

**THE CRIMINAL JUSTICE SECTION  
OF THE  
AMERICAN BAR ASSOCIATION**

*August 5, 2022 – Chicago, Illinois*

**ANNUAL REVIEW  
of the  
U.S. SUPREME COURT’S  
CRIMINAL LAW CASES  
(2021-2022)**

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 2021 Term (Oct. 2021-August 2022)  
(with clickable links to the cases).

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August 2022

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**THE 2021 TERM (OCT. 2021- JULY 2022)**

**CRIMINAL LAW (AND RELATED) DECISIONS  
OF THE U.S. SUPREME COURT**

**TABLE OF CONTENTS**

	<u>Page</u>
<b>List of all Cases, with <u>Brief</u> Descriptions .....</b>	<b>2</b>
<b>2022 ABA Annual Meeting Panelists.....</b>	<b>6</b>
<b>Editor’s Brief Overview of the Criminal Docket, OT 2021 .....</b>	<b>6</b>
And Explanatory Notes .....	10
<b>Detailed Summaries of all Cases (begins on.....</b>	<b>12</b>
<b>Constitutional Decisions</b>	
<b>A. First Amendment.....</b>	<b>12</b>
<b>B. Second Amendment.....</b>	<b>12</b>
<b>C. Fourth Amendment .....</b>	<b>14</b>
<b>D. Fifth Amendment.....</b>	<b>16</b>
<b>E. Sixth Amendment .....</b>	<b>19</b>
<b>F. Eighth Amendment.....</b>	<b>20</b>
<b>Federal Statutes</b>	
<b>A. Federal Death Penalty .....</b>	<b>21</b>
<b>B. Federal Criminal Sentencing.....</b>	<b>22</b>
<b>C. RLIUPA (Religious Land Use and Institutionalized Persons Act) .....</b>	<b>25</b>
<b>D. Mens Rea .....</b>	<b>28</b>
<b>Habeas Corpus.....</b>	<b>29</b>
<b>Native American Tribal Authority .....</b>	<b>33</b>
<b>Immigration Law.....</b>	<b>35</b>
<b>Civil Cases Related to Criminal Topics .....</b>	<b>39</b>
<b>Summary Reversals (without full briefing or argument) Opinions.....</b>	<b>42</b>
<b>Writings Related to Orders</b>	
<b>A. Applications for Stays .....</b>	<b>43</b>
<b>B. Denials of <i>Certiorari</i>: Death Penalty Cases &amp; Others .....</b>	<b>43</b>
<b>C. Orders to Grant <i>Certiorari</i>, Vacate, and Remand (GVRs).....</b>	<b>46</b>
<b>Criminal Law <i>Certiorari</i> Grants for the Upcoming 2022-23 Term.....</b>	<b>47</b>
<b>Chart: “Who Wrote What” in Criminal Law-and-Related Cases (2021-22 Term).....</b>	<b>49</b>

**LIST OF CASES SUMMARIZED, WITH BRIEF DESCRIPTIONS**

*(divided topically; in reverse chronological order within topics)*

*Detailed Summaries of each decision begin on p. 12*

**I. CONSTITUTIONAL DECISIONS**

**A. First Amendment**

*Egbert v. Boule* (June 8; **Thomas**, 6 (5+1)-1): No *Bivens* cause of action for First Amendment violations (or 4<sup>th</sup> A in this case); (**summarized under Fourth Amendment below**) .....14

**B. Second Amendment**

*New York State Rifle and Pistol Association Inc. v. Bruen* (June 23; **Thomas**, 5-4): Second A right includes presumptive right to openly carry firearms in public. Gov’t must justify exceptions by “historical traditions” in firearms regulation (no “intermediate scrutiny”). Some bans in “sensitive places,” or based on “manner” or “intent” of carrying, are allowed.....12

**C. Fourth Amendment**

*Egbert v. Boule* (June 8; **Thomas**, 6-3): No *Bivens* cause of action for federal excessive force claim, despite similarity to the 4<sup>th</sup> A claim in *Bivens*.....14

*Thompson v. Clark*: (April 4; **Kavanaugh**, 6-3): For a 4<sup>th</sup> A claim of “malicious prosecution” under § 1983, plaintiff need not show that a prosecution ended with an “affirmative indication of innocence,” but only that the prosecution ended without a conviction. ....15

**D. Fifth Amendment**

*Vega v. Tekoh* (June 23; **Alito**, 6-3): A *Miranda* violation does not provide a basis for a § 1983 claim; *Miranda* warnings are not a constitutional “right” or “law.” .....16

*Denezpi v. U.S.* (June 13; **Barrett**, 5-4 (Gorsuch dissent)): No double jeopardy issue when federal authorities prosecute both a tribal offense and a federal criminal offense; separate sovereigns are the source of law for each offense, so they are not the “same” offense. ....17

**E. Sixth Amendment**

*Hemphill v. New York* (Jan. 20; **Sotomayor**, 8 (6+2)-1): The Confrontation Clause is violated by admission of unavailable witness’s prior transcript; New York’s “defense opens the door” doctrine, when “necessary to correct a misleading impression,” is unconstitutional.....19

**F. Eighth Amendment (capital cases)**

*Nance v. Ward* (June 23; **Kagan**, 5-4): Capital prisoner proposing a “feasible” method of execution may still challenge their execution method under § 1983, even though the proposed method is not authorized in that state .....20

*Ramirez v. Collier* (March 24; **Roberts**, 8-1) (summarized under “Federal Statutes,” below): Capital prisoner is likely to prevail (under the RLIPUA statute) regarding a religious request to be touched and spoken to by a pastor at execution; injunction allowed.....25

**II. FEDERAL STATUTES**

**A. Federal Death Penalty**

*U.S. v. Tsarnaev* (March 4; **Thomas**, 6-3): “Boston Marathon Bomber” death penalty reinstated; *voir dire* and mitigating evidence arguments rejected.....21

**B. Federal Criminal Sentencing**

*Wooden v. U.S.* (March 7; **Kagan**, 9-0 (but w/four concurs)): Ten burglaries of storage lockers in a row committed in one continuous episode do not meet the ACCA’s “different occasions” requirement for multiple prior “violent crime” convictions. ....22

*U.S. v. Taylor* (June 21; **Gorsuch**, 7-2): § 924(c) enhancements): An attempted Hobbs Act robbery is not a “crime of violence” under § 924(c). ....24

*Concepcion v. U.S.* (June 27; **Sotomayor**, 5-4 (Thomas and Gorsuch provide fifth votes for defendant)): The 2018 “First Step Act” permits federal judges to consider any intervening facts or law, when resentencing for crack cocaine sentences. [Consider together with Gorsuch’s view in *Patel v. Garland*, below.].....25

**C. RLIUIPA (Religious Land Use and Institutionalized Persons Act)**

*Ramirez v. Collier* (March 24; **Roberts**, 8-1): Capital prisoner is likely to prevail (under the RLIPUA statute) regarding a religious request to be touched and spoken to by a pastor at execution; injunction allowed.....25

**D. Mens Rea**

*Ruan v. U.S.* (June 27; **Breyer** (9 (6+3) to 0 (*Alito* concur for 3 in judgment only))): Conviction of licensed doctors for distributing controlled substances “except as authorized” is vacated because government must prove the defendant subjectively acted “knowingly or intentionally;” a “reasonable physician standard is rejected .....28

[Consider together with *Unicolors* (Feb. 24, listed under “Civil Cases” below), a copyright case discussion of “mistake of fact vs. mistake of law” doctrine].....42

**III. HABEAS CORPUS**

*Shoop v. Twyford* (June 21; **Roberts**, 5-4 (3+1) (capital case)): Federal court can’t use “All Writs” Act to transport state prisoner for neurological testing, without first finding that the evidence sought would be admissible. ....29

*Kemp v. U.S.* (June 13; **Thomas**, 8-1 (Gorsuch dissent)): A judge’s error of law is a “mistake,” so governed by FRCivP 60(b)(1) not (b)(6) [so habeas prisoner loses here as untimely]. ....30

*Shinn v. Ramirez* (May 23; **Thomas**, 6-3 (capital case)): Federal habeas court may not

consider evidence outside the state court record, even to prove a claim that post-conviction counsel was ineffective [*Martinez v. Ryan* (2012) is limited].....31

***Brown v. Davenport*** (April 21; **Gorsuch**, 6-3): In a constitutional “harmless error” habeas challenge, federal court cannot grant relief unless both the *Brecht* and AEDPA standards are met; they are not met here (long historical review [revision?] of habeas law by Justice Gorsuch). .....32

