a warrantless blood draw.** For example, an **“accident might give officers a slew of urgent tasks** beyond that of securing medical care for the suspect.” So this case is different than the “minimum degree of urgency common to all drunk driving cases” that we said does not justify a warrantless blood draw in *McNeely*. “We do not settle whether the exigent circumstances exception covers the specific facts of this case;” instead we remand for that. (And, ftnt 2, we think the Question we granted review on “easily encompasses the rationale” we adopt today.)

Thomas concurring in the judgment: As I said in dissent in *McNeely*, “the natural metabolization of alcohol in the blood stream” always constitutes an exigency. So I concur only in the judgment here, and the Wisconsin court should apply that rationale on remand.

Sotomayor dissenting, with Ginsburg and Kagan: Our cases make a rule clear: **“If there is time, get a warrant.”** Below, Wisconsin conceded that there was time here; “that should be the end of the matter.” Wisconsin “affirmatively waived” reliance on exigency, below. But now, the Court adopts a “brand new presumption of exigent circumstances” that contravenes our precedents. *McNeely* [which I wrote] ruled that “blood tests are not categorically exempt from the warrant requirement.” But “the plurality instead creates a new *de facto* categorical rule out of thin air.” Moreover, “reach[ing] out” to decide the issue for “all drivers ... makes today’s decision more misguided, not less.” In fact, **“there is no indication ... that the tableau of horrors” that the plurality imagines, “the scene of a drunk-driving-related accident,” in fact occurs “in most cases.”** The plurality operates on its own “freewheeling instincts – with no briefing or decision below on the question.” The case-by-case, “if there is time, get a warrant,” rule of *McNeely* should continue to be applied. Officers confronting a truly exigent situation “will be able to rely on the exception to draw blood.” The plurality “ignores” *McNeely* and its “almost always” presumption “turns [*McNeely*] on its head.” **“What it really does is to strike another needless blow at the protections guaranteed by the Fourth Amendment.”**

Gorsuch dissenting: We took this case to determine the validity of Wisconsin’s implied consent statute. “Neither the parties nor the courts below discussed” the Court’s exigent circumstances arguments adopted today. I would dismiss this case as improvidently granted (DIG).

C. FIFTH AMENDMENT

[United States v. Davis](#), 139 S.Ct. 2319 (June 24, 2019), 5-4 (**Gorsuch**; Kavanaugh dissenting with Thomas, Alito, and Roberts (joining all but Part II-C)), affirming 903 F. 3d. 483 (5th Cir. 2018).

Headline: The residual clause in § 924(c), **defining a crime as a “crime of violence”** for purposes of sentencing enhancement if it “by [its] nature, involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,” is **unconstitutionally vague** (as we previously held regarding similar language in *Johnson* (2015) and *Dimaya* (2018)).

Facts: Maurice Davis and Andre Glover were convicted by a jury of federal Hobbs Act offenses for “a string of gas station robberies” and subject to potential 70 and 100 year imprisonment terms. But the government also sought (and the jury convicted) additional penalties (a mandatory and consecutive 35 years) under § 924(c), for brandishing a firearm in the course of committing a crime of violence. On appeal, the defendants argued that §924(c)’s definition of “crime of violence” was indistinguishable from the residual clause that the Supreme Court had struck down as unconstitutionally vague in *Johnson* (2015). The Fifth Circuit initially rejected that argument, but after we remanded for reconsideration in light of *Sessions v. Dimaya* (2018)), the Fifth Circuit concluded that §924(c)(3)(B) is unconstitutionally vague.

Gorsuch (for 5): First sentence(s): “In our constitutional order, a vague law is no law at all. ... Congress “has to write [criminal] statutes that give ordinary people fair warning.” A vague law also “hand[s] off the legislature’s responsibility for defining criminal behavior to unelected prosecutors and judges.” **The “nearly identical language” in other statutes has already been held unconstitutionally vague; that is true here too.** Trying to “[in]d a way around the problem,” the government now suggests that §924(c) should not employ a “categorical approach” to the “ordinary case,” but instead adopt a “case-specific method that would look to the defendant’s actual conduct” in the conviction offense. But “it’s not even close; the statutory text commands the categorical approach.” In order for the case-by-case approach to work, it would require the word “offense” to mean different things in the same statute: both the offense generally, and the specific offense. While such a double meaning is occasionally permissible where the statute supports it, it can’t be done here. **“Text, context, and history” do not support a case-specific approach,** even if writing the statute that way “might have been a good idea.” In general, “the same language in related statutes carries consistent meaning.” Adopting two different meanings would produce absurd results. Finally, the doctrine of “constitutional avoidance” cannot save §924(c). “Employing the avoidance canon to expand a criminal statute’s scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests.” Unlike prior cases where the court adopted a plausible interpretation that narrowed a statute in order to avoid striking it, the government’s contention here would criminalize conduct not initially within the ambit of §924(c)(3)(B). “The only way the statute can be saved is if we were ‘suddenly’ to give it a new meaning different from the one it has borne for the last three decades. And if we could do that it would indeed be ‘surprising’ and ‘extraordinary.’” The dissent’s suggestion that a case-specific method is more in line with what “John Q. Public” would think, is merely an “appeal to intuition” that is not consistent with all we have said.

Kavanaugh dissenting (joined by Thomas and Alito, and Roberts except for Part II-C, the “constitutional avoidance” discussion): Congress intended to address the use of guns in crime harshly, and courts have so applied it for 33 years. Now “all of a sudden” it is unconstitutional? **This exercise of our “awesome power” to strike down legislation does “not uphold the separation of powers,” it “transgress[es] the separation of powers.”** “The Court’s decision today will make it harder to prosecute violent gun crimes in the future.” To save the statute, we should agree with the government’s suggested construction of the statute to allow “case-specific” determinations of whether

the current crime was a “crime of violence.” *Dimaya* and *Johnson* are distinguishable because they avoided Sixth Amendment issues under *Apprendi* not present here – here the jury found that the present offense involved a gun. Meanwhile, “substantial risk” statutes are a common feature in criminal law, and today’s decision threatens them. “§924(c)(3)(B must be read in line with the traditional, common practice of focusing on the actual defendant’s conduct during the underlying crime.” Finally (but with non-joinder from the Chief Justice), the doctrine of constitutional avoidance should “save this ambiguous statute from unconstitutionality where fairly possible.” Instead, the Court “runs the statute into a rock.” **“I respect and entirely understand how the Court got here,” but “this statute is not a prior conviction statute.”** It “operates entirely in the present and is not remotely vague.”

B. SIXTH AMENDMENT

Garza v. Idaho, 139 S.Ct. 357 (February 27, 2019), 6 to 3(2-1), **Sotomayor**; Thomas dissenting, reversing 405 P.2d 576 (Idaho 2017).

Headline: Important decision on waivers of appeal as part of plea agreements. Here, counsel’s decision to not file an appeal despite the client’s request was ineffective assistance of counsel, even though the defendant had pled guilty and signed a waiver of appeal. Prejudice is presumed.

Facts: Garza pled guilty to criminal charges in Idaho state court. His signed plea agreements stated that he “waive[d] his right to appeal,” without more. But after sentencing, Garza told his lawyer, repeatedly, that he wanted to appeal. But the lawyer did not file an appeal, saying that Garza’s waiver of appeal was “problematic.” The time for appeal expired. Garza filed a petition for post-conviction relief, arguing ineffective assistance of counsel for failing to file a timely notice of appeal (Garza indicated that he wanted to argue, in part, that his guilty plea had not been voluntary). The Idaho Supreme Court affirmed denial of relief, however, finding that Garza could not carry his burden of showing both deficient performance by his lawyer, and resulting prejudice. Not applying a presumption of prejudice was a minority view in a deep split among state and federal courts.

Sotomayor (for 6): Although *Strickland v. Washington* (1984) generally requires a defendant to prove both deficient attorney performance and resulting prejudice, the Court has recognized some exceptions where prejudice may be “presumed” (such as a denial of counsel at a critical stage, or failure to subject the prosecution’s case to “meaningful testing”). “In *Roe v. Flores-Ortega* (2000), [we] held that when an attorney’s deficient performance costs a defendant **an appeal that [he] would have otherwise pursued, prejudice ... should be presumed “without “examining’ the merits of his underlying claim.”** Today we hold that **this “presumption applies even when the defendant has signed an appeal waiver.”**

The term “appeal waiver” misleadingly suggests a monolithic end to all appeal rights. But in reality, **“no appeal waiver serves as an absolute bar to all appellate claims.”** The precise language of a waiver can define a limited scope; in addition, the government can forfeit or waive its waiver rights. Moreover, **“all jurisdictions appear to treat at least some claims as unwaivable,”** such as “whether the waiver itself ... was unknowing or involuntary” (footnote 6 lists other examples). Meanwhile, filing a notice of appeal is “purely a ministerial task that imposes no great burden on counsel,” and is generally “nonsubstantive.” Finally, **the “bare decision whether to appeal is ... the defendant’s, not counsel’s, to make.” It is not a “strategic” decision left to counsel** (and counsel can file a notice of appeal without being bound to frivolous arguments). “A direct application of *Flores-Ortega* resolves this case.” Garza had a right to an appellate proceeding,

even if his appeal had “poor prospects” for prevailing. We reject the Solicitor General’s argument as amicus that Garza had no “right” to appeal; “he simply had fewer possible claims.” And we decline to impose a rule that a defendant like Garza must show, in a post-conviction proceeding, that he had “non-frivolous grounds for appeal” – such a rule would be “both unfair and inefficient in practice.” Most post-conviction petitioners are unrepresented by counsel (and there is no right to counsel there). Judicial examination of them all would be “difficult and time-consuming.” A “more administrable and workable rule” when counsel fails to file a timely appeal that a defendant wanted to pursue, is simply to give the defendant “a new opportunity to appeal.” Courts can then dismiss appeals that are frivolous or barred by any appeal waiver.

Thomas dissenting, joined by Gorsuch in full and Alito in parts I and II: the majority’s ruling effectively deprives appeal waivers of meaning. Moreover, **Garza’s lawyer reasonably decided that filing a notice of appeal might be construed as a breach and thereby jeopardize Garza’s favorable plea bargain (avoiding a life term for a 10-year sentence).** This was strategic and thus insulated from challenge under *Strickland*. *Flores-Ortega* does not control, because there was no waiver of appeal in that case. And Garza has still not identified any non-frivolous issue he might appeal here. The Court “undermines the finality of criminal judgments.”

In addition [Justice Alito does not join this part], the Court has, in a series of decisions, strayed far “from the original meaning of the Sixth Amendment.” There is “little available evidence” that the Amendment required effective counsel, let alone government-paid counsel. Yet today, the federal budget alone for defense counsel is over \$1 billion. “It is beyond our constitutionally prescribed role to make policy choices” that impose “additional costs on the taxpayer and the Judiciary.” The Court should not extend the Sixth Amendment right to counsel any further.

Gamble v. United States, 139 S.Ct. 1960 (June 17, 2019), 7 (6-1) to 2 (**Alito**; *Thomas* concurring; *Ginsburg* dissenting; *Gorsuch* dissenting), affirming 694 Fed. Appx. 750 (11th Cir 2017).

Headline: The “separate sovereigns” exception to the double jeopardy clause is reaffirmed, not overruled -- *stare decisis* controls. Convictions as felon-in-possession under both Alabama and federal law are affirmed.