#### IV. NATIVE AMERICAN TRIBAL AUTHORITY

***Oklahoma v. Castro-Huerta*** (June 29; **Kavanaugh**, 5-4 (Gorsuch dissent)): Federal and state governments have concurrent jurisdiction to try crimes committed in “Indian country” against Indians by non-Indians. “Indian country is part of a state, not separate from it.” [Gorsuch dissent: this refuses to recognize the force of my opinion in *McGirt v. Oklahoma* (2020), which found 43% of Oklahoma to still be “Indian Territory.”] .....33

***Ysleta del Sur Pueblo v. Texas*** ((June 15; **Gorsuch**, 5-4 (with Barrett; Roberts dissent)): Only those gaming activities entirely prohibited by Texas law are also banned by federal law from Tribal lands. ....34

***Denezpi v. U.S.*** (June 13; **Barrett**, 5-4 (Gorsuch dissent)): [**summarized under Fifth Amendment, above**]: No double jeopardy issue when federal authorities prosecute both a tribal offense and a federal criminal offense; separate sovereigns are the source of law for each offense, so they are not the “same” offense. ....17

#### V. IMMIGRATION LAW

***Biden v. Texas*** (June 30; **Roberts**, 6-3 (5-4 on jurisdiction)): The Executive branch has authority to rescind the trump “Remain in Mexico” policy. ....35

***Garland v. Aleman-Gonzalez*** (June 13; **Alito**, 6-3): District court has no jurisdiction to entertain a class action of undocumented aliens who claim they are entitled to a bond hearing after 180 days of detention. ....36

***Johnson v. Arteaga-Martinez*** (June 13; **Sotomayor**, 9-0 (really 8-1, Breyer dissent in part)): Statute does not provide certain undocumented aliens with a right to a bond hearing after 180 days of detention. ....37

***Patel v. Garland*** (May 16; **Barrett**, 5-4 (Gorsuch dissent)): District court has no jurisdiction to review factual findings made in a discretionary adjustment of status proceeding. [compelling facts; Gorsuch says “bureaucratic mistakes” ought to be reviewable.] .....38

#### VI. CIVIL CASES RELATED TO CRIMINAL TOPICS

***Golan v. Saada***: (June 15; **Sotomayor**, 9-0, international child abduction): Once a Federal judge has found that a child is exposed to a grave risk of harm if returned to a foreign country, the Hague Convention does not categorically require court to examine all possible ameliorative measures (Order to return child to Italy is vacated). ....39

*Thompson v. Clark* (April 4; **Kavanaugh**, 6-3) [summarized under “Fourth Amendment” above]: For 4<sup>th</sup> A claim of “malicious prosecution” under § 1983, plaintiff need not show that a prosecution ended with “affirmative indication of innocence,” but only that the prosecution ended without a conviction. ....15

**Two “Civil case” decisions addressing the “State Secrets privilege”:**

*FBI v. Fazaga* (March 4; **Alito**, 9-0): The Foreign Intelligence and Surveillance Act (FISA) rules do not “displace” protections of the State Secrets privilege. ....40

*U.S. v. Zubaydah* (March 3; **Breyer**, 7 (five opinions) to 2 (Gorsuch dissenting with Sotomayor)): The State Secrets privilege protects govt from having to confirm or deny the location of a secret CIA detention site (even if the location is known through other sources). ....41

*Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.* (Feb. 24; **Breyer**, 6-3) (consider together with *Ruan*, above): Both “mistakes of fact” and “mistakes of law” can excuse an inaccurate copyright registration. “Knowledge [as used in the Copyright Act] means actual, subjective awareness of both the facts and the law.” .....42

**SUMMARY REVERSALS (Opinions without full briefing or argument)**

*Rivas-Villegas v. Cortesluna* (Oct. 18; *per curiam*, 9-0): Circuit precedent was not so similar that qualified immunity should be denied. ....42

*City of Tahlequah, Oklahoma v. Bond* (Oct. 18; *per curiam*, 9-0): Law is not “clearly established” where “level of generality” for finding similar precedents is too general; officers here were entitled to qualified immunity.....43

**WRITINGS RELATING TO ORDERS**

- A. Denials of Stay Applications ..... 43
- B. Denials of *Certiorari in Death Penalty and Other Cases* .....43
- C. Orders to Grant *certiorari*, Vacate and Remand (“GVRs”).....46

**CRIMINAL LAW CERTIORARI GRANTS FOR UPCOMING (Oct. ’22) TERM**

- A. Already Scheduled for Argument .....47
- B. Granted but Not Yet Scheduled for Argument (as of August 2, 2022).....47

**IX. CHART: Who wrote What in OT ’21 .....49**

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

**Annual Review of the  
Criminal Law (and Related) Opinions of the  
U.S. Supreme Court  
Issued During the October 2021 Term**

**2022 Annual Meeting Panelists**

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**The Editor's Brief Overview of the 2021-22 Term, Criminal Cases**

**The most interesting observation about OT '21 is that seven cases were decided in favor of the defendant** (*Hepmhill*, *Ramirez*, *Nance*, *Wooden*, *Taylor*, *Concepcion* and *Ruan*). If you add two additional "liberal" results in "quasi-criminal" cases (*Thompson* and *Biden v. Texas*) – plus one Native American decision that might be argued either way (*Ysleta*) -- the picture is one of a more "moderate" Court, on the criminal side, than the civil side of the docket reflects. Of course, even on the criminal side of the docket, the major constitutional cases decided last Term reflect strong conservative results: *Bruen* (finding a broad Second Amendment "right to carry" weapons in public), *Vega* (finding that *Miranda* is not a constitutional "right" even though it applies to the States), and *Egbert* (all-but-overruling *Bivens*). Still, even the constitutional side of the criminal docket did not go entirely against criminal defendants -- *Hemphill* (6<sup>th</sup> A), and *Ramirez* (8<sup>th</sup> & 1<sup>st</sup> A), and *Nance* (8<sup>th</sup> A) each endorsed defendants' constitutional arguments, although *Ramirez* was technically statutory.) And the **habeas portion** of the docket (*Shoop*, *Kemp*, *Shinn* and *Brown*) was unforgivingly ungenerous to state criminal defendants. But a total of ten "liberal" results on the criminal and quasi-criminal docket, out of 25 criminal cases total, is a very different picture of the Court than the popular media impression of this Term.

The total number of "cases decided" by the Court in a Term is always debatable. This year, if you count just signed opinions after full briefing and oral argument, it is 58. Then you might add five argued cases that produced no interesting opinions, for a total of 63. You could also add three unsigned, unargued "Summary reversals," to get to 66. And if you wanted to add other cases in which some Justice wrote something about an "Order" -- such as on "Stay" applications or on denials of *certiorari* (this is something like the ["Shadow Docket" you have heard about](#)) – well, the numbers increase dramatically. One good source of statistics is [Scotusblog's "Stat pack."](#) But all sources make debatable choices – there is no universally agreed-upon approach to the numbers.



For 25 years, I have collected my own statistics and written my own “Criminal Law and Related” Summaries booklet (*you are currently reading the 2022 version*). I use a broad definition of “criminal” cases, which in addition to purely criminal (state and federal cases), counts Supreme Court decisions that are civil but obviously about criminal prosecutions (habeas corpus, for example), civil cases that have significant implications for criminal prosecutions (immigration, for example); cases that are civil lawsuits against government actors for various criminal actions (§1983 lawsuits for excessive force, for example), and civil cases that can have reverberations in criminal contexts (this Term, for example, *Fazaga* and *Zubaydah* (two “state secrets” privilege cases) and *Unicolors* (a copyright case that discusses “mistake of fact, mistake of law” doctrine, bearing similarity to the *mens rea* debate in *Ruan*).

Under my broad definition, there were 25 “criminal law and related” decisions issued by the Court this Term after full briefing and argument (and 2 additional “*per curiam*” summary reversals in criminal qualified immunity cases). 25 such decisions, out of an overall docket of, say, 63 cases – about 40% of the docket -- is a bit above normal. The Supreme Court’s docket is usually between about 25% and 33% criminal cases. But again, it depends how one counts. ☺

After two “pandemic Terms” during which the oral presentation of cases was dramatically altered, the Court was almost “back to normal” this Term. That is, this Term’s cases were all argued to the Justices in person, in the Supreme Court’s courtroom at 1 First Street (that is, except for a very few arguments in January when Justice Sotomayor, whose diabetes is an underlying Covid-susceptible medical condition, did not take the bench but instead listened live in her chambers due to a “who will wear a mask” controversy). However, unlike normal, only the advocates (and one “panel” media representative) were allowed into the courtroom to watch the arguments in person; there was no public entry into the building at all. Still, the rest of us could listen to “live-streamed” audio (not video), a new pandemic-induced practice that will now continue beyond any pandemic limitations. That is a healthy positive from the disrupted pandemic years.