Facts: When a local Mobile, Alabama police officer stopped Gamble’s car and searched it, he found a loaded 9-mm handgun. Gamble, a felon, was charged and pled guilty under an Alabama statute providing that no one previously convicted of a “crime of violence” (Gamble’s second-degree robbery conviction fit the definition) “shall own a firearm or have one in his or her possession.” After he had pled guilty but before sentencing, Gamble was federally indicted in Alabama district court under a federal statute making it unlawful for anyone convicted of a “crime punishable by imprisonment for a term exceeding one year ... to ... possess, in or affecting commerce, any firearm.” Gamble moved to dismiss arguing that the federal indictment was for the “same offense” and therefore precluded by the Sixth Amendment’s Double jeopardy Clause (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”). Meanwhile Gamble received a one-year prison sentence for his Alabama conviction; and after he pled guilty to the federal charge, **he received an additional three-year prison sentence.** The district court denied Gamble’s motion, and the 11th Circuit affirmed, based on the long-standing “dual sovereignty doctrine,” which says that because States and the federal government are “separate sovereigns,” they may both (and indeed, two different States may also) prosecute a defendant for the same offense. The Supreme Court granted certiorari expressly to consider whether that doctrine should be overruled.

Alito (for 7): We reaffirm and do not overrule the dual sovereignty doctrine, which is based on “text, historical evidence, and 170 years of precedent.” The text prohibits double jeopardy for “the same offense” (not the “same conduct or actions”), and “offenses” are defined by laws, **“So where there are two sovereigns there are two laws and two “offenses.”** We have so held since at least 1852, in [Moore v. Illinois](#). Moreover, we know that the Framers intended the Bill of Rights to bind only the federal government (*Baron*, 1833). And the “duality of harm” policy – that the harms to each sovereign are different – supports the idea. “We see no reason to abandon the sovereign-specific reading of the phrase ‘same offense.’”

We think Justice Gorsuch’s historical evidence offered in dissent is “feeble” and “other history points the other way.” His theory that the Constitution established “the People” as “One Whole” in order to “promote liberty” is wrong, and it “fundamentally misunderstands the governmental structure established by our Constitution.” Federalism “enhances individual liberty in many ways,” and meanwhile it “often results in two layers of regulation,” state and federal. Taxes, for example; and “the sale of marijuana.”

Finally (and the bulk of Alito’s opinion), “the doctrine of *stare decisis*” counsels sticking with “*numerous* major decisions of this Court spanning *170 years*” (emphases in original). “Ambiguous historical evidence” is not enough. [Ed. note: Alito seems to want to show that he can do history as well as Gorsuch, and so goes into minute historical analysis, which is omitted here.]. The 1969 “incorporation” of the DJ Clause against the states simply means that the States now must follow the Supreme Court’s interpretation of the Bill of Rights – which has included the dual-sovereignty doctrine for 170 years. Neither does the prolific expansion of criminal laws in the last century give any reason to overrule, particularly since overruling would do little to inhibit it. **Unless the narrow elements-focused interpretation of “same offense” were also overruled, state and federal prosecutions for the same conduct would still go on.** And [last rhetorical flourish], “perhaps believing that two revolutionary assaults in the same case would be too much, Gamble has not asked us to overrule” that.

Thomas concurrence: Even though I once suggested that the dual-sovereignty doctrine was constitutionally wrong, I now “agree that the historical record does not bear out my initial skepticism.” So I concur, but I write separately to give my own theory of *stare decisis*. (By the way, footnote 1, the proliferation of federal criminal laws is really due to our incorrectly broad interpretation of Congress’s power to regulate interstate commerce.). Instead of the four-factor test we now say we use, we should “restore” our *stare decisis* jurisprudence, and simplify it to allow overruling and precedent that is “demonstrably erroneous.” [Ed. note: Thomas provides lengthy history, but little to explain how you can tell when precedent is “demonstrably erroneous.” Yet] he says that “The Court’s multifactor balancing test ... has resulted in policy-driven arbitrary discretion.” You can’t “quantify the unquantifiable.” [In case anyone doesn’t see where I am going, I cite to an abortion case at the end (*Stenberg*, 2000).]

Ginsburg dissent: The dual sovereignty doctrine is “misguided” and threatens liberty based on “a metaphysical subtlety.” We should look at the issue “from the standpoint of the individual who is being prosecuted.” British and common law history is simply “inapposite.” This happened in the United States, and after “incorporation” of the right against the States, which “render[s]” the prior “rationale[s] obsolete.” Also, under the Constitution, the single “sovereign” is “the People,” and government was divided to protect individual liberty, not subvert it. The Framers rejected a proposed change to the Double Jeopardy Clause that would have added “by any law of the United States,” thereby rejecting the very theory now relied upon. “Early American courts regarded” dual

prosecutions “with disfavor.” Finally, “*stare decisis* is not an inexorable command.” There is no reliance interest here and the doctrine “diminishes individual rights.” We should overrule it.

Gorsuch dissent: First sentence: A free society does not allow its government to try the same individual for the same crime until it’s happy with the result. The government is “the People” yet this allows the government to “add one punishment on top of the other.” There is “no meaningful support in the text of the Constitution, ... its original public meaning, structure, or history.” “The vast disparity of power between governments and individuals” was the focus of the Constitution, and “the rule against double jeopardy was firmly entrenched in both the American colonies and England at the time of” the Framing. **“Most any ordinary speaker of English would say that Mr. Gamble was tried twice for ‘the same offense.’**” “Federalism” is designed “to protect individual liberty,” not “to threaten it.” *Stare decisis* should have less force when the Constitution is at issue; “blind obedience to *stare decisis* would leave this Court still abiding grotesque errors like *Dred Scott*, *Plessy*, and *Korematsu*.” The text does not say “dual sovereigns,” and this Court has misinterpreted the text for decades. The 1852 *Moore* case the Court relies on “did violence to the Constitution in the name of protecting slavery and slaveowners,” and it “did not actually approve a successive prosecution.” [Ed. note: this is true, about *Moore*.]. In addition, “the world has changed,” and federal criminal law has exploded in the past 50 years. “The benign spirit of prosecutors” can no longer (if ever) be counted on, and **the only people who rely on dual sovereignty are prosecutors. “When governments may unleash all their might ... 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.”** [Ed. note: this is one of four cases this Term in which Gorsuch sided with the defense side in a criminal case. Meaning?]

Flowers v. Mississippi, 139 S.Ct. 2228 (June 21, 2019), 7 (6-1) to 2 (Kavanaugh; Alito concur; Thomas dissent, with Gorsuch in part), reversing 240 So.3d 1082 (Miss. 2017).

Headline: On outrageous facts, the Mississippi Supreme Court clearly erred in finding that prosecutor’s strikes of black potential jurors were not motivated in substantial part by discriminatory intent.

Facts: There is not enough room to give all the outrageous details. In sum, the same DA prosecutor (who is white) tried Flowers (who is black) six times for murder. Overall he struck 41 of 42 black persons who were in the jury pool. The Mississippi Supreme Court reversed the first three convictions, finding *Batson* (1986) jury selection race discrimination and other prosecutorial misconduct. In the next two trials, in which five and three black jurors were on the jury despite the state using all its strikes against blacks, the juries hung (suggesting some doubt). In the sixth trial (at issue here), the prosecutor struck five of six black jurors, leaving one on. The jury convicted and Flowers was sentenced to death. When a divided Mississippi Supreme Court affirmed, saying that the prosecutor’s reasons were “valid race-neutral” reasons and “not pretextual,” the U.S. Supreme Court remanded for reconsideration in light of *Foster* (2016). The Mississippi Supreme Court affirmed again, 5-4, and cert was again granted.

Kavanaugh (for 6): “Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.” The Fourteenth and Sixth Amendments require that lawyers not discriminate by striking jurors on the basis of (among other things) race. *Batson* (1986); *Struader* (1880). “The Fourteenth Amendment ‘proscrib[es] all state-imposed discrimination against the Negro race,’ including in jury service” (quoting *Brown vs. Board*

of Ed. (1954). Yet “the freedom to exercise preemptory strikes or any reason meant that the problem of racial exclusion from jury service remained widespread and deeply entrenched, Almost total in certain jurisdictions, especially in cases involving black defendants.” *Swain* (1965) seemed to approve this, but *Batson* (1986) “in essence overruled” it. (A long exegesis of *Batson* follows.) [Ed. Note: *Batson* was written by Kennedy, for whom Kavanaugh clerked.]. Now, “in the eyes of the Constitution, one racially discriminatory strike is too many.” *Batson* has subsequently been “enforced and reinforced, ... guarded against any backsliding.” [Ed. note: seems to be a response to Thomas’s dissent which questions *Batson*.]. [After 18 pages,] “we now address *Flowers*’ case.” (The opinion goes through “four categories of evidence” which “taken together, require reversal.”) We consider the facts of this trial (the sixth) and also “history” and “the numbers” of all the trials, which “speak loudly.” “Accept[ing] one black juror” is no defense; as we said in *Miller-El II* (2005), this might be just “an attempt to obscure discrimination.” Here there was disparate questioning by the prosecutor of black versus white jurors; and clear evidence, “viewed “in context,” that the strike of one juror “was motivated in substantial part by discriminatory intent.” “We break no new legal ground here,” but “simply enforce and reinforce *Batson*.” There was “clear error” below.

Alito concurring: This is a “highly unusual, one-of-a-kind” case. Were the history here different, “I would have no trouble affirming.” But on “the totality” here, “I agree with the Court.”

Thomas dissenting, joined by Gorsuch in all but Part IV (Part IV is Thomas’s attack on *Batson*, joined by no one else). The majority “distorts the record, eviscerates our standard of review;” the one juror focused on in the sixth trial “would have been stricken by any competent attorney. (Forty pages of detail are omitted here.) [These next statements are not joined by Gorsuch:] Moreover, preemptory strikes are “essential to the fairness of trial by jury; yet here **“the Court ... prevents ... black defendants from striking potentially hostile white jurors.”** [Ed. note: yes.....that’s a bad thing?]. The Court **“ignores the realities of racial prejudice;”** preemptory strikes help **“to combat prejudice.”**

United States v. Haymond. 139 S.Ct. 2369 (June 26, 2019), 5 (4 + 1) to 4 (**Gorsuch** for plurality; *Breyer* concurring in the judgment; *Alito* dissenting), affirming 869 F. 3d 1153 (10th Cir. 2017).

Headline: The provisions of 18. U.S.C. §3583(k), requiring judges to sentence individuals on supervised release to an additional five years to life imprisonment when the judge finds, by a preponderance of the evidence, that the individual has possessed child pornography, violate Fifth Amendment Due Process and the Sixth Amendment right to jury trial, as articulated in *Apprendi* and *Alleyne*.

Facts: Andre Ralph Haymond was convicted by a jury of possessing child pornography and sentenced to 33 months in prison plus a 10-year period of supervised release after his prison term was completed. But after prison and while on supervised release, the government found 59 images of what it claimed was child pornography on Haymond’s cell and computer. In a proceeding to revoke Haymond’s supervised release, a judge found, by a preponderance of evidence and without a jury, that Haymond did knowingly possess 13 of the images. A 2003 statute (18. U.S.C. §3583(k)) required the judge to impose a mandatory minimum imprisonment term of five years (and discretionarily up to life), if the new conduct violated any of a list of specified offenses, including child pornography. The judge imposed the mandatory five years, but said it was “repugnant” to be required to do so without a jury trial and proof beyond reasonable doubt.

On appeal, **the Tenth Circuit held the provision that required a mandatory five-year sentence on only a preponderance, judge-only finding, to be unconstitutional under the *Apprendi*** rationale of the Fifth and Sixth Amendments. On remand, the district judge sentenced Haymond to an additional 28 months in prison, which was actually time served since his original revocation. The Tenth Circuit viewed this discretionary judge-only-by-a-preponderance decision, upon revocation, to be okay.