The Justices also did not release their opinions from the courtroom bench (as has been the past practice), but instead via the Court’s website. Even if the Justices go back to from-the-bench opinion announcements, many hope that a practice of instant and simultaneous website opinion posting will continue. Finally, on the topic of covid-changed practices, although it was not required by any rule, the Justices apparently informally agreed to defer to Justice Thomas (the Senior Justice on the Court) for the first question in every oral argument (if he chose to take it). The years of a silent Justice Thomas are now a dim and fading memory – he is actively engaged and his questions often set the tone for following questions and arguments.

For those of you who still enjoy watching the Ninth Circuit get kicked around, the Court reversed 12 of 12 granted CA9 cases. Just remember that the Ninth Circuit’s immense workload produces far more decisions for potential review than any other Circuit – and that the Court reverses all Circuits far more often than it affirms. (For example, this Term the Court granted 8 cases from the 5<sup>th</sup> Circuit (a Circuit viewed as more conservative than the 9<sup>th</sup>) and it also reversed 7 of those decisions.). The Ninth Circuit – and all “lower” Court judges – takes comfort in Justice Jackson reminding them in 1953 that the Justices “are not final because we are infallible; we are infallible only because we are final.”

The “blockbuster” decision of this Term was, of course, *N.Y. State Rifle and Pistol Assn v. Bruen*. Building on the 2008 *Heller* and 2010 *McDonald* decisions, the Court announced that there is a Second Amendment “right to carry” a firearm “in public,” “for self defense,” and that while licensing requirements may be imposed, they must be based on some “historical regulation” of firearms in this

country -- and it is the government, not a license applicant, who must bear the burden of proving that the regulation is constitutional. A government may not require any special showing of “good cause” for individuals to obtain a public-carry license. Much still remains to be litigated in light of *Bruen*. But there is no doubt that this is a dramatic shift in the status quo in many States, rivaling (but not surpassing?) the impact of the Court’s “no constitutional right to abortion” decision in *Dobbs*.

The Justices also placed two venerated precedents on the chopping block. First, in *Egbert*, Justice Gorsuch’s concurrence said out loud what Justice Alito’s majority opinion all-but-decided: *Bivens v. Six Unknown Federal Narcotics Agents* (1970) should be overruled. *Egbert* did not expressly overrule *Bivens*, but the decision says that a case must be virtually identical to *Bivens* on its facts to justify an impling, from a constitutional provision, a civil action for damages against federal agents not provided statutorily by Congress. Implied constitutional damages actions appear to be severely limited by *Egbert*, and precedents that extended *Bivens* beyond the 4<sup>th</sup> Amendment seem endangered.

Similarly, *Vega v. Tekoh* described a very limited constitutional (and arguably inconsistent) vision of *Miranda*, by ruling that although *Miranda* is “constitutionally based” it is not a “constitutional right” that can provide damages under 42 U.S.C. §1983. The opinion reads like an “almost overruling” of *Dickerson* (2000), in which Chief Justice Rehnquist wrote for the Court that *Miranda* (1966) states “constitutionally based” rights and “law” that may be applied against the States (as they were in *Miranda* itself). In *Vega*, Justice Alito says that *Dickerson*’s statements were “bold and controversial,” and inconsistent with prior (and subsequent) decisions describing the *Miranda* warnings as merely judge-made “prophylactic” rules. As such, they cannot be used as “law” to found a civil action under §1983 for violation of “constitutional rights or law.” Why a “bold and controversial” precedent can be ignored, is not explained – and neither is the continued application of *Miranda* through the 14<sup>th</sup> Amendment’s Due Process Clause against the States. How can a constitutional “due process” right not be a “constitutional right” under §1983? *Vega* strikes this Editor as the most mysterious ruling of the Term, basically an “*ipse dixit*” decision born out of hostility to *Miranda* itself.

The habeas portion of the docket also reflects uniformly anti-prisoner decisions this Term. Justice Gorsuch has now written his historical (and limiting”) views of the proper role for federal habeas into a majority opinion (in *Brown*). And *Shinn* reflects another very limited view of a precedent, ruling that the right to challenge the ineffective assistance of post-conviction counsel in a habeas action (*Martinez v. Ryan*, 2012), does not include a right to develop any evidence to prove such a claim, beyond what is already in the state court record. This is ironic, of course (as Justice Sotomayor’s dissent firmly describes), since the state court record is necessarily inadequate to support ineffectiveness because state court counsel were (allegedly) ineffective in developing it.

Nevertheless, as the Term evolved, Justice Gorsuch found himself dissenting from the conservative criminal majority (albeit on technical grounds) in two later habeas cases, *Kemp* and *Shoop*. When you combine those dissents with Justice Gorsuch’s dissenting opinions in some immigration cases (e.g. *Patel*), and also Native American cases (e.g. *Denezpi* and *Castro-Huerta*), a fascinating portrait of Justice Gorsuch is beginning to emerge. (Gorsuch also wrote the *Taylor* (pro defendant) and *Yselta* (pro-Native American) decisions.) Undoubtedly conservative and avowedly “originalist” and “textualist,” Justice Gorsuch is also deeply disturbed by administrative “lawmaking” in criminal contexts (*Castro-Huerta*) and opposed to allowing “bureaucratic mistakes” going unreviewed when seemingly unjust (*Patel*). One might also add to this list Justice Gorsuch’s joinder with the three “liberals” in the *Grzegorzcyk* case, dissenting from the denial of the Solicitor General’s GVR request, below at page 45. Justice Gorsuch taught legal ethics at Colorado law schools for a

decade before ascending to SCOTUS. A deep sense of fairness and justice appears to lead him toward results that are not always ideologically predictable. Keep your eye on Gorsuch as time moves on.

I will say more in detail at our program, about the 6, or 9, “pro-defendant” decisions this Term. That is a very large chunk of the docket, and it flew entirely under the radar of the mainstream media (who were perhaps understandably focused on Abortion and “public carry” gun rights). It may demonstrate at least two things, perhaps (I am tentative to go too far in psychoanalyzing Justices to whose deliberations and private thoughts I am a stranger). First, the “liberal” Justices (here I am inclined to most credit Kagan) are learning how to couch their arguments, and cast their *certiorari* votes, in ways that may attract one or two of their more conservative colleagues. And second, it suggests that the conservative Justices are open to allowing “pro-defendant” results in some, “small,” cases, while keeping their focus trained on the far broader constitutional cases that have huge national, as opposed to individual, consequences. Mind you, I resist using unspecific labels like “liberal” or “conservative” for complex cases, issues, or personalities. I also think speculating about the “whys” and underlying motivations and “strategies” of U.S. Supreme Court Justices is, at best, a fool’s game. Still, the ideological divide among the current Justices seems pretty clear and stark. And speculative attempts to try to explain and understand “patterns” in decisions (although a pretty small “sample”) are often irresistible.

Meanwhile, the area of sentencing, federally at least, is one in which all three decisions (*Wooden*, *Taylor*, and *Concepcion*) came out in favor of the defendant. Written by three different, and perhaps not predicted, Justices: Kavanaugh, Gorsuch, and Sotomayor (who was joined by Gorsuch and Thomas!). *Wooden* is a wonderfully entertaining discussion of what constitutes an “occasion,” a case that generates endless lawyerly hypotheticals. Wooden and friends break into a storage locker facility and one unoccupied storage locker; and then quickly blast through the cheap sidewalls of nine additional side-by-side storage lockers. Is that ten separate burglaries? Yes -- and Wooden actually pleads guilty to ten such state offenses. But when it later comes to deciding whether to apply a huge federal sentencing enhancement for multiple “crimes of violence” (and burglary is already defined as a “crime of violence”), the Court decides that no, this was only one such crime, because the statute limits the definition to one “occasion.” Justice Kagan employs one of her typically understandable “Joe Average” examples: a wedding with many components (pre-ceremony gathering, ceremony, reception, dancing) is often described as “a wonderful [single] occasion.”

We could go on in entertaining detail about many of the other cases on this Term’s criminal docket. And we will – the panel needs to leave some things for its in-person work ☺! The four Immigration decisions, and the three Native American decisions, as well as two cases addressing the “state secrets” privilege (*Zubaydah* and *Fazaga*), are all fascinating. Again, Justice Gorsuch’s unexpected (by some) deep concerns about tribal sovereignty and the awful historical treatment of tribes is extremely interesting to see spread on the pages of the U.S. Reports. Meanwhile, *Ruan* (and a civil copyright case, *Unicolors*) present always mind-bending ideas about *mens rea*, and what counts as criminal “knowledge” and “intent.” When reading these decisions, 1L nightmares may return!

Finally, the Court has (right now) a relatively unexciting docket of 8 criminal cases already granted for review starting next October. And the last page of this booklet lets you see, on one page, “who wrote what” this Term. The Justices produced 66 separate writings (majorities, concurrences, and dissents) among its 27 criminal-and-related cases. My view is that a Justice never expends the time, energy, and “capitol” to write a separate opinion, unless they believe they have a good reason. So reading those separate writings can often yield revealing insights into their individual perspectives and concerns. Interestingly, the largest number of separate writings per Justice (10) was shared by Justices

Sotomayor and Gorsuch (who appear to have become good friends after sitting next to each other for two years – that will change **now that Justice Ketanji Brown Jackson is added** – whose new perspective will perhaps change a few things on the Court, unperceived at this early moment?). That the “workhorse” title is shared by Justices of “opposite” ideological perspectives, is perhaps the best demonstration of this Term’s moderate (relatively speaking) criminal law results.

The energy devoted, in particular by **Justice Sotomayor**, to writing separately about the Court’s “Orders” (whether dissenting from or just “respecting” them) -- see p. 43 -- is note-worthy. Plainly both she and her clerks devote substantial time and effort to finding and evaluating items on the Court’s docket that others pay little attention to. It will be interesting to see [\*what affect\*](#) of a second woman of color (Jackson), who also has deep experience as a trial district judge and has [\*mentioned her concerns\*](#) about criminal justice [\*as a former public defender\*](#), will have on this aspect of the Court’s criminal docket. [The foregoing hyperlinks are a random sample of hundreds of articles about Justice Janckson that googling brings up.] Justice [\*Byron White is alleged to have said\*](#) that the addition of any one new Justice produces an entirely “new Court.” An overview of this Term ought not pass without mention of the addition of this particular new Justice with deep criminal law experience.

Our fantastic panelists will have more to say about these cases, and likely others not mentioned here. Stylistically, I hope that the “clickable” links in the electronic version of this booklet are useful to you. The ABA also post these Summaries on its Criminal Justice Section webpage (and as always, you can also request a copy by emailing the staff at the Criminal Justice Section, or Professor Little directly.) I am always happy to receive your comments, good bad or (I hope not) indifferent!). Once again, I am 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. I particularly want to thank Carol Rose, whose now-decades of experience of working with the ABA, and me, entitles her to a gold medal! Finally, the [\*website\*](#) for the Criminal Justice Section can give you a wealth of information on a multitude of other criminal law-related topics!

I look forward to sharing more fascinating and significant rulings with you next summer, as well as in this one. Meanwhile, remember to Do Justice (“*Fiat Justicia*,” UC Hastings’ motto since 1878) in whatever you do!

— Professor Rory K. Little  
UC Hasting College of the Law  
San Francisco, CA

August 2022

### **Explanatory Notes for these Materials**

The pages that follow provide detailed summaries of all 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 provides the page number where its more-detailed summary is located, below.) Some decisions address more than one subject; Professor Little 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 securities law cases, habeas cases, immigration law decisions, and others, because such “civil” cases often arise in a criminal factual milieu, or can be useful to practitioners and judges for applying the criminal law (if not immediately, then in the future). For example, the relevance of immigration issues to criminal liability and sentencing; and the similarities between civil securities fraud and criminal fraud, 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 opinion within the case, and citation to the lower court’s opinion. A “**Headline**” description of the holding is then immediately provided. Then follows a more 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 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 -- we firmly believe that the words of the Justices themselves best reflect the meaning of their opinions. Finally, comments that appear in [brackets] are the (sometimes opinionated) thoughts of Professor Little, not the Justices. We signal most of these with a bolded “[**Ed. note...**],” unless that interferes with the “flow” of the summary.

Following the Summaries of Opinions in argued cases, we provide brief descriptions of opinions in cases that were “summarily reversed” – that is, decided on just the certiorari filings, without full merits briefing or oral argument. Following that, we provide interesting dissents or concurrences (“Writings”) regarding Orders issued this Term (most often, dissents from denial of stays or *certiorari*, or Orders on “stay” applications in criminal cases).

The booklet ends with a list of criminal-law-and-related cases in which *certiorari* has already been granted for next Term, for a preview of what may be coming. And the final page of the booklet is always a chart showing which Justices wrote which opinions this Term (including separate concurring and dissenting opinions). This provides a “snapshot” of which Justices are writing, what sort of opinions they are spending their time on, and how much work they are devoting to criminal law topics.

These materials are the product of Professor Little alone (with some drafting and substantial formatting 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 are often omitted; and changes in capitalization and punctuation and even verb tenses or singular-plurals, and other non-substantive changes, may have been made. Finally, remember that what follows 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 begin on the next page.*

# DETAILED SUMMARIES OF THE COURT'S CRIMINAL LAW (AND RELATED) OT 2021 OPINIONS

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## I. CONSTITUTIONAL DECISIONS

### A. FIRST AMENDMENT

*Egbert v. Boule*, 142 S.Ct. 1793 -- **summarized below under Fourth Amendment** (Jun. 8, 2022). **Thomas**, 6 (5+1) to 3; *Gorsuch* concurring; *Sotomayor* concurring in judgement in part and dissenting in part.

**Headline:** We will not imply a *Bivens* cause of action for First Amendment violations -- and we will not apply *Bivens* even for the Fourth Amendment here, because it is a “new context.”

### B. SECOND AMENDMENT

*New York State Rifle and Pistol Association Inc. v. Bruen*, 142 S.Ct. 2111 (Jun. 23, 2022). **Thomas**, 5-4; *Alito* concurring; *Kavanaugh* concurring with Roberts; *Barrett* concurring; *Breyer* dissenting, reversing 818 Fed.Appx 99 (CA2, 2020).

**Headline:** The Second Amendment provides “law abiding adult citizens” with a **constitutional right to carry firearms in public for self-defense**. State can limit in “sensitive places” and provide other exceptions. But **the constitutional presumption is that such persons have the right to carry**, and the burden is on the government which **must justify any exceptions as consistent with this nation’s history of firearms regulation**.

**Facts:** Two New York state residents (Nash and Koch) applied for an unrestricted license to carry a handgun in public. They “did not claim any unique danger to [their] personal safety,” although Nash “cited a string of recent robberies in his neighborhood.” Both men were denied an unrestricted license, although they were granted a limited license for “hunting and target shooting,” and to “carry to and from work.” The New York state statute (the “Sullivan law, in effect since 1905) requires an applicant to demonstrate “proper cause” for having a public carry license, and a licensing officer may deny the license if the applicant does not “demonstrate a special need for self-protections distinguishable from that of the general community,” such as “particular threats, attacks, or other extraordinary danger.” Denials will be upheld so long as there is a “rational basis in the record.” The federal courts dismissed this lawsuit challenging the NY law, by applying “intermediate scrutiny” and finding that the licensing law was “substantially related to the achievement of a substantial government interest.” Six states and the District of Columbia have such discretionary “may issue” laws. (By contrast, 43 states not at issue here have less restrictive “shall issue” laws, requiring that a public carry license be issued “whenever applicants satisfy certain threshold requirements.”)

**Thomas (for 6)** [this is a short summary of the 63-page majority opinion]: In *Heller* (2008) and *McDonald* (2010) we ruled that the Second Amendment “protects the right of an ordinary law-abiding citizen to possess a handgun in the home for self-defense.” We now rule that it similarly protects a **general “right to carry a handgun for self-defense outside the home.”** (Later described at p. 54 as “a right of the public to peaceably carry handguns for self-defense.”) By restricting this general right and placing the burden on the applicant to “demonstrate a special need for self-defense,” the New York law is unconstitutional.

We reject the lower courts’ “two-step, means-end” scrutiny approach. **“The Constitution presumptively protects” handgun carrying in public**, and **“the government may not simply posit that [a] regulation promotes an important interest.** Rather, **the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearms regulation.”**

**“The government must prove that** its firearms regulation is part of **the historical tradition** that delimits the outer bounds of the right to keep and bear arms.” A “judge-empowering interest-balancing inquiry” is rejected (quoting *Heller* and attributing that view to Justice Breyer’s dissent there).