Gorsuch (for 4, a plurality joined by Ginsburg, Sotomayor and Kagan): “Together with the right to vote ... the right to trial by jury” was fundamental to the Framers (quoting a 1766 letter from John Adams). Thus the Fifth Amendment (“due process”) and Sixth Amendment (“right to a speedy and public trial, by an impartial jury”) require “that the government must prove to a jury every criminal charge beyond a reasonable doubt” (citing *Apprendi*). [Ed. note: a doctrine that Justice Scalia, whose seat Gorsuch now holds, was responsible for]. “Because the Constitution’s guarantees cannot mean less today than they did the day they were adopted, ... **a jury must find beyond reasonable doubt every fact ‘which the law makes essential to a punishment’**” (quoting *Blakely*, 2004).

Application of this rule was “pretty straightforward” for many years. Even when doctrines of “probation” and “parole” were developed, to permit some of a criminal sentence to be served out of prison, subject to being re-imprisoned if parole conditions were violated, “the prison sentence” that could be imposed for a parole or probation violation “could not exceed the remaining balance of the term of imprisonment already authorized by the jury’s verdict [or guilty plea].” But “more recent legislative innovations” have been struck down, if they “fail to respect the jury’s supervisory function.” (Footnote 3: with “two narrow exceptions”: prior convictions, and consecutive sentences for multiple counts of conviction. *Almendarez-Torres* (1998) and *Oregon v. Ice* (2009).) Indeed, in *Allyene* (2013), we ruled that **a jury must also find, beyond reasonable doubt, any facts that are legislatively required to impose a mandatory minimum imprisonment term.**

“The lesson for our case is clear:” Haymond’s original crime authorized imprisonment from 0 to 10 years. But the new finding of possessing pornography – “without a jury and based only on a preponderance” – “**increased the legally prescribed range** of allowable sentences” to, now, a mandatory minimum five years up to life. So Haymond’s new sentencing was “unconstitutional.” “**Any action triggering a new and additional punishment**” is subject to *Apprendi* protections. [Ed. Note: Interestingly, Haymond’s total imprisonment time, original plus five additional (upon revocation) years, would have totaled less than eight years, which was within the original 0-10 year range. The plurality notes this on page 20, without analyzing it. It is apparently the exposure to a new five-year mandatory minimum term, and possibly up to life, that is driving (see footnote 9) the plurality here.]

We reject opposing arguments. First, **this is still part of a Sixth Amendment “criminal prosecution,” even if in a post-sentencing revocation context.** *Apprendi* applies to “any increase in authorized punishment.” Such a defendant “remains an ‘accused’ with all the rights provided by the Sixth Amendment.” Also, the fact that § 3583(k) existed when Haymond was originally sentenced, does not permit “an evasion of **the historic rule that a jury must find all of the facts necessary to authorize a judicial punishment.**” This appears to have happened here: the government could have prosecuted Haymond for a new child pornography crime, but instead chose the “quick-and-easy” route of revocation, thereby avoiding “an old-fashioned jury trial.” Finally, the old parole system was “entirely harmonious” with the Constitution, because you could only re-imprison a defendant for time that did not exceed the original possible sentence. The “structural difference” here is that Haymond was “exposed,” based on only a preponderance and without a jury, to a possible prison term “*beyond* that authorized by the jury’s verdict.” (In footnotes and in text, “we have no occasion to decide” whether other applications of the supervised release structure violate the constitution.) Finally, this is

just different (applying “outside the prison walls” to “a free man”) than disciplinary proceedings in prison that can result in more time or harsher conditions.

The government argues that the problem could be cured with just a remand for the district judge to empanel a jury to determine whether revocation should happen here. Thus the statute could still be applied, just with jury trials. [Ed. note: interestingly, that “just add jury trials” was an argument in *Booker* too, regarding the federal Sentencing Guidelines. But a 5-4 majority rejected it.] That argument appears not to have been made below, but we remand to CA10 to figure it out.

Breyer (concurring in the judgement only [and providing the necessary fifth vote]): “I agree with much of the dissent.” In general, “I would not transplant the *Apprendi* line of cases to the supervised release context.” [Ed. note: Breyer has been a consistent dissenter in the *Apprendi* line, although he did join *Allelyne* on mandatory minimums.] But this specific provision, imposing a new and mandatory minimum prison term, is “more like punishment for a new offense.”

Alito dissenting, joined by Roberts, Thomas and Kavanaugh: In a scathing dissent, Alito (a longtime *Apprendi* critic) describes the plurality decision as having “potentially revolutionary implications,” laying the groundwork to declare the entire supervised release system unconstitutional. **If jury trials are required for all supervised release revocations (about 17,000 last year), “as a practical matter” they “cannot be held,” and the entire system “will come crashing down.”** Maybe the plurality says it is not deciding (although its “strategy” seems clear) – but this is “like a 40-ton truck speeding down a steep mountain road with no brakes.” This is really no different than the parole system, which the majority appears to approve; today’s decision “exalts form over substance.” [Ed. note: in saying this, Alito echoes the prior *Apprendi* dissents of Justices O’Connor and Kennedy in years past.] Once convicted and sentenced, Haymond was no longer an “accused” within the meaning of the Sixth Amendment, nor is revocation part of the Amendment’s “criminal prosecution.” The plurality ignores two constitutional precedents of ours, making this same distinction for probation and parole revocations. (Alito even cites a prior opinion by “then-Judge Gorsuch” on the point.) Historically, “American juries have simply played no role in the administration of previously imposed sentences.” **The plurality is “unpardonably vague and suggestive in dangerous ways,” and is “not grounded on any plausible interpretation of the original meaning of the Sixth Amendment.”**

C. EIGHTH AMENDMENT

Moore v. Texas, 139 S.Ct. 666 (Feb. 19, 2019), 6 (5-1) to 3 (*per curiam* summary reversal; *Roberts* concurring; *Alito* dissenting with Thomas and Gorsuch), *reversing* 584 S.W. 3d 552 (Tex. 2018).

Headline: On remand from this Court, Texas court repeated the same errors, finding (again) that Moore is not intellectually disabled for execution. So we reverse again (and this time the Chief Justices agrees).

Facts: Bobby James Moore was sentenced to death in Texas. But on habeas, **the state trial court found**, after evidentiary hearing, that Moore was intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia*. The Texas Court of Criminal Appeals reversed, relying in part on “lay factors” listed in a state precedent, *Briseno* 2004. We granted cert and reversed, identifying “at least five errors” and condemning reliance on the *Briseno* factors. The Chief Justice wrote a dissent for three Justices. Yet on remand, the Texas court reached “the same basic conclusion.”

Summary reversal *per curiam* (for 6): We now summarily reverse -- the Texas court has, “with small variations, repeat[ed] the analysis we previously found wanting.” The court failed to address the evidence of “adaptive deficits,” again erroneously focusing instead on Moore’s perceived “strengths.” The Texas court also discussed “at length” Moore’s “adaptive improvements made in prison,” which is “difficult to square with our caution against” that. The court also again “departed from medically-based “clinical practice.” And the court again appeared to rely on *Briseno* factors, without mentioning *Briseno*. We said before that these practices relied on **“lay perceptions of intellectual disability” and have no place in a determination of intellectual disability.** The Texas court’s latest determination “rests upon analysis too much of which to closely resembles what we previously found improper.” In fact, “we agree with Moore and the prosecutor that, **on the basis of the trial court record, Moore has shown that he is a person with intellectual disability.**” [Ed. note: although the case is formally remanded for “further proceedings,” in light of this last sentence it is hard to see what more Texas can do.]

Roberts (concurring): Although I dissented last time (and I still agree with the merits of my discussion then), it is now “easy to see that the Texas Court ... misapplied” our decision. It “repeated the same errors that this Court previously condemned – if not quite *in haec verba*, certainly in substance.” [Ed. note: this is truly the “institutional” Chief Justice.]

Alito dissenting, joined by Gorsuch and Thomas: The prior opinion “fail[ed] to provide a clear rule,” so it is unsurprising, and not blameworthy, that the Texas court found its own path. “Today” the Court “takes it upon itself to correct” the Texas court’s factual findings and reverse.” But “that is not our role” and is “an unsound departure from our usual practice.” “The error in this litigation was ... our own failure to provide a coherent rule of decision in *Moore II*.” I would deny cert.

Timbs v. Indiana, 139 S. Ct. 682 (February 20, 2019), 9 (7-1-1) to 0 (**Ginsburg**; *Gorsuch* concurring; *Thomas* concurring in the judgment, vacating 84 N.E. 3d 1179 (Ind. 2017)).

Headline: The Eighth Amendment’s **“Excessive Fines Clause” applies to States’ actions (that is, it is “incorporated” into the 14th Amendment’s Due Process Clause)**, and applies to civil forfeitures.

Facts: Tyson Timbs used his car in transporting a small amount of heroin. Indiana law permits property used to “facilitate” a drug transaction to be forfeited. The maximum fine for the crimes Timbs pled guilty to was \$10,000; the car was worth \$42,000 and had clearly been purchased with money not traceable to drugs (it was insurance money Timbs received when his father died). The **State trial court ruled** that taking Timbs’ car would be “grossly disproportionate” to the crime. But the Indian Supreme Court reversed, noting that the Eighth Amendment’s “no excessive fines” provision had never been “incorporated” against the States, so it did not apply here.

Ginsburg (for 8; Thomas concurs in the judgment only): It’s clear that when ratified in 1791, the Bill of Rights applied only against the federal government. But when the 14th Amendment was ratified in 1868, it “fundamentally altered our country’s federal system” (*McDonald*, 2010), “incorporating” fundamental protections in the Bill of Rights to apply against the States as well. The Eighth Amendment, which bans “cruel and unusual punishment,” also says “nor excessive fines imposed.” The “venerable lineage” of that idea traces back “to at least” the Magna Carta in 1215. It

is “fundamental to our ordered scheme of liberty” and “deeply rooted in this Nation’s history and tradition.” Therefore, it is now “incorporated” against the States.

As for civil forfeitures, we held in *Austin* (1993) that the Excessive Fines Clause applied to that federal forfeiture. Indiana may not now expand the question we granted certiorari on, to ask that *Austin* be overruled. And Timbs “misapprehends” the nature of our constitutional incorporation analysis. Once the Clause applies against the States, the lesser question whether the Clause should apply to civil *in rem* forfeitures does not have to be “fundamental” or “deeply rooted.” The Clause applies against the States, and we vacate and remand for further proceedings.

Gorsuch, concurring: Although Justice Thomas may be right that “the appropriate vehicle for incorporation” should be the Privileges and Immunities Clause of the 14th Amendment and not Due Process, “the majority faithfully applies our precedent” and “nothing in this case turns on th[e] question” of which Clause to use. There is “no serious doubt” that the Excessive Fines Clause must apply against the States.

Thomas, concurring only in the judgment: As I said in *McDonald* (2010), the proper basis for applying Bill of Rights provisions against the States is the Privileges and Immunities Clause of the 14th Amendment. [Ed. note: neither Thomas nor the other Justices expressly notes that **the P&I clause protects only for “citizens,” while the Due Process clause applies to all “persons.” This seems like a particularly significant difference, especially at the current moment.**]

[**Madison v. Alabama**](#), 139 S.Ct. 521 (Feb. 27, 2019), 5-3 (**Kagan**; Alito dissenting with Thomas and Gorsuch; Kavanaugh not participating because not confirmed at time of argument), vacating (Ala. Cir. Ct. 2018).