Our approach today is consistent [the majority asserts] with “how we protect other constitutional rights.” “We know of no other constitutional right that an individual may exercise only after demonstrating to government officials a special need.” Meanwhile, “the Second Amendment ... surely elevates above all other interests the right of law-abiding responsible citizens to use arms for self-defense” (quoting *Heller*). **[Ed. note:** As I often advise my students, when lawyers use words like “surely” (a favorite of Justice Scalia), they usually mean “we have no authority for what we are about to say.”] “Historical analysis can be difficult,” but it is “more legitimate and more administrable” than other approaches. We reject [footnote 6] the idea that “judges are ill-equipped” to do historical analysis. The “societal problem” of urban gun violence was known to the Framers; “the lack of distinctly similar historical regulation addressing that problem” is relevant. *Heller* rejected as “false” the argument that “there were somewhat similar restrictions in the founding period.” Yes, “the Constitution can and must apply to circumstances beyond those the Founders specifically anticipated.” But here, this means **the Second Amendment protects “all instruments that constituted [today] bearable arms ... [including] modern instruments that facilitate armed self-defense.”** See *Caetano* (2016) (summary reversal applying 2<sup>nd</sup> A. to stun guns). “Reasoning by analogy” is permitted; “a historical twin” is not required. **[Ed. note:** Ironically, the majority then proposes its own two-step approach: whether “historical regulations impose[d] a comparable burden,” and “whether that burden is comparably justified.” This sounds a bit like the two-step intermediate scrutiny rejected above.]

Thus **restrictions on guns in “sensitive places” are okay.** But govt can’t expand that “simply to all places of public congregation” (e.g. “the island of Manhattan”). Also [8 pages later], “well-defined restrictions governing the **intent** [of carrying], and the **manner** [“manner likely to terrorize”] of carry [which is “more than merely carrying a firearm in public”], or other [undefined] **exceptional circumstances,**” can be okay. And “surety statutes” that “provide financial incentives for responsible arms carrying” seem okay too.

Applying our historical analysis to New York’s law, we find it unconstitutional. [Most of the next 40 pages of detailed historical analysis is omitted here.] There is no “home/public distinction” in the text or history, and **“bear” means “public carry.”** And “not all history is created equal;” the understanding of constitutional provisions “when the people adopted them” is the relevant measure. When “later history contradicts what the text says” **[ed. note:** which the majority apparently conflates with what “the original meaning was”], “the text controls.” We think this is the same whether in 1791 [when the Bill of Rights was adopted] or 1868 [when the 14<sup>th</sup> Amendment, which applies the 2<sup>nd</sup> A to the States, was adopted]. **Nothing in our history supports “altogether prohibit[ing] the public carry of arms.”** (Old contrary cases are dismissed as “outliers,” “exceptional,” “short-lived,” or applying only to “minuscule” populations.) **[Ed. note:** remarkably, the majority actually cites favorably to *Dred Scott* (1857, at p. 52) – very unusual.] Finally [n. 9], **“nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ “shall issue” licensing regimes** – although “we do not rule out constitutional challenges” either.

*Alito concurring:* [He is basically responding to the dissent; he decries the dissent’s lengthy reliance on statistics of gun violence and deaths, as irrelevant.]. “All we decide” is “the right of law-abiding people to carry a gun outside the home for self-defense.” There was no need for a trial or factual findings below to decide this; there is no evidence that the New York law actually would reduce gun violence. An intermediate scrutiny analysis places “no limits on judges. History is the best measure” for the Second Amendment. **“Today, no less than in 1791, many Americans have good reason to fear that they will be victimized and unable to protect themselves. ... [T]he Second Amendment guarantees their right to do so.”**

**Kavanaugh concurring** (joined by Roberts): First, many restrictions and “existing ‘shall carry’ licensing regimes” are not declared unconstitutional today. “Fingerprinting, a background check, a mental health records check, and training in firearms handling and ... the use of force, among other possible requirements” are listed as seeming okay.

**Barrett concurring**: First, the opinion today does not conclusively determine” how “post-ratification practice may bear on the original meaning of the Constitution” (citing contrasting views). “Second and relatedly,” the Court “avoids” settling contrasting views on “Freewheeling reliance” on 1868 history and whether it can be relevant or resolve the “original meaning of the Bill of Rights.”

**Breyer dissenting** (joined by Sotomayor and Kagan) [52 pages]: “The Court severely burdens” the efforts of many States to address the modern dangers of “gun violence” (providing pages of statistics and examples of the modern problem, including suicides, domestic violence, child abuse, etc.). It should be “constitutionally proper ... to consider ... the serious [modern] dangers and consequences.” Reliance on “the single tool” of history “goes too far,” is “impractical,” and “raises troubling questions” for our expertise and methodology. Moreover, “historical precedent” [17 pages worth] does support the New York law. Finally, the Court “misreads *Heller*,” which in fact did not resolve many of the questions decided today. And the Court does not identify any “less restrictive alternative” that New York could employ to address the “substantial government interest” in reducing gun violence.

Moreover, deciding this case merely “on the basis of the pleadings,” without evidentiary development, leads to “a mistaken understanding of how NY’s law operates in practice.” There is no evidence that the “proper cause” requirement has been used to deny a reasonable “right to bear arms.”

### C. FOURTH AMENDMENT

*Egbert v. Boule*, 142 S.Ct. 1793 (Jun. 8, 2022), **Thomas** (6 to 3 on the Fourth Amendment claim); *Gorsuch* concurring in the judgment; Sotomayor dissenting in part and concurring in the judgment in part, reversing 998 F.3<sup>rd</sup> 370 (CA9 2021, with 12 judges dissenting from denial of rehearing *en banc*).

**Headline:** No *Bivens* cause of action for federal excessive force claim, even though *Bivens* itself was a federal excessive force Fourth Amendment claim. (Also, **no extending the *Bivens* cause of action rationale to the First Amendment.**) *Bivens* is now viewed as a “disfavored judicial activity.”

**Facts** [which make Mr. Boule a relatively unsympathetic plaintiff]: Boule markets his home, on the unobstructed Canadian border in Washington State, as a bed-and-breakfast called the “Smugglers Inn.” (The opinion includes a photo to show how “easily” a person could “enter [or leave] the United States” by simply stepping across the grass.) The “area is a hotspot for cross-border smuggling of people, drugs, illicit money” and other “items of [criminal] significance.” Boule would charge Canadian-bound “guests” a fee for picking them up at an airport; or charge persons unlawfully entering from Canada to Seattle or elsewhere. Meanwhile, Boule would sometimes also inform federal law enforcement of “persons of interest” and not even “offer his erstwhile customers a refund” when they were arrested by U.S. Border Patrol agents. [**Ed. note:** In short, Boule was a crook and a fink.]

In 2014, Boule informed Border Patrol agent Egbert of an incoming suspicious Turkish guest. But when Egbert followed Boule’s car with the passenger into Boule’s driveway, Boule ordered Egbert to leave his property. In his later federal complaint, Boule alleged that Egbert declined to leave, and instead threw Boule against his car and then to the ground. But the Turkish guest’s papers were in order so Egbert left (and the guest later unlawfully walked into Canada). Boule filed an administrative complaint against Egbert for excessive force; Boule alleges that Egbert retaliated for this expressive conduct by instigating expensive federal and State audits of Boule and his business. (Egbert, we learn in the dissent, was later found by the agency to deserve removal for “lack of integrity.”) Boule then sued Egbert in federal court, alleging causes of action directly under the First and Fourth Amendments under the rationale of *Bivens*. The district judge granted summary judgment against Boule but the Ninth Circuit reversed, finding that both constitutional causes of action could go forward.



**Thomas (for 5):** In *Bivens v. Six Unknown Fed. Narcotics Agents* (1970), we ruled that the Fourth Amendment implicitly authorizes a damages remedy against federal officials for alleged constitutional violations. [Congress had authorized damages against state officials under §1983, but there was no statutory remedy for equivalent federal official violations.]. The *Bivens* rationale was extended twice (*Davis*, Fifth Amendment, 1979; *Carlson*, Eighth Amendment, 1980), but since then we have decided 11 times to not imply any further constitutional causes of action. The Judiciary’s authority to imply causes of action without legislative support is “at best, uncertain,” and “Congress is far more competent than the Judiciary to weigh [the competing] policy considerations.” However, “rather than dispense with *Bivens* altogether” today, we will describe it as “disfavored” and not “extend it” to the First Amendment here, or to any “new context.” The rule is: **“if there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy.”**

The facts here are a “new” Fourth Amendment context; in *Hernandez* (2020) we similarly did not apply *Bivens* even though a Fourth Amendment violation was alleged, due to “national security concerns” at the border. *Bivens* itself, while presenting “almost parallel circumstances,” actually bears only “superficial similarities.” The Ninth Circuit’s, and the dissent’s, contrary view is “deeply flawed.” “Cross-border concerns” are present here; and the Border Patrol has an “alternative remedy” in their internal investigation process [even though it provided Boule no recompense]. As for the First Amendment retaliation claim, “there are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy.” “It is easy to allege” a constitutional violation, but there are costs to allowing a *Bivens* action. Even if *Davis* allowed a similar claim, it **“carries little weight because it predates our current approach.”** [Ed. Note: !! That is basically saying “we will not follow a precedent because today we do not like it.”]. “If we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution. But to decide the case before us, we need not reconsider *Bivens*.”