Headline: The Eighth Amendment does not prohibit execution of a prisoner merely because he cannot remember committing the crime. But it **does prohibit executing someone who lacks a “rational understanding” of why the State seeks to execute him**; this is not limited to any particular mental condition such as “insanity” or “delusions.” Here, dementia could be enough.

Facts: Madison killed a police officer in 1985 and was sentenced to death for capital murder. “In recent years, [his] mental condition has sharply deteriorated.” After a 2016 stroke, he sought a stay of execution because “he no longer understands the status of his case or the nature of his conviction and sentence.” There was much expert testimony, and the state trial court rejected his claim, finding that while he could not remember his crime, he had failed to prove that he did not rationally understand his punishment.” Madison sought federal habeas relief. The district court denied, but the Eleventh Circuit found Madison had proved the sort of “heavy burden” that the federal habeas statute (AEDPA) requires for relief from a state conviction. However, the US Supreme Court summarily reversed because no case “clearly established” that failure to remember the crime was ground for prohibiting execution, and that the “possibility of fair-minded disagreement” regarding Madison’s understanding was sufficient to block habeas relief under AEDPA. *Dunn v. Madison* (2017, *per curiam*).

In 2018 when Alabama set an execution date, Madison again sought relief in State court, arguing that “he had suffered further cognitive decline,” and that the State’s psychology expert had now had his license suspended. Alabama argued that nothing had changed, and that Madison was “not delusional or psychotic,” and an “expansion” of *Panetti* (2007) and *Ford* (1986) would be required to apply them here. A week before execution, the state court ruled that Madison had not proved “insanity.” We stayed the execution and granted Madison’s cert petition.

Kagan (for 5): Because the case now comes to us on direct review of the state court’s decision,” our prior ruling under the more strict AEDPA standards “cannot help resolve the questions raised here.” There are two questions presented. On the first, we rule (and the parties agree) that “merely because [a defendant] cannot remember committing his crime” is not reason to constitutionally prohibit execution. “A person lacking memory of his crime may yet understand why the State seeks to execute him.” On the second question, *Ford* and *Panetti* are not limited to “insanity” – “what matters is whether a person has the ‘rational understanding’ *Panetti* requires,” such as “the reasons for his sentence.”

In 1986, *Ford* presented a defendant who had “lost his sanity,” and we found that the Eighth Amendment prohibits the execution of “a category of defendants defined by their mental state incompetent to be executed.” In *Panetti* (2007) we addressed a defendant who “suffered from gross delusions,” and we ruled that “the Eighth Amendment ... prohibits the execution of a prisoner whose mental illness prevents him from ‘rationally understanding’ why the State seeks to impose that punishment.” Here, Madison argues a lack of understanding from “dementia” rather than “insanity” or “delusions.” **But the *Panetti* “standard has no interest in establishing any precise cause.” “A judge must look beyond any given diagnosis to a downstream consequence.” They are “all the same under *Panetti* so long as they produce the requisite lack of comprehension.”** We are “at the least unsure” whether the Alabama courts understood or relied on these distinctions, so “we must return this case to the state court for renewed consideration of Madison’s competency.” And the state court “may not rely on any arguments or evidence tainted with the legal errors we have addressed;” so “the court should consider whether it needs to supplement the record.” “The state court, we have little doubt, can evaluate such matters better than we.”

Alito dissenting, with Thomas and Gorsuch: First sentence: “What the Court has done in this case makes a mockery of our Rules.” Madison argued below and in his petition here that the issue was that he could not remember his crime. Then “he switched to an entirely different argument.” But that “was not a question that the Court agreed to hear.” These “tactics flagrantly flout our rules, and we should not “reward counsel’s trick.” In any case, on the merits, “there is little reason to think” that the Alabama court made the legal error the majority identifies. [Ed. note: Justice Alito’s footnote 4, responding to the majority, is one of the longest I’ve ever seen, taking up a full two pages of the slip opinion.]. If the Court is actually just disagreeing with the correctness of the state court’s factual finding on Madison’s competency [which Alito implies it cannot properly do], “it should own up to what it is doing.” We should dismiss this case as improvidently granted (“DIG”).

Bucklew v. Precythe, 139 S.Ct. 306 (April 1, 2019), 5-4 (**Gorsuch**; *Thomas* concurring; *Kavanaugh* concurring; **Breyer** dissenting; **Sotomayor** dissenting), affirming 883 F.3d 1087 (8th Cir. 2018).

Headline: Bucklew’s **as-applied challenge** to Missouri’s lethal injection protocol – that this execution would cause him severe pain due to his unusual medical condition – **fails to satisfy the *Baze–Gossip* method of execution test.**

Facts: Bucklew was convicted of murder and sentenced to death. Having lost over “a decade of litigation,” Bucklew’s case was then “caught up in a wave of litigation over lethal injection [execution] procedures.” Although the Supreme Court upheld a “three-drug protocol in *Baze v. Rees* (2008), Bucklew filed or joined a number of lawsuits challenging Missouri’s lethal injection execution protocols. The “pressure from anti-death-penalty advocates” caused drug manufacturers to stop supplying the necessary drugs. Missouri ultimately adopted a one-drug protocol, using “the

sedative penobarbital.” “12 days before execution, Mr. Bucklew filed yet another lawsuit,” an “as-applied” challenge under *Baze*, arguing that due to his own unusual medical conditions, Missouri’s method would cause him “severe pain.” But his lawsuit was remanded because he had not identified an “alternative procedure” that would cause him less pain. Then the Supreme Court in *Glossip* (2015) ruled that method-of-execution challengers must identify such an alternative. Bucklew finally suggested that lethal nitrogen gas” would be such an alternative. The district court ruled that although there might be a “triable issue of fact” on Bucklew’s “severe pain” claim, there was no evidence that “nitrogen hypoxia would sufficiently reduce the risk.” The Eighth Circuit ultimately affirmed, and we granted a stay “on the same day Mr. Bucklew was scheduled to be executed” to review his claim.

Gorsuch (for 5): “The Constitution allows capital punishment” and “the Eighth Amendment does not guarantee a prisoner a painless death.” Firing squads, hanging, electrocution, lethal gas, and lethal injection, have all been approved. *Baze* and *Glossip* now both require that before one method can be challenged, a readily-implemented alternative method “that would significantly reduce a substantial risk of severe pain ... that the State has refused to adopt without a legitimate penological reason” must be shown. (Two Justices, Scalia and Thomas, believe that more must be shown, an “intent” to inflict such pain. But we need not revisit that here.). Although the method need not be one currently approved under the State’s law, an alternative is required “for all Eighth Amendment method of execution claims;” there is no exception for “as-applied” claims. “Choosing a label” does not “change the meaning of the Constitution;” to hold otherwise would be to “invite pleading games.”

Bucklew’s suggestion of nitrogen hypoxia does not meet the test. First, no State has ever used it (a few states did approve it “while this case has been pending”). Bucklew concedes that “further research” is needed, so it is not “readily implemented.” **Moreover, “choosing not to be the first to experiment” is a legitimate reason not to choose a method.** In addition, there is no evidence that it could produce more than “a minor reduction in risk” of pain. (By the way, footnote 2, we also “see no abuse of discretion” in disallowing discovery as to the identity of the State’s lethal injection team members.).

Finally (Part IV), there is an “important interest in the timely enforcement of a sentence,” and “the people of Missouri, the surviving victims ... and others like them, deserve better.” “Courts should police carefully against attempts ... to interpose unjustified delay. **Last minute stays should be the extreme exception, not the norm.**” Penultimate sentence: “**Federal courts can and should protect settled state judgments from undue interference** by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories.”

Thomas concurring: I stick to my view that the Eighth Amendment is violated “only if [a chosen method] is deliberately designed to inflict pain.” Justice Breyer is wrong to the contrary.

Kavanaugh concurring: I join the Court’s opinion but I “underscore the Court’s additional holding that the alternative method of execution need not be authorized under current state law. ... All nine Justices today agree on that point.” A firing squad might be such an alternative. Thus there is “little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative.” **[Ed. note: Gorsuch’s majority opinion is not so clear on this point.]**

Breyer dissenting, joined by Ginsburg, Sotomayor, and Kagan, except for Part III (in which Breyer says he “agrees with the Court that [death penalty delays] are excessive – but that is one reason that “there is simply no constitutional way to implement the death penalty”). On the merits here, I think Bucklew has shown a genuine issue of material fact” on whether Missouri’s method will cause him

sever pain, in light of his unusual and extreme medical conditions. As for identifying an alternative, I dissented in *Glossip*, but even under that case its ruling should not apply to “as applied” challenges. No prior cases ever applied such a requirement. **And “horrid modes of torture” are categorically outlawed by the Eighth Amendment, regardless of alternatives.** Moreover, there are issues of fact regarding nitrogen too. Finally, Justice Thomas is just wrong that the Eighth Amendment requires “intent” – it categorically prohibits “cruel and unusual” punishments.

Sotomayor dissenting: I agree with Breyer, but write separately “to address the troubling dicta with which the Court concludes its opinion, ... especially” the last-minute stays should be the exception part. That would be a “radical reinvention of established law and the judicial law,” if it “were ... to be mistaken for a new governing standard.” In fact, because death is final, “the equities ... will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits.” (Here the Justices are still fighting about a case earlier in the Term, *Dunn v. Ray*, in which the prisoner was denied the presence of an Imam and a stay was denied.). “Fortuity or the imminence of an execution may shake loose constitutionally significant information when time is short” and late-arising claims cannot be treated as “presumptively suspect.” **“There are higher values that ensuring that executions run on time.”**

II. FEDERAL CRIMINAL STATUTES

Armed Career Criminal Act (“ACCA”) cases:

United States v. Stitt and Sims, 139 S.Ct. 399 (December 10, 2018), 9-0 (Breyer), reversing 860 F.3d 854 (6th Cir. 2017) and 854 F.3d 1037 (8th Cir. 2017).

Headline: “Burglary” as a predicate offense for the mandatory minimum 15-year imprisonment term under the Armed Career Criminal Act **includes burglary of any vehicles that has been adapted for, or is customarily used for, overnight accommodation.**

Facts: Two cases consolidated for argument; the opinion gives very few specific facts. Each defendant (Victor Stitt and Jason Daniel Sims) was convicted of a federal felon-in-possession offense for which there is a possible ten-year imprisonment sentence. But each also had prior state burglary convictions (Stitt in Tennessee, Sims in Arkansas), which might have served as predicates for a much harsher Armed Career Criminal Act mandatory-minimum sentence of 15 prison years (if the defendant has three prior “violent felony” convictions). The Tennessee statute defines burglary to include vehicles “designed or adapted for the overnight accommodation of persons;” the Arkansas statute says “a vehicle ... customarily used for overnight accommodation of persons.” The federal ACCA says that a prior conviction for “burglary” counts as a predicate violent felony, but it does not define “burglary.” **In *Taylor* (1990), the Supreme Court said that a “generic” definition of “burglary” should uniformly apply for the federal statute; and that each State’s statute must be examined to see whether it “categorically” fits, rather than looking at the specific facts of each case.** Both Circuits here said these vehicle statutes did not qualify. The question now is whether these state burglary statutes meet the federal definition of “burglary.”

Breyer (for a unanimous 9): *Taylor* (1990) made it clear that when Congress used the undefined term “burglary” in ACCA, it was “intended to reflect the generic sense in which the term was used in the criminal codes of most States at the time the Act was passed” (which was 1986). That makes this case easy, because “in 1986, a majority of state burglary statutes covered vehicles adapted or customarily used for lodging.” There is still a “risk of violent confrontation” when persons break into

such vehicles, and “we have no reason to believe that Congress intended to make a part-time/full-time distinction.” Although we suggested in *Taylor* that “automobiles” might not be covered in ACCA, “[o]ur examination [now] convinces us that we did not decide in either case the question now before us.” While “ordinary vehicles” might not count, the statutes before us today, do. Sims argues that the Arkansas statute might reach cars, “in which a homeless person occasionally sleeps.” We remand for consideration of that argument if properly presented below.

[Stokeling v. United States](#), 139 S.Ct. 544 (January 15, 2019), 5-4, **Thomas**; Sotomayor dissenting [**Ed. note:** with Roberts, Ginsburg and Kagan, an interesting combo]), affirming 684 Fed. Appx. 870 (11th Cir. 2017).

Headline: “Robbery” as a predicate offense for the mandatory minimum 15-year imprisonment term under the Armed Career Criminal Act “**encompasses robbery offenses that require the criminal to overcome the victim’s resistance,**” including even “**minimal force**” robberies. (This case was argued the same day as *Stitt*, above, but here the Court splits 5-4).

Facts: Stokeling (like the defendants in *Stitt*, above, argued on the same day) was convicted of federal felon-in-possession. Based on a prior Florida state robbery conviction, the government sought a 15-year mandatory-minimum prison sentence, under the federal Armed Career Criminal Act (ACCA). ACCA does not mention “robbery” explicitly, but allows a prior conviction to count if the prior crime “has as an element the use, attempted use, or threatened use of physical force against another” (18 U.S.C. § 924(e)(2)(B)(i)). The district court erroneously looked at the specific facts of Stokeling’s prior conviction and found that although he “grabbed the victim by the neck and tried to remove her necklaces,” it did not qualify. But under *Taylor* (1990), the court must use a “categorical” approach to examine the state statute, and not consider specific facts. The Florida robbery statute requires “force,” which the Florida Supreme Court has ruled means “resistance by the victim that is overcome by the physical force of the offender.” The 11th Circuit concluded that, so interpreted, the Florida robbery statute “categorically” presents the sort of potential violence that ACCA requires. The court rejected Stokeling’s argument that “minimal force” robberies should not count.

Thomas (for 5): “We conclude” that ACCA “**encompasses robbery offenses that require the criminal to overcome the victim’s resistance.**” Common law separated “mere larceny” from robbery by adding “force” or “violence” (citing Blackstone, 1769). “Overcoming resistance” was sufficient for robbery, “however slight the resistance” (citing a 1905 Treatise). We think this is what Congress intended in ACCA. “We need not declare a winner in th[e] numbers game” [unlike the suggestion in *Stitt*], that is, determining how many States in 1986 when ACCA was enacted used “overcoming the victim’s resistance.” “Many States would not qualify” if we accepted Stokeling’s “minimal force” argument, and Congress did not intend that. We also reject the idea that the “slightest offensive touching” that we rejected as “force” in *Johnson* (2010) is the same as the force we require here (“sufficient to overcome the victim’s resistance”). This “necessarily involves a physical confrontation and a struggle.” “Physical force” means “capable of causing physical pain or injury,” and we think that is intended here (we reject Stokeling’s “reasonably expected to cause pain or injury” standard). “We decline to impose yet another indeterminable line-drawing exercise on the lower courts.” But we agree [apparently?] that a “sudden snatching” is not an ACCA robbery.

Sotomayor dissenting (joined by Roberts, Ginsburg and Kagan) [**Ed. note:** note the odd combo, Roberts joining here, Breyer joining the majority]: We said in *Johnson* (2010) that “physical force”

in ACCA requires a “heightened degree of force.” Today’s decision “distorts” that decision. Our “categorical approach” requires the Court to ask “whether the least culpable conduct covered by the [State] statute at issue” requires “physical force” as used in ACCA. But if a robbery victim’s resistance is “minimal,” then the force required to overcome it is also “minimal.” Yet *Johnson* (written by Scalia) requires “violent,” “substantial,” and “great” force (also snarkily citing a First Circuit decision written by then-Judge Breyer). Today’s decision will “make robbers [subject to 15 years minimum] out of thieves who use minimal force” – “a half-notch above garden-variety pickpocketing or shoplifting.” Congress did not intend that.

[Quarles v. United States](#), 139 S.Ct. 1872 (June 10, 2019), 9-0 (**Kavanaugh**; *Thomas* concurring), [affirming](#) 850 F.3d 836 (6th Cir. 2017).

Headline: “Burglary” as a predicate offense for ACCA includes unlawful “remaining in” burglaries, even if the intent to commit a crime was formed well after the defendant “remained in” the structure rather than contemporaneously with the first moment of “unlawful remaining.”

Facts: This is the third ACCA decision of the Term, and the Court says this one presents “an exceedingly narrow question.” Once again, the defendant was convicted of federal felon-in-possession, and the government alleged that his prior Michigan state conviction for “third degree home invasion” should categorically count as generic “burglary” as used in ACCA. See *Stitt* above (discussing ACCA burglary). The Michigan statute includes anyone who “enters a dwelling without permission and, at any time while he or she is ... present in ... the dwelling, commits a misdemeanor.” Quarles argued that expanding common-law burglary to unlawful presence cases where intent is developed “at any time” (and is only to commit a misdemeanor) goes too far – common law burglary required that criminal intent be contemporaneous with the “breaking and entering,” and Quarles argues that the same “exact first moment” idea should be required for “remaining in” burglaries as well. (Although the “categorical” approach prohibits considering the facts of the particular case, the Court takes pains to briefly summarize Quarles’ current and prior convictions, which involved pretty awful armed attacks on a girlfriend, an ex-girlfriend, and others.). The District Court and the Sixth Circuit rejected Quarles’ argument; the Supreme Court granted cert because there was a Circuit split.

Kavanaugh (for a unanimous 9): The 1990 *Taylor* opinion defined “generic burglary” for ACCA predicates as including “unlawful or unprivileged entry into, *or remaining in*, a building or structure with intent to commit a crime.” This is enough to encompass “remaining in” burglaries when the intent is formed “at any time” during the unlawful presence. A majority of States included “remaining in” burglaries in their statutes when ACCA was enacted (1986), and the few that had addressed the question had included “at any time” burglaries within the category. And certainly “the possibility of a violent confrontation does not depend on the exact moment” that criminal intent is formed. Moreover, to say that Michigan’s and other States’ burglary statutes would not count for ACCA “would thwart the stated [Congressional] goals of” ACCA, which was to include the burglary statutes of most States and “impos[e] enhanced punishment on” folks like Quarles. “Modest state-law deviations” from *Taylor*’s generic definition of “burglary do not disqualify a State’s statute, so long as the state definition “substantially corresponds.” **[Ed. note:** in a final footnote, the Court says Quarles “did not preserve” an interesting argument that some of Michigan’s misdemeanors do not even require criminal *mens rea*. I’d expect to see that raised in future Michigan ACCA cases.]

Thomas concurring: I concur because the Court “correctly applies our precedent requiring a ‘categorical approach.’” But “[t]his case demonstrates the absurdity of applying the categorical approach.” “There are strong reasons to suspect that” the categorical approach “is not compelled by ACCA’s text.” Instead, juries could simply be empaneled to decide whether the specific facts a defendant’s prior convictions fit the ACCA definition or not. We should consider that question sometime. [Ed. note: expect to see a raft of cert petitions now try to present this question. **Justice Thomas is experiencing a new heyday, and any retirement plans seem out of the picture.**]

Supervised Release:

Mont v. United States, 139 S.Ct. 1826 (June 3, 2019), 5-4 (**Thomas**; Sotomayor dissenting with Breyer, Gorsuch, and Kagan), affirming 723 Fed. Appx. 325 (6th Cir. 2018).

Headline: A convicted criminal’s period of **supervised release is “tolled” during his pretrial incarceration for a new criminal offense**, where the court’s later-imposed sentence credits the pretrial detention as time served for the new offense.

Facts: Petitioner, Jason Mont was released from federal prison on March 6, 2012 under supervised release scheduled to terminate on March 6, 2017. Among other violations of his supervised release, Mont was arrested on new state drug trafficking charges in June 2016. Mont pled guilty to the state charges and was sentenced on March 21, 2017 to a term of six years with ten months’ credit for time served during pretrial incarceration. On March 30, 2017, several weeks after his supervised release was slated to end, the District Court issued a warrant and set a supervised-release hearing date. At that hearing, the District Court revoked supervised release, ordering Mont to serve an additional forty-two months’ imprisonment consecutive to his state sentence.

Mont challenged the revocation of supervised release, claiming that the court no longer had jurisdiction as his supervised had ended on March 6, 2017. The Court of Appeals disagreed, noting that under 18 U.S.C. §3624 the supervised release period is tolled when an individual is imprisoned “in connection with” another criminal conviction. According to the Court of Appeals, a period of pretrial imprisonment that is credited as time served on a subsequent conviction qualifies to toll the period of supervised release.

Thomas (for 5): “If the court’s later imposed sentence credits the period of pretrial detention as time served for the new offense, then the pretrial detention also tolls the supervised-release period.” This turns on interpretation of 18 U.S.C. §3624(e), which mandates that supervised released is tolled “during any period in which the person is imprisoned in connection with a conviction for Federal, State, or local crime unless the imprisonment is for a period of less than 30 days.”

First, pre-trial detention is “in connection with” the subsequent conviction; “we need not consider the outer bounds of the term ‘in connection with’ [because] pretrial incarceration is directly tied to the conviction when it is credited toward the new sentence.” Second, the text of §3624(e) “undeniably requires courts to retrospectively calculate whether a period of pretrial detention should toll a period of supervised release,” because the provision excepting imprisonment of less than thirty days necessarily requires a court to determine retroactively whether or not such pre-trial detention lasted longer than thirty days. Third, the goals of supervised release have no effect until the other confinement ends, and “it 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.”

The petitioner’s argument that the present tense construction of the statute forbids retroactive tolling is wrong because it “confuses the rule with a court’s analysis of whether that rule was satisfied.” The district court was within its power to retroactively toll Mont’s period of supervised release for the ten months of his pretrial imprisonment on the new charge.

Sotomayor dissenting (joined by Breyer, Kagan, and Gorsuch [**Ed. note:** another odd combination this Term – Ginsburg is with the majority]): The majority “adopt[s] a backward-looking approach at odds with the statute’s language.” Under the text, a period of pretrial confinement cannot be ‘in connection with a conviction’ because it is before the conviction has occurred (relying on the statute’s use of the present tense). Such tolling is not mandated by the 30-day provision in the statute; it “creates no anomalies if the statute is read to toll supervised release only during a detention following a conviction,” because only then would the court necessarily know the length of detention “in connection with” the conviction. The government has other tools to preserve its power under supervised release. Indeed, “in this very case, the district court had at least three opportunities to issue a warrant prior to the expiration of Mont’s original supervised release term.”

***Mens Rea* and Unlawful Firearms Possession under U.S.C. § 924(a)(2):**

Rehaif v. United States, 139 S.Ct. 2191 (June 21, 2019), 7-2 (**Breyer**; Alito dissenting with Thomas), reversing 888 F.3d 1138 (11th Cir. 2018).

Headline: A statute making it a crime for certain aliens to “knowingly possess” a firearm requires proof that the defendant knew he was in the prohibited category of aliens. More generally, **under § 922(g), “the government must prove” that a defendant “knew he belonged to the category of persons barred from possessing a firearm.”**

Facts: Hamid Rehaif entered the U.S. on a non-immigrant student visa. He did poorly and was told that his immigration status could be terminated unless he transferred to another university or left the U.S. He did neither. When the government learned that Rehaif had shot firearms at a firing range, he was prosecuted for possessing firearms while being an alien unlawfully in the United States (under 18 U.S.C. §§ 922(g) and 924(a)(2)). The jury was instructed that the government was “not required to prove” that Rehaif “knew that he was illegally or unlawfully in the United States.” Rehaif was convicted and sentenced to 18 months in prison. The 11th Circuit affirmed.