***Gorsuch, concurring in the judgment:*** Oh come on; we should just overrule *Bivens*. “This set of facts [does not] differ meaningfully from ... *Bivens*.” “In fairness to future litigants and our lower court colleagues, we should not hold out ... false hope.”

***Sotomayor* (joined by *Breyer* and *Kagan*) dissenting as to the Fourth Amendment, while concurring in the judgment on the First Amendment** [24 pages; the majority is 17 pages]: Our precedents “recognize that suits for damages play a critical role in deterring unconstitutional conduct by federal law enforcement officers. While the Court does not overrule *Bivens*, it “rewrites a legal standard it established just five years ago, stretches national-security concerns beyond recognition, and discerns a remedial structure where none exists.” As for the First Amendment, I would reject a *Bivens* claim “by following precedent,” not rewriting it. This **“restless and newly constituted Court”** is “inconsistent with governing precedent” and “forecloses remedies in yet more cases.” And its distinctions and reasons are “extraordinary and gratuitous.” Still, “lower courts should not read [today’s opinion] to render *Bivens* a dead letter.” **Congress has not acted to change *Bivens* in 50 years**; whittling it down is “making a policy choice for Congress. “Today’s decision is no exercise in judicial modesty.”

***Thompson v. Clark***, 142 S.Ct. 1332 (Apr. 4, 2022). ***Kavanaugh***, 6-3; ***Alito*** dissenting joined by Thomas and Gorsuch; **reversing** 794 Fed. Appx. 140 (CA2, 2020).

**Headline:** For the “favorable termination” requirement necessary to file a **§1983 Fourth Amendment claim for “malicious prosecution,”** the plaintiff need not show a prosecution ended with “affirmative indication of innocence,” but **only that the prosecution ended without a conviction.**

**Facts:** Thompson’s mentally ill sister-in-law called 911 to say that Thompson was sexually abusing his newborn daughter. Police officers entered Thompson’s apartment over his objection, and ultimately arrested Thompson for resisting their entry. (The baby was later found to have diaper rash.) Thompson spent two days in jail; the state court (Brooklyn) charges were later dismissed by the prosecution before trial, without explanation from either the prosecutors or the judge. Thompson sued under §1983,

alleging that the Fourth Amendment was violated by the state’s “malicious prosecution.” But Second Circuit precedent required some official “affirmative indication of innocence,” so Thompson’s Fourth Amendment claim was dismissed.

**Kavanaugh (for 6):** Our precedents (*Manuel*, 2017; *Albright*, 1994) recognize a Fourth Amendment claim for “unreasonable seizure pursuant to legal process,” described as “malicious prosecution.” (Ftnt. 2: Justice Kennedy argued in an *Albright* concurrence that the Due Process clause might be a better “analytical home” for such a claim, but we do not address that here.). “To determine the elements of a constitutional claim under §1983, this Court’s practice is to first look to the most analogous tort as of 1871 when §1983 was enacted.” [Ed. Note: another of many uses of “history” by a majority this Term.]. “Malicious prosecution” is the most analogous 1871 tort: “the wrongful initiation of [criminal] charges without probable cause.” A “favorable termination” is an element of this tort; and we think that in 1871 that element was satisfied merely by showing that the “prosecution ended without a conviction.” An acquittal or an affirmative showing of innocence was not required. A contrary statement in the 1976 *Restatement (2d) of Torts* is “flawed,” because that “did not purport to describe the consensus of American law as of 1871.” Moreover, this element need not “logically” turn on “the fortuity of whether the prosecutor or court happened to explain why the charges were dismissed.” In fact, *weaker* prosecution cases are “paradoxically” more likely to be dismissed early without explanation. Meanwhile, “officers are still protected” by qualified immunity and the no probable cause requirement. Other “pertinent questions” remain open for argument on remand.

**Alito (joined by Thomas and Gorsuch), dissenting:** The Court has “create[d] a chimera of a constitutional tort” based on a “mistaken reading” of *Albright*. The Court ought not “recognize [this] novel hybrid claim of uncertain scope” based on “cursory” history, “that has no basis in the Constitution.” Basically, Alito argues that there should not even be a Fourth Amendment “tort” called “malicious prosecution” – the two things “have almost nothing in common.” The Fourth A says nothing about “wrongful initiation of charges,” and “it is not clear what” wrongful even means here. The plurality opinion and *dicta* in *Albright* should not be read to support this. “Today’s decision” just “sow[s] more confusion.” We should simply hold that a malicious prosecution claim may not be brought under the Fourth Amendment,” and leave it to New York state law to provide a remedy.

#### D. FIFTH AMENDMENT

[\*Vega v. Tekoh\*](#), 142 S.Ct. 2095 (Jun. 23, 2022). **Alito, 6-3; Kagan** dissenting; reversing and remanding 985 F. 3d. 713 (CA9, 2021, with 7 dissents from denial of rehearing *en banc*).

**Headline:** A violation of *Miranda* does not provide a basis for a §1983 claim. *Miranda* is not a constitutional “right” nor it is a “law” of the United States.

**Facts:** [as in *Egbert*, above, the Court has chosen a case whose facts do not make for a very sympathetic plaintiff]: Tekoh was questioned at the hospital where he worked as a nurse, about an allegation of sexual patient abuse, by deputy sheriff Vega. After a one-hour interrogation, Tekoh provided a written apology. Vega never informed Tekoh of his *Miranda* rights; and Tekoh alleged coercive questioning tactics. But a California state judge ruled that Tekoh had not been in custody at the time, and at two criminal trials of Tekoh, the statement was admitted against Tekoh. The first state trial resulted in a mistrial; the second yielded an acquittal.

Tekoh then sued Vega in federal court under 42 U.S.C. §1983, which provides for damages against state officials who “subject” a person to “deprivation of any rights ... secured by the Constitution and laws” of the United States. At an initial trial, Vega prevailed, but a mistrial was declared due to a faulty jury instruction. At a second trial, the judge declined to instruct that a violation of *Miranda* required a finding that the Fifth Amendment was violated; instead the jury was instructed to decide under “the totality of ... the circumstances” whether Tekoh’s statements had been “improperly coerced or compelled.” The jury found in favor of deputy Vega. But on appeal the Ninth Circuit reversed (over

7 dissents at the *en banc* stage), ruling that although *Miranda* states “prophylactic” rules, the Court’s decision in *Dickerson* (2000) “made clear” that the right to not have a *Miranda*-violation statement introduced against you at a criminal trial “is indeed a right secured by the Constitution.”

**Alito (for 6):** The Fifth Amendment undoubtedly bars introduction of statements “obtained by compulsion,” and we have repeatedly said that *Miranda* provides “prophylactic” rules designed “to prevent the violation of this important [constitutional] right.” But it “is wrong” to say that “a violation of *Miranda* constitutes a violation of the Fifth Amendment right.” **Although *Dickerson* held that the *Miranda* rules “are ‘constitutionally based,’” they are only “prophylactic rules” and not themselves constitutional rights or “laws” protected under §1983.** *Miranda* itself was clear on this point [ed. note: ???]. While *Dickerson* reaffirmed that *Miranda* applies against the States, it “avoid[ed] saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right.” While some decisions have “expan[ded]” the protections of *Miranda* – for example, *Withrow* (1993) ruled that *Miranda* applies in post-conviction collateral proceedings -- other decisions have said that the “judicially-crafted [*Miranda*] rule ... applies only where its benefits outweigh its costs” (*Maryland v. Shatzer*, 2010). “[A]ll the post-*Miranda* cases” (except *Dickerson*) “engaged in cost-benefit analysis to define the scope of these prophylactic rules.” “*Dickerson* did not upset th[is] firmly established prior understanding.” The statement in *Dickerson* that *Miranda* constitutes a “law of the United States” that is thereby binding on the States under the Supremacy Clause was a “bold and controversial claim” that is “insupportable” without “calling into question the prior [prophylactic rule] decisions.”