Breyer (for 7): There is a “**longstanding presumption**” that Congress “**intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct**” (*Morisette*, 1952), “**even when Congress does not specify any scienter**” (*Staples*, 1994). “Jurisdictional elements normally have nothing to do with the wrongfulness of the defendant’s conduct,” so they are normally “not subject to the presumption” (*Luna Torres*, 2016). But the unlawful or prohibited status of a defendant is not a jurisdictional element, and there is “no convincing reason” not to apply the presumption here. Finally, when Congress uses the word “knowingly,” we “normally read [it] as applying to all the subsequently listed elements of the crime” (*Flores-Figueroa*, 2009).

Regarding unlawful gun possession statutes, “the possession of a gun can be entirely innocent,” so it is “the defendant’s status, and not his conduct alone, that makes the difference.” Without deciding about other statutes, here “the defendant’s status is the crucial element.” And the “mistake of law” doctrine does not apply here, because Rehaif’s legal status is “a collateral question of law” that still bears directly on his criminal intent. [**Ed. note:** this of course does nothing to

resolve “the confusion surrounding the –ignorance-of-the-law maxim,” which the Court acknowledges – but then, no one else has really done any better.] Finally, Congress added the “knowingly” element to firearms possession statutes in 1986, so no inference to “ratify” some prior understanding regarding *mens rea* can be drawn. (Any harmless error argument is for remand).

Alito dissenting joined by Thomas: “Thousands of cases for more than 30 years” have held that the government need not prove knowledge of status for §922(g) gun possession crimes. There was no conflict among the lower courts. But this decision will now “make it significantly hard to convict.” (In addition, the facts show that Rehaif must have known of his unlawful status, so this case is “trivial.”) Meanwhile, the text of §922(g) does not require this result; the word “knowingly” is imposed by a separate statute, §924, and need not be read into § 922(g) in the way that the Court does. **“Presto chango ... What a magic trick!”** We have never before applied the *mens rea* presumption to a defendant’s knowledge of “defendant’s own status;” instead, we should treat this as a jurisdictional element. Many of §922(g)’s categories are actually very complicated and hard to prove (for example, “adjudicated as a mental defective,” or “domestic violence,” or subject to certain “restrain[ing orders]”). And “we have upheld the constitutionality of some strict-liability offenses in the past.” [Ed. note: Alito is right about this; the law of *mens rea* has certainly “evolved” over the past 50 years.] There is no telling where the Court’s reasoning will stop; the majority “opens the gates to a flood of litigation.”

Native American Law

Herrera v. Wyoming, 139 S.Ct. 1686 (May 20, 2019), 5-4 (Sotomayor; Alito dissenting with Roberts, Thomas, and Kavanaugh), vacating (Wyoming St. App. 2017).

Headline: Wyoming’s statehood in 1890 did not abrogate protected hunting rights stemming from an 1868 treaty with the Crow Tribe allowing them to hunt in all unoccupied territory.

Facts: Clayvin Herrera, a member of the Crow tribe of native Americans, “pursued a group of elk past the boundary of the [Crow] reservation and into neighboring Bighorn National Forest in Wyoming.” Wyoming charged Herrera with taking elk off-season and without a license. Herrera moved to dismiss, arguing that he was protected by the United States’ **1868 treaty with the Crow tribe, which preserved for the tribe “the right to hunt on the unoccupied lands of the United States so long as game may be found thereon [and] peace subsists.”** The motion was denied and Herrera was convicted by a jury (which was not permitted to hear the treaty defense). The state appellate court affirmed the conviction, following a 1995 Tenth Circuit decision (*Repsis*) that the treaty rights had expired when Wyoming became a State by Act of Congress in 1890 that did not mention such rights; and that in any case the land was not “unoccupied” once it was made a National Forest. The Tenth Circuit had relied on an 1896 Supreme Court opinion (*Wild Horse*), while Herrera argued that *Minnesota v. Mille Lacs Band of Chippewa Indians* (1999) had repudiated *Wild Horse*.

Sotomayor (for 5): First, “this case is controlled by *Mille Lacs*,” not *Wild Horse*. *Mille Lacs* “methodically repudiated” the logic of *Wild Horse*, ruling that the “equal-footing” admission of a State is not “irreconcilable” with Indian treaty rights, and absent some express revocation, those rights continue. The treaty itself defines the conditions for the duration of the rights. *Wild Horse* “retains no vitality” and (footnote 1) is “effectively overruled.” This also precludes the Tenth Circuit’s decision, prior to *Mille Lacs*, from having any preclusive effect. And Wyoming has identified no “compelling concerns of repose or reliance.” Finally, there is no evidence that Congress

intended the Crow Tribe’s hunting right to expire at statehood. Nor does statehood automatically mean that all lands are not “unoccupied.”

Under the still-valid treaty, the land is not “unoccupied” simply because it has been designated a National Forest. The word “unoccupied” means “free of residence or settlement.” The Presidential Proclamation on Bighorn “reserved” the land “from entry or settlement.” Logging and mining on the land does not mean “settlement.” We do not decide remaining issues, such as whether specific sites within the National Forest now fit the definition of “occupied;” or whether Wyoming may still regulate tribal hunting “in the interest of conservation.” Vacated and remanded.

Alito dissenting, joined by Roberts, Thomas and Kavanaugh: The Court’s opinion is “puzzling,” because it “sidesteps” a secondary issue-preclusion argument based on the Tenth Circuit’s *Repsis* decision (which the Crow Tribe litigated): its holding on “unoccupied.” If the state courts decide that *Repsis* has preclusive effect on that argument, then the court’s opinion is “so much wasted ink.” **[Ed. note:** In a lengthy footnote 5, the majority says the issue was not included in the Question Presented here, and may have been forfeited, so it does not address it. So it is not further detailed here.] We think Herrera’s argument is precluded by the Tenth Circuit judgment. The rest of the majority’s opinion is a “pointless disquisition.” **[Ed. note:** this seems doubtful in light of 5 votes.]

Sharp (previously Carpenter) v. Murphy, No. 17-1107 (argued Nov. 27, 2018; scheduled for reargument in OT 2019), from 875 F.3d 896 (10th Cir. 2017):

Case set for reargument: The ultimate Question is who may prosecute Indians (Native Americans) within a huge part of Oklahoma, which turns on the precedent question whether the 1866 boundaries of the Creek Nation still remain today an “Indian reservation,” or has that reservation been “disestablished” by Congress.

Facts: Patrick Murphy, a member of the Creek (Muskogee) Indian tribe, was convicted in state court of murdering another Creek Indian, on within the Creek reservation. He was sentenced to death. After his conviction and sentence were affirmed on appeal, he argued in state post-conviction proceedings that the State lacked jurisdiction to prosecute him, because the Indian Major Crimes Act gives exclusive jurisdiction to the federal government to prosecute serious offenses committed by Indians. The state court’s rejected that argument, and on certiorari to the Supreme Court, the U.S. Solicitor General stated its position that Congress had disestablished the Creek Nation territory, in a series of actions, including admission of Oklahoma as a state in 1906. But in a federal habeas proceeding, the Tenth Circuit rejected the district court’s conclusion agreeing with the Solicitor General, and reversed Murphy’s conviction. The Supreme Court granted review, but after oral argument in OT 2018, at which the immense implications of declaring about half of Oklahoma to still be Indian Territory, the Court called for supplemental briefing. On the last day of that Term the Court set the case for reargument.

Federal Habeas Corpus Law

Shoop v. Hill, 139 S.Ct. 504 (Jan. 7, 2019), 9-0 (**per curiam** summary reversal), reversing 881 F.3d 483 (6th Cir. 2018).

Per curiam for unanimous Court: The Sixth Circuit granted habeas to Shoop, finding that the Ohio courts unreasonably applied “clearly established law” in finding that Shoop was not so intellectually disabled that he cannot be executed. But the Court of Appeals clearly “relied repeatedly and extensively on our decision in *Moore v. Texas* (2017), which was not handed down until long

after the state court decisions.” [Ed. note: that case is “*Moore I*,” see the same case below (“*Moore II*,” which was decided a month after this one. The Justices clearly had that decision in mind (even though not yet publically announced) when this one was issued; the difference is that this case is on habeas, while *Moore* was and is on direct review from the state court.] However, when reviewing state court criminal judgments **on habeas, a federal court may only apply law that is “based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time.” The court cannot apply later-established law on habeas.**

III. IMMIGRATION

[Nielsen v. Preap](#), 139 S.Ct. 954 (March 19, 2019), 5 (3-2) to 4 (**Alito (plurality in part)**); *Kavanaugh* concurring to provide fifth vote; *Thomas* concurring in judgment with Gorsuch; *Breyer* dissenting with Sotomayor, Kagan, and Ginsburg), reversing 831 F. 3d 1193 (CA 9 2016).

Headline: A statute mandating detention of some aliens without a bail hearing, which requires their arrest “when they are released” from some other custody, applies even if the alien is not arrested immediately upon release (and even many years later).

Facts: Mony Preap, suing on behalf of a class, is a lawful permanent resident whose two drug convictions qualified him for removal and also mandatory detention without bond (bail) under 8 U.S.C. §1226(c). This statute describes aliens who should be detained without bond until their immigration case is resolved; (c)(1) says the Secretary “shall take into custody any [such] alien ... when the alien is released.” Preap had been released from a prior criminal custody in 2006, but immigration officials did not arrest him pursuant until 2013. (Other class members were similarly not arrested by ICE until 5 and 11 years after custodial releases.) In this habeas class action, the district court ruled that aliens are exempt from the mandatory detention requirement, unless they are arrested immediately “when released.” The Ninth Circuit affirmed, but four other Circuits had ruled that the statute required detention without bond even if the arrest is not made immediately after release.

Alito (for a majority on the merits; only 2 other Justice join on jurisdiction): First (joined only by the Chief Justice and *Kavanaugh* [ed. note: but presumably the dissenters also agree that the Court has jurisdiction, so is there really a majority on jurisdiction?]), Alito finds that the Court is not barred by statute from considering this appeal (just as Alito had concluded for the Court last term in [Jennings v. Rodriguez](#) – indeed, much of this case is dependent on the *Jennings* opinions and vote split last Term). Importantly, the Court finds that even if the named class reps’ cases were resolved, the case would not be “moot” because “the harms alleged are **transitory enough to elude review.**” [Ed. note: similar to *Roe*, which Alito does not cite: “capable of repetition but evading review”?].

On the merits, “the Ninth Circuit’s [statutory] interpretation was wrong,” and “neither text nor structure supports” its ruling. (Significantly, the Court allows that “joseph” hearings for release might still be available (n. 8), and states expressly that **its statutory ruling today “does not foreclose ... constitutional challenges to applications** of the statute.”) Alito offers a complicated grammatical argument (pages 12-13) that *Breyer* disagrees with in dissent. The Court uses this grammatical point to rule (as a matter of “plain text”) that § 1226(c) was never intended by Congress to be limited to those arrested immediately upon release.

Moreover, “**even if ... (c)(1) requires immediate arrest, that does not invalidate the Secretary’s later arrest and detention without bond, because “ as we have held time and again, an official’s crucial duties are better carried out late than never.**” Justice *Breyer*’s dissent offers case authority to the contrary, and this part of Alito’s opinion is only for a plurality of three. Making

a veiled reference to the phenomena of state and local “sanctuary cities,” who do not notify ICE of imminent alien releases, Justice Alito says that Congress would not have intended for dangerous aliens to receive bail just because arrest did not happen immediately after their release.

Finally, upholding mandatory detention here does not violate the doctrine of “constitutional avoidance,” because that doctrine applies only when a statute is ambiguous,” and this statute (as the Court similarly ruled in *Jennings*, upholding a mandatory detention statute) is not.

Kavanaugh concurring: I want to “emphasize the narrowness of the issue before us, and in particular to emphasize what this case is *not* about.” A brief list followed.

Thomas dissenting in part and concurring in the judgment (joined by Gorsuch): As in *Jennings*, “I continue to believe that no court has jurisdiction ... before final orders of removal have been entered.” However, “I largely agree with the Court’s resolution of the merits,” so I join all but the jurisdictional section and the discussion of “better late than never” precedents.

Breyer dissenting (joined by Kagan, Sotomayor, and Ginsburg): The “ordinary meaning” of “when released” in the statute, and grammar rules, permit an interpretation that the Secretary must arrest within a “reasonable time” of release (perhaps six months). If not, then a bail hearing (not release, just a hearing) is required. the special ‘transition’ period congress enacted as evidence that, if the statute did not intend to require immediate arrest, such a transition period would have been unnecessary.

Although the issue “may sound technical, ... it is extremely important,” because denial of bail hearings to persons who have given no cause for arrest for years after a release from custody “runs contrary to basic American and common-law traditions.” “The Government” has a “duty not to deprive any ‘person’ of ‘liberty’ without ‘due process of law.’” Justice Kavanaugh is wrong; “the question before us is not ‘narrow.’” In the face of “linguistic ambiguity,” we ought not assume that Congress intended to deny even a “possibility of bail” to persons who have long since paid their debt to society.”

IV. CIVIL CASES RELATED TO CRIMINAL TOPICS

Law Enforcement Pensions:

[Dawson v. Steager](#), 139 S.Ct. 698 (February 20, 2019), 9-0 (**Gorsuch** for a unanimous court) reversing No.16-0441 (W. Va. May 17, 2017).

Headlines: A West Virginia law exempting the pensions of state and local law enforcement officers but not the federal pensions of U.S. Marshall’s unlawfully discriminates based on the source of the compensation in violation of U.S.C. § 111.

Facts: Petitioner, James Dawson, is a retired U.S. Marshall living in West Virginia. West Virginia law exempts the pensions of state and local law enforcement officers from state taxation, but not those of U.S. Marshalls. Mr. Dawson contends this is a violation of U.S.C. § 111 which permits states to tax the income of federal employees so long as it “does not discriminate against the officer or employee because of the source”. The trial court found for plaintiff, holding that because the duties of a U.S. Marshall were identical to those of state and local law enforcement, the West Virginia was discriminating against Mr. Dawson in violation of section 111. The West Virginia Supreme Court reversed.

Gorsuch (for the unanimous court): The court unanimously dispensed with each of West Virginia’s arguments, holding the statute to be discriminatory under U.S.C § 111, which requires that states not treat retired state employees more favorably than retired federal employees when no significant differences between the two classes justify such treatment. Here, the trial court found the duties of the two classes to be identical.

The state first argues that “because it affects so few people that it couldn’t meaningfully interfere with the operations of the federal government,” the exemption should be upheld. But the *de minimis* quality of the discrimination is irrelevant because section 111 bans *all* discrimination. The state then contends that because the statute is merely intended to help state employees the law should be upheld. But the “state’s interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant.”

Instead, the question is whether the state treats similarly situated state and federal employees differently. To decide that question, the court looks to how the state has defined the favored class. Here, “the distinguishing characteristic of these plans is the nature of the jobs previously held”, leading the court to conclude that federal and state law enforcement must be treated equally. The state counters that because “it treats federal retirees no worse than (some) similarly situated state employees” it has not discriminated. However, the question hinges not on a comparison between federal employees and state employees who don’t receive a tax benefit, but on those who do. In a last-ditch effort, the state argues that the real distinguishing factor is the meager size of the state pensions, but this is roundly contradicted by the language in the statute.

Securities Law:

[Lorenzo v. Securities and Exchange Commission](#), 139 S.Ct. 1094 (March 27,2019), 6 to 2 (Breyer; Thomas dissenting with Gorsuch; Kavanaugh took no part in the decision), affirming 872 F. 3d (D.C. Cir. 2017).

Headline: **The knowing disseminator of a false or misleading statement can be liable under Rule 10b-5(a) and (c)**, even if he is not the primary “maker” of the statement so cannot be held liable under subsection (b) and *Janus Capital Group* (2011).

Facts: Francis Lorenzo, an investment banker, sent two emails that were knowingly false, to help sell debentures in a publically-traded company. The SEC brought suit against Lorenzo for violating Rule 10b-5, which has three subsections. The DC Circuit ruled that Lorenzo could not be liable under subsection (b) because he was not the primary “maker” of the false statements under *Janus Capital Group* (2011)). But the Circuit agreed that Lorenzo had acted with “a mental state embracing intent to deceive, manipulate, or defraud,” and so could be liable under subsections (a) and (c).

Breyer (for 6): We affirm the three subsections of Rule 10b-5 make it unlawful “(a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit.” “It is difficult to see how his [Lorenzo’s] actions could escape the reach of these provisions.” Any dictionary definition of the terms of (a) or (c) would have to include Lorenzo’s conduct; and “this Court and the commission have long recognized considerable overlap among the subsections of the Rule and related provisions.” Lorenzo’s claim, that only subsection (b) governs false statements, is wrong because it would exempt those who, like Lorenzo, are not “makers” from liability. But “using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud.” Our holding does not makes *Janus* meaningless; its holding would still be

relevant “where an individual neither makes nor disseminates false information.” Finally, Lorenzo’s claim that holding him liable would run counter to the Rule’s “primary” and “secondary” liability distinction is wrong -- persons can be primarily liable for some violations, and only secondarily liable for others. Lorenzo’s conduct is clearly of the type Congress sought to prohibit.

Thomas (dissenting with Gorsuch): The majority makes *Janus* a “dead letter” by “holding that a person who has not ‘made’ a fraudulent misstatement can nevertheless be primarily liable for it.” Rather than allowing disseminators of false statement to avoid liability entirely, applying *Janus* would still allow them to be held secondarily liable.

The False Claims Act

[Cochise Consultancy v. United States, ex rel. Billy Joe Hunt](#), 139 S.Ct. 1507 (May 13, 2019), 9-0 (**Thomas**), affirming 887 F.3d 1081(11th Cir. 2018).

Headline: The statute of limitations in 31 U.S.C. §3731(b)(2) applies to a private party bringing a *qui tam* suit on behalf of the United States under the False Claims Act regardless of whether the government has intervened in the suit. A private party is not an “Official of the United States” for purposes of the provision allowing suit to be brought up to three years after a government official knew or should have known the relevant facts.

Facts: Billy Joe Hunt brought suit against two defense contractors known collectively as Cochise, under the False Claims act in November, 2013. The suit alleged that Cochise submitted false payment claims for contract work in Iraq ending in early 2007. 31 U.S.C. §3731(b) provides two statute of limitations provisions for civil actions under the False Claims Act. Subsection (b)(1) requires that an action be brought within six years of the statutory violation; (b)(2) sets an alternative limitation as three years after “the official of the United States charged with responsibility to act in the circumstances” knew or should have known the relevant facts, but not more than ten years after the violation. Here, Hunt claimed that he divulged the relevant information to the United States in an interview in 2010. As no action had been taken by the United States, Hunt argues his *qui tam* action was authorized under (b)(2)’s statute of limitation. The district court dismissed as untimely, claiming that either (b)(2) did not apply to suits where the government did not intervene, or, that for purposes of (b)(2) the statute of limitations would begin to toll when the relator, not the government, official learned of the relevant facts. The Eleventh Circuit reversed.

Thomas (for 9): Petitioners argued that either § 3731(b)(2) did not apply where the government has declined to intervene, or alternatively that a private plaintiff serves as the “government official” for purposes of §3731(b)(2). The court rejected this, observing that because the language of both statutes of limitation are written to apply to “civil actions under section 3730,” petitioner’s first contention would mean that “a relator-initiated, non-intervened suit is a ‘civil action’ for purposes of subsection (b)(1) but not (b)(2).” But “in all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning” in that statute. An interpretation that limited civil actions to only those suits in which the government intervenes would mean that neither (b)(1) nor (b)(2) would apply to non-intervened suits, a contention petitioner expressly disclaimed.

Next, the private party in a non-intervened suit is not an official of the United States under subsection (b)(2). In the statute, the relator is expressly labelled a private party, and the statute states that the ‘official’ charged with responsibility to act is the Attorney General or his delegate. “We see

nothing unusual about extending the limitations period when the government official did not know and should not reasonably have known the relevant facts.”

Section 1983 and Fabrication of Evidence

McDonough v. Smith, 588 U.S. __ (June 20, 2019), 6-3, Sotomayor; Thomas dissenting with Kagan and Gorsuch), reversing 898 F.3d 259 (2d Cir. 2018).

Headline: The **statute of limitations** under § 1983 for a claim of fabrication of evidence used to pursue criminal charges does not begin to run (“accrue”) **until the criminal proceedings terminate in the defendant’s favor.**

Facts: A state primary election in Troy, New York, apparently involved forged ballots. McDonough was the Commissioner of elections. Smith was appointed special prosecutor to investigate, and secured a grand jury indictment against McDonough. Three years later, after one mistrial and then an acquittal of McDonough on all counts, McDonough sued Smith in federal court under 42 U.S.C. § 1983, for “fabrication of evidence” and “malicious prosecution without probable cause.” He alleged that Smith had “falsified affidavits, coached witnesses to lie, and orchestrated a suspect DNA analysis.” The district court dismissed (and the Second Circuit affirmed) malicious prosecution based on prosecutorial immunity; and dismissed fabrication of evidence based on a ruling that the three-year statute of limitations (SOL) began to run back when McDonough learned of the misdeeds and suffered a loss of liberty, not later when the acquittal occurred.

Sotomayor (for 6): The SOL does not begin to run until the allegedly wrongful criminal proceedings have “terminated in his favor.” This is by analogy to the common law tort of malicious prosecution, and “the practical considerations” that counsel against allowing early “collateral attacks” on criminal judgements. (We assume the lower courts were right in describing the cause of action; **we “make no statement” on whether prosecutorial immunity might apply** to fabrication of evidence [**Ed. note:** an essential point for remand]; and we note that the length of a SOL is a matter of state law, but when it “accrues” is a matter of federal law under § 1983.) A “favorable-termination requirement” is rooted in “pragmatic concerns” (*Heck*, 1994): “avoiding parallel criminal and civil litigation over the same subject, and the related possibility of conflicting and civil judgments.” These days, “prosecutions regularly last as long as – or even longer than – the relevant civil limitations period.” Requiring claims like this to be filed while state criminal proceedings are ongoing would harm defendants and also “run counter to core principles of federalism, comity, consistency and judicial economy.” The federal plaintiff’s suit “necessarily questions the validity of a state proceeding.” By the way (footnote 10), if a criminal case were “terminated” by something not so clear as an acquittal (such as a plea bargain or a dismissal), a “more context-specific and capacious” definition might be needed – we are not doing that here.