Thus a *Miranda* violation is not “deprivation of a right secured by the Constitution” under §1983. Neither is it (we say) a federal “law” within §1983. And even if it is a “law,” it should not be “expanded to include the right to sue for damages under §1983.” [Ed. note: this three-page section of the opinion seems remarkably indirect and circuitous.] Benefits from applying *Miranda* for §1983 “would be slight, [and] the costs would be substantial.” It would “disserve judicial economy” by requiring federal courts to adjudicate questions “already decided by a state court.” [Ed. note: that is, of course what habeas does, see *Withrow*; also, §1983 was designed in Reconstruction to overcome contrary state official actions and rulings.]. Meanwhile, “little additional deterrent value” would accrue, given that suppression of a *Miranda* violation statement is already allowed [note that this did not happen here] and *Miranda* is applicable “in other recognized contexts.” Quoting from *Abrahms* (2005), the Court says that “§1983 does not provide an avenue for relief every time a state actor violates a federal law” addressing application of §1983 to “a newly created right”. “[W]e see no justification for expanding *Miranda*.”

**Kagan dissenting (joined by Breyer and Sotomayor):** “*Dickerson* tells us in no uncertain terms that *Miranda* is a ‘constitutional rule.’” *Dickerson* undoubtedly means that the right (which applies to the States) is, as §1983 requires, “secured by the Constitution.” *Dickerson* ruled that Congress could not contradict *Miranda*. Describing *Miranda* as “prophylactic” does not take away from its “constitutionally-based,” federal “law,” status. So “only one conclusion can follow” – yet the Court today “prevents individuals from obtaining any relief.”

We ruled in *Dennis* (1993) that §1983 protects rights under the dormant Commerce Clause, despite the lack of text supporting those “implied” rights. Section 1983 was designed to provide a monetary remedy for damages caused by violation of constitutional or federal rights. [Tekoh, although ultimately acquitted, plainly suffered damages by being put through years of criminal prosecution based on an unwarned statement.] Denying him the §1983 federal remedy now “injures the right by denying the remedy” (see *Egbert*, earlier this Term).

[\*Denezpi v. U.S.\*](#), 142 S.Ct. 1838 (Jun. 13, 2022). **Barrett**, 6-3; [Gorsuch](#) dissenting (unusual combo, joined by Sotomayor and Kagan -- Breyer votes with majority), [affirming](#) 979 F.3d 777 (CA 10, 2020).

**Headline:** It is **not double jeopardy when federal authorities prosecute identical tribal and federal offenses**, because the laws of “separate sovereigns” are the source of each offense, so they are not the “same offense.”

**Facts:** Merle Denezpi, a member of the Navajo Nation, sexually abused a young woman on the Ute tribal reservation. Federal authorities prosecuted Denezpi for assault and battery as defined in the Ute tribal law, pursuant to a longstanding (1883) Dept. of Interior regulation (a “CFR”) allowing “Courts of Indian Offenses” to hear violations of Native American tribal laws when a tribe has not established its own court system. The CFR prosecutor is a federal official. Today there are five such “CFR courts” “serving 16 of the more than 500 federally recognized tribes.”

Denezpi pled guilty to the Ute charge and was sentenced to 140 days imprisonment. Six months later, a federal grand jury in the District of Colorado charged Denezpi with the federal crime of “aggravated sexual abuse in Indian country.” Denezpi’s objection under the Double Jeopardy Clause was rejected, and a jury convicted him; he was sentenced to 30 years imprisonment.

**Barrett** (for 6, including Breyer): “Denezpi’s single act transgressed two laws: the Ute ... Code and the United States’ Code.... **The two laws, defined by separate sovereigns, therefore proscribe separate offenses,**” and not “**the same offense**” under the Fifth Amendment’s Double Jeopardy Clause. [Ed. note: the Court does not appear to address whether or not the two offenses are “the same” under the *Blockbuster* “same elements” test; Gorsuch’s dissent asserts without objection that the first offense was “lesser included” within the second.]. “The Clause by its terms does not prohibit twice placing a person in jeopardy for the same *conduct* or *actions*,” it applies only to a “same offense.”

“Our reasoning in *Wheeler* (1978) controls here.” We ruled there that the “separate sovereigns” doctrine did not prohibit the prosecution of a Navajo Nation member for both a tribal and a similar federal criminal offense. The fact that, here, both prosecutions were by “federal authorities,” does not change that result. **The separate sovereign rule is not an “exception” to the DJ clause; rather it “follows from the text.”** There is “no evidence that ‘offense’ was ‘originally understood to encompass ... the identity of the prosecutor;” that is “nonsensical.” There is some “loose language from our precedent” that is “imprecise” (*Sanchez Valle*, 2016; *Heath*, 1985). But when “read in context, their helpfulness dissipates,” and they “did not answer the question” presented in this case. And tribal sovereignty “*is* furthered” by enforcing the Ute tribe’s own code, “regardless of who enforces it.”

**Gorsuch** dissenting (joined by Sotomayor and Kagan [but not, unusually so these days, by Breyer]): First, I believe that the separate sovereigns doctrine is “at odds with the text and original meaning of the Constitution,” *see* my dissent in *Gamble* (2019). Still, even that doctrine “cannot sustain the Court’s conclusion” here. “The Court of Indian Offenses is ‘part of the federal government’” (quoting the CFR that establishes it). It is “a curious regime” [Ed. note: Gorsuch appears to question its constitutionality – food for a future case?] Moreover, the anti-tribal ethic that established these “CFR courts” is apparent in much of the history of their creation [Gorsuch quotes things]. And “no one disputes that “Denezpi’s first crime of conviction ... is a lesser-included offense of his second ... conviction.” The first crime was clearly the product of a federal regulation, that “assimilates” tribal law. {Barret’s *fn*.2 says that “we do not address” this “complex,” and not presented, question.]. The Court is “wrong” that the first offense was a “tribal” one – it was instead a “federal regulatory crime” created by “federal bureaucrats.” “Federal administrative authorities created this tribunal.” [Ed. note: here we see Gorsuch’s general dislike of federal regulations, as opposed to Congressional statutes, as one source of his unhappiness here.]. If nothing else, the “rule of lenity [should tip the balance in Mr. Denezpi’s favor.” *Wheeler* does not control; even the majority recognizes that it involved different facts (prosecution by a pure tribal court). [Note: Justices Kagan and Sotomayor do not join this last part of the Gorsuch dissent:] The majority’s reasoning would “seemingly” allow the same federal government to prosecute the “same offense” twice, if one was a state offense and the other a federal crime. Indeed, the Court leaves open that this might violate the

Due Process Clause. Thus there is “much open for the future.” But **“the irony” of allowing this “federal bureaucrats” regime to continue “will not be lost on those whose rights are diminished.”**

## E. SIXTH AMENDMENT

*Hemphill v. New York*, 142 S.Ct. 681 (Jan. 20, 2022). **Sotomayor** (8 (6+2) to 1); *Alito* concurring (with *Kavanaugh*); Thomas dissenting), reversing 35 N.Y. 3d 1035 (NY Ct. App. 2020).

**Headline:** An **“opened the door” hearsay exception** to a criminal defendant’s Sixth Amendment right “to be confronted with the witnesses against him,” **when a judge finds that a defense has created a “misleading” impression, is unconstitutional.** The Court can reach this claim when the constitutional claim was “presented” below, even if the precise argument was not made at every state court level. “The Confrontation Clause requires that the reliability and veracity of the evidence of a criminal defendant be tested by cross examination, not determined by a trial court.”

**Facts:** A stray 9mm bullet killed a 2-year-old child during an altercation in the Bronx, NY [**ed. note:** Justice Sotomayor’s old stomping grounds]. The police initially arrested a man named Morris after his friend Gilliam identified Morris as the shooter. Searching Morris’s apartment, police found a 9mm bullet, as well as three .357 magnum bullets, on Morris’ nightstand. Three witnesses identified Morris in a lineup as the shooter, but Gilliam then recanted and alleged Hemphill was the shooter. The State later dismissed Morris’ charges in exchange for a guilty plea to possession of a .357 magnum revolver, not a 9mm gun.

Five years later, the state indicted Hemphill for the murder, after learning that his DNA matched a sample recovered from Gilliam’s apartment on clothing of the same color as the shooter. At trial, Hemphill pursued a “third-party culpability defense,” blaming Morris for the shooting and noting that police had found a 9mm bullet (the same type of bullet that had killed the child) on Morris’s nightstand. Morris was unavailable to testify, so the State sought to introduce the transcript of Morris’s earlier plea to the .357 magnum offense. Hemphill objected that this “hearsay” would deprive Hemphill of “an opportunity [for] cross-examination.” Both sides elicited testimony that officers had found both types of bullets on Morris’s nightstand, but the trial judge then also admitted the old plea transcript, relying on a 2012 New York decision allowing otherwise inadmissible hearsay if a defendant “opened the door” by creating a “misleading impression” that was “reasonably necessary to correct” by admitting hearsay. Hemphill objected that this was a “*Crawford* violation,” referencing the Supreme Court’s 2004 Confrontation Clause decision. New York’s appellate courts affirmed Hemphill’s conviction, endorsing the “opening the door” exception from an old NY case called *Reid*.