Thomas dissenting, joined by Kagan and Gorsuch [**Ed. note:** what an interesting combination!]: We should have DIGged this case (“dismiss as improvidently granted”), because McDonough “fails to specify which constitutional right [Smith] allegedly violated,” which is a “threshold inquiry” and which failure “profoundly complicates our inquiry.” He may have no constitutional claim at all; moreover, it may be barred by prosecutorial immunity. There are too many unresolved questions that the majority “assumes.” We should dismiss, not rule.

V. WRITINGS RELATING TO ORDERS (such as dissents from denial of *certiorari*)

A. Applications for Stay of Execution

[Dunn v. Price](#) (April 12, 2019): **Breyer** dissenting from denial of stay of execution with Ginsburg, Sotomayor, and Kagan, because lower court refused to allow a report on the likelihood of severe suffering to be introduced into evidence, and complaining about Court's refusal to delay "until tomorrow, when the matter could be discussed;" and [Price v. Dunn](#) (May 13, 2019): **Thomas** concurring in denial with Alito and Gorsuch, and writing (later) to "set the record straight;" and [Price v. Dunn](#) (May 30, 2019): **Breyer** dissenting again, with Ginsburg, Sotomayor and Kagan in part.

[Abdur'rahman v. Parker](#) (May 13, 2019): Sotomayor dissenting from denial of certiorari; despite the Court having decided *Bucklew* (above, p. 22), the requirement to identify an alternative method is "fundamentally wrong."

[Murphy v. Collier](#) (March 28, 2019): **Kavanaugh** concurring in grant of stay of execution unless the state permit's a **Buddhist spiritual advisor** to accompany Muphy in the execution chamber; [Thomas and Gorsuch dissent](#) w/o opinion.

[Dunn v. Ray](#) (February 7, 2019): **Kagan** dissenting from denial of stay, with Ginsburg, Breyer and Sotomayor, because **Muslim Imam was barred** from execution chamber.

[Miller v. Parker](#) (December 6, 2018): **Sotomayor** dissents from the denial of an application for stay of execution claiming defendant's choice to die by electric chair instead of lethal injection was not freely made.

[Zagorski v. Haslam](#) (November 1, 2018): **Sotomayor** dissents from the denial of an application for stay of execution claiming defendant's choice to die by electric chair instead of lethal injection was not freely made.

[Zagorski v. Parker](#) (October 11, 2018): **Sotomayor** and Breyer dissent from denial of application for stay of execution noting "perverse requirement that inmate offer alternative methods for their own executions."

B. Other Death Penalty writings

[Tharpe v. Ford](#) (March 18, 2019): **Sotomayor** "respecting" the denial of certiorari, where the merits of the petition did not involve race but the record reflected that a juror exhibited "appalling ... bias" against "N*****s." "The work of purging racial prejudice from the administration of justice is far from done."

[Lance v. Sellers](#) (January 7, 2019): **Sotomayor** dissenting from denial of certiorari with Ginsburg and Kagan, in claim of ineffective counsel who failed to introduce mitigating evidence in a death penalty sentencing hearing.

[Reynolds v. Florida](#) (November 13, 2018): Sotomayor dissents from denial of certiorari regarding Florida court's decision that error in petitioner's case was *de minimis* despite SCOTUS ruling that the sentencing scheme is unconstitutional.

[Townes v. Alabama](#) (October 29, 2018): Sotomayor dissents from denial of certiorari in case regarding whether or not jury was instructed that they 'may' or 'must' infer intent to kill.

C. Miscellaneous

[Schock v. United States](#), 586 U.S. (February 19, 2019): Sotomayor concurring in the denial of certiorari regarding whether interpretation of house rules available for collateral appeal stating willingness to reconsider if such rules are entered into evidence at the district court.

[White v. Kentucky](#), 586 U.S. (January 14, 2019): Alito, Thomas, and Gorsuch dissent from remand to Supreme Court of Kentucky following *Moore v. Texas* because case was decided prior to *Moore v. Texas*.

[Hester v. United States](#), 586 U.S. (January 7, 2019): Gorsuch and Sotomayor dissenting from denial of cert regarding whether *Apprendi* should be applied to court ordered restitution.

[Stuart v. Alabama](#), 586 U.S. (November 19, 2018): Gorsuch and Sotomayor dissent from denial of certiorari regarding whether or not Sixth Amendment includes right to cross-examine forensic analysts.

[Brown v. United States](#), 586 U.S. (October 15, 2018): Sotomayor and Ginsburg dissenting from denial of certiorari of petitioner's claim that their sentence as 'career criminals' under then mandatory guidelines violates *Booker*.

[Apodaca v. Raemisch](#), 586 U.S. (October 9, 2018): Sotomayor dissenting from denial of certiorari regarding Eight Amendment challenge to solitary confinement.

VI. CRIMINAL LAW *CERTIORARI* GRANTS FOR UPCOMING (Oct. '19) TERM

As of August 6, 2019, the Court has granted review in 50 cases for the OT '19 Term (some will be consolidated and count as only "one" case). By my broad definition, 18 of these are criminal or quasi-criminal (such as immigration cases). Here are brief descriptions (my own) of the questions presented in the criminal cases that have been granted:

Cases already scheduled for argument:

1. [Ramos v. Louisiana](#) (No. 18-5924), scheduled for argument on Oct. 7, 2019 (the first day of the new Term): Is the Sixth Amendment's unanimous jury requirement for conviction in criminal cases "incorporated" against the States?

2. [Kahler v. Kansas](#) (No. 18-6135), scheduled for argument on Oct. 7, 2019: Does a State’s abolishment of the insanity defense violate the 8th and 14th Amendments?
3. [Mathena v. Malvo](#) (No. 18-217), scheduled for argument on Oct. 16, 2019: Do *Miller* (holding that mandatory life without parole for persons under 18) and *Montgomery* (holding that *Miller* is retroactive) permit the 4th Circuit to vacate the LWOP sentence of **the juvenile “D.C. sniper,”** who was seventeen at the time of his offense but the sentence was not mandatory?
4. [Kansas v. Garcia](#) (No. 17-834), scheduled for argument on Oct. 16, 2019: Is Kansas’s prosecution of three persons for “identity theft” (using another person’s SSN) preempted by the federal Immigration Reform and Control Act, and may Kansas use information that is on IRCA forms when a statute says the information may not be used “for purposes other than” specified federal actions?
5. [Kansas v. Glover](#) (No. 18-556), scheduled for argument on Nov. 4, 2019: Is it reasonable suspicion under the Fourth Amendment to stop a car on the assumption that the registered owner is the one driving the car, when you do not actually know who the driver is and no traffic laws were violated?
6. [Barton v. Barr](#) (No. 18-725), scheduled for argument on Nov. 4, 2019: Is the “stop-time” rule for immigration cases -- stopping a period of continuous residence when an alien commits an offense that would render someone “inadmissible” – triggered if the alien is a lawful permanent resident who is not seeking admission?
- 7-9. **Three immigration “DACA” cases**, Nos. 18-587, 588 and 589, low number is [Dept. of Homeland Security v. U.C. Regents](#), scheduled for argument on Nov. 12, 2019: Is the decision by DHS to “wind down” the DACA program judicially reviewable, and if so, lawful?
10. [Hernandez v. Mesa](#) (No. 17-1678), scheduled for argument on Nov. 12, 2019: Should the Court recognize a claim for damages arising directly under the Fourth and Fifth Amendments under *Bivens*, where no other remedy at law exists for the shooting death of a juvenile across the border by a federal agent?

Cases granted but not yet scheduled for argument:

11. [Opati v. Republic of Sudan](#) (No. 17-1268): Does the Foreign Sovereign Immunities Act apply retroactively to allow punitive damages against foreign states for terrorist activities occurring before enactment of the new statute?
12. [New York State Rifle & Pistol Assn v. City of New York](#) (No. 18-280): Whether a city law prohibiting transportation of a handgun outside city limits is constitutional? A motion to dismiss as moot based on changes to New York laws is pending (filed July 22, 2019).
13. [Holguin-Hernandez v. United States](#) (No. 18-7739): Must a defendant who argued for a lower sentence formally object after pronouncement of sentence, to preserve a claim on appeal that the sentence is unreasonable?
- 14 & 15. Two consolidated immigration cases, lower number is [Guerrero-Lasprilla v. Barr](#) (No. 18-776): When and how is denial of “equitable tolling” on a statutory motion to re-open judicially reviewable? [Hard to precisely describe the question in these two cases.]

16. [Kelly v. United States](#) (the “**Bridgegate**” case), No. 18-1059: Does a public state official criminally defraud the United States, when the official advances a reason for actions that is not the true reason, and the actions taken cost the United States money?
17. [McKinney v. Arizona](#) (No. 18-1109): Death penalty case, two questions, both revolving around the requirement that courts must consider non-statutory “mitigating evidence” before imposing a death sentence: (1) must the court apply current law, or the law as it stood when the offense was committed (where current law benefits the defendant)? And (2) must the state resubmit the case to a new jury, when resentencing the defendant based on additional mitigating evidence? [Again, precisely identifying the QPs is difficult because the parties’ statements are very different.]
18. [Shular v. United States](#) (No. 18-6662): Does evaluation of what counts as a “serious drug offense” under the Armed Career Criminal Act require the same sort of “categorical approach” as is required for determining a “violent felony”?
19. [Banister v. Davis](#) (No. 18-6943): Whether and under what conditions a timely Rule 59(e) motion [to alter or amend the judgment] should be recharacterized as a second or successive habeas petition?

WHO WROTE WHAT
in CRIMINAL-and-related Cases in the 2018-19 Term

(all writings, not just majorities, in argued cases)

Majority opinions are in **Bold**; *Concurrences are in italics*; Dissents are underlined

ROBERTS

Nieves
Moore

THOMAS

Stokeling
Mont
Cochise
Gamble
Mitchell
Timbs
Quarles
Nielsen

GINSBURG

Timbs
Nieves
Gamble

BREYER

Rehaif
Stitt
Lorenzo
Haymond
Bucklew
Nielsen

ALITO

Mitchell
Gamble
Nielsen
Tenn. Wine
Gundy
Flowers
Haymond
Rehaif
Madison
Herrera
Moore

SOTOMAYOR

Garza
McDonough
Herrera
Mitchell
Bucklew
Stokeling
Nieves
Mont

KAGAN

Gundy
Madison

GORSUCH

Davis
Haymond
Bucklew
Dawson
Nieves
Timbs
Gamble
Mitchell
Tenn. Wine

KAVANAUGH

Flowers
Quarles
Bucklew
Nielsen
Davis

Per curiam summary reversals (no individual author)

Moore
City of Escondido
Shoop v. Hill

Total Criminal-and-Related Decisions in argued cases: 26 (out of 66 total signed decisions), plus 2 *per curiam* summary reversals. I'd say that 18 of 26 were "pure" criminal cases.

Total Writings in argued Criminal Law-and-Related cases: 54 (plus 3 summary reversals). This is much fewer than 72 last Term – but last Term was an aberration, it was only 47 the Term before. Particularly with regard to Roberts, Ginsburg, and Kagan, it seems clear that some Justices are putting their energies elsewhere.

Criminal Law Workhorses: Justice Alito (11 writings, 5 of them dissents). He is a former U.S. Attorney and perhaps the most interested in federal criminal law. At the other end of the ideological spectrum, Justice Sotomayor (also a former prosecutor) seems to enjoy her role as a "Great dissenter" in criminal cases – a mantle usually not assumed until a much older age! Finally, Justice Kagan wrote less than ever – her interests, and I think her long-term strategy, lie elsewhere. As noted in prior years of this compendium, Justice Kagan prefers not to write dissents unless necessary.