**Sotomayor for 8:** First, Hemphill “adequately presented” his constitutional claim in the lower courts (contrary to Justice Thomas’s dissent). Hemphill argued the Sixth Amendment “at every level,” and brought the issue to the state courts “with fair precision and in due time.”

On the merits, **the “opening the door” exception to correct a “misleading impression” violates the constitutional Confrontation rules of *Crawford*.** *Crawford* rejected prior hearsay rules based on judicial findings of “reliability,” and concluded that the only exceptions to the Confrontation right should be ones that were well-established “at the time of the founding.” States still have flexibility to establish “reasonable procedural rules governing the exercise of a defendant’s right to confrontation” – but the *Reid* exception is not a “procedural” rule. It is a “substantive principle of evidence” that “requires a trial court to determine whether” a defendant has created a “misleading impression.” But “the Confrontation Clause bar[s] judges from substituting their own determinations of reliability for the method the Constitution guarantees [i.e., confrontation].” It is not for the trial judge to “weigh the reliability or credibility” of evidence, but rather “to ensure that the Constitution’s procedures for testing the reliability ... are followed.” **Defendants do not “open the door” to violations of constitutional requirements merely by making evidence relevant to contradict their defense.** There is no “truth-

finding” function that overrides the Confrontation Clause. “Courts may not overlook its command, no matter how noble the motive.”

*Alito concurring* (joined by Kavanaugh): “I join the opinion of the Court in full.” But I want to make clear that a defendant can waive “the right to confront adverse witnesses,” when their conduct indicates “intent to relinquish the right” or is inconsistent with asserting the right. Specifically, a defendant who introduces only a portion of a declarant’s statement, can “open the door” to admission of the rest under “the traditional rule of completeness.” The Court’s decision here “does not call into question the rule of completeness or other principles that may support implied waiver.”

*Thomas dissenting*: Failing to adequately raise an argument below is a jurisdictional rule, not “merely prudential.” [Thomas attacks precedents that suggest otherwise, and he claims that rule has been “jurisdictional” “for nearly 200 years”.] On this record, Hemphill failed to “properly present” his specific claim here, to the courts below. “A general statement that the decision of a court is against the constitutional rights of the objecting party ... will not raise a federal question” (quoting *Clarke v. McDade* (1897) [Ed. note: Justice Thomas so frequently appears to prefer cases from the Nineteenth century]. Moreover, the Court ought not recharacterize New York’s *Reid* rule without giving them an opportunity to “clarify” it. “I would dismiss this case for lack of jurisdiction.”

## F. EIGHTH AMENDMENT

*Nance v. Ward*, 142 S.Ct. 2214 (Jun. 23, 2022). **Kagan** (5-4); Barrett dissenting, reversing 981 F.3d 1201 (CA 11, 2020) and 994 F.3d 1335 (CA 11 2021, three judges dissenting from *en banc*).

**Headline: Capital prisoner challenging their method of execution, who proposes a method that is not authorized in the state, may still challenge the method under §1983.**

**Facts:** Nance was sentenced to death in Georgia for shooting a bystander while fleeing a bank robbery. His conviction and sentence were affirmed and final on habeas. He now challenges, via a §1983 lawsuit, the lethal injection method of execution in Georgia, alleging it will cause him severe pain due to various medical conditions. As required by precedent (*Glossip*, 2015, from which Kagan dissented), Nance proposes an alternative method: firing squad. That method is not authorized by Georgia state law, but Nance says the State could simply borrow it from other States. The District Court dismissed Nance’s lawsuit as untimely, but the 11<sup>th</sup> Circuit affirmed for a different reason, saying that he should not use §1983, but rather federal habeas (which CA 11 then dismissed as successive).

**Kagan** (for 5): In *Bucklew* (2019), we ruled that a capital prisoner may meet the *Glossip* requirement by proposing a “well-established,” “feasible,” method of execution, even if not currently authorized in the prisoner’s State. Today we must examine “the dividing line between §1983 and the federal habeas statute. **If an inmate’s claim would “necessarily imply the invalidity of his conviction or sentence,” habeas must be used.** *Heck v. Humphrey* (1994). The key is “necessarily.” Here, Nance’s challenge would not “necessarily” invalidate his death sentence; Georgia could just change its statute to add or allow execution by firing squad. This is true of §1983 in other contexts: a successful §1983 lawsuit often invalidates a state law and the state may then change its law in response. This includes “prison conditions” challenges, as well as other types of constitutional challenges to state laws. Georgia’s argument would lead to the “strange” result of different results in different states; but the Eighth Amendment is supposed to apply uniformly across the nation. Relegating this lawsuit to federal habeas, and then subjecting it to a limitation (no successive petitions) not applicable under §1983, would “turn *Bucklew* into a sham.” However, we “do not for a minute countenance ‘last minute’ claims, so on remand the timeliness of Nance’s lawsuit can be considered.

**Barrett, dissenting** (with Thomas, Alito and Gorsuch): Nance’s claim would necessarily declare his lethal injection sentence invalid. Suggesting that the State can change its statutes is “looking too far down the road;” §1983 should be evaluated under “state law *as it currently exists*.” Potentially different

results under different state laws is merely “an unremarkable consequence of federalism.” Obviously, States disagree about the death penalty.

[Ramirez v. Collier](#), 142 S.Ct. 1264 (Mar. 24, 2022), summarized under “Federal Statutes” below.

**Headline: Under the RLUIPA statute, Capital prisoner is likely to prevail on his religion-based claim to be touched and spoken to by a pastor at execution; Constitutional claims not addressed.**

## II. FEDERAL STATUTES

### A. Federal Death Penalty

[U.S. v. Tsarnaev](#), 142 S.Ct. 1024 (March 4, 2022). **Thomas** (6-3); *Barrett* concurring with Gorsuch; *Breyer* dissenting with Sotomayor and Kagan), [reversing](#) 968 F.3d 24 (CA 1, 2020).

**Headline:** Death penalty reinstated for the “**Boston Marathon bomber**.” Rejecting “what publicity have you seen” *voir dire* questions was not an abuse of discretion; and neither was **excluding an alleged mitigation circumstance** involving claims that the defendant’s older brother had previously committed murders (that the defendant did not know about) and so was “the ringleader” here.

**Facts:** The facts of the “Boston Marathon bombing” are relatively well known [an ironic start, given the *voir dire* publicity discussion below). Two brothers planted “homemade pressure cooker bombs” at the Boston Marathon finish, which when exploded “hurled nails and metal debris into the crowd, killing three and maiming and wounding hundreds.” Trying to avoid capture, the brothers killed a campus police officer, and the younger brother then fatally ran over his older brother (Tamerlan). The surviving brother here was found guilty of federal murder charges, and sentenced to death.

On appeal, the First Circuit vacated the death sentence, on two grounds. First, that the trial judge had failed to ask prospective jurors individually what they had learned, if anything, from media about the case. A 1968 CA1 decision, *Patriarca* [patterned on a Model ABA Standard] required such a *voir dire* question, under the Circuit’s claimed “supervisory powers.” Second, the trial judge excluded defense evidence that Tamerlan had allegedly killed three drug dealers 18 months earlier; Tsarnaev offered hearsay evidence of this to argue that Tamerlan had been a “ringleader” and Tsarnaev just a youthful follower acting under his older brother’s influence. (There was no evidence, however, that Tsarnaev actually knew of his older brother’s alleged involvement in the prior murders.)

**Thomas** (for 6): We reverse the First Circuit’s ruling on both grounds [interestingly, without the normal statement that the case is “remanded for further proceedings consistent with our ruling”]. **First**, the district judge did not abuse his discretion in refusing a particular type of “what publicity have you seen?” *voir dire* question. There is “no blanket constitutional requirement” for such questions even in a high-media case; and the trial judge here used an extensive *voir dire* questionnaire of 1,373 prospective jurors, and then individualized questioning of 256 prospective jurors over three weeks. Even if the Circuit court has a general “supervisory power” (a question we leave open), “lower courts cannot create prophylactic supervisory rules that circumvent or supplement legal standards set out in decisions of this Court,” like the “abuse of discretion” standard our cases set for jury *voir dire*. There was no abuse of discretion here in light of the careful *voir dire* actually conducted.

**Second**, “it was reasonable and not an abuse of discretion” for the trial judge to exclude the “other crimes” evidence on the specific facts here. There was no evidence that Tsarnaev had any role in the prior crime, or even that it was true, because “all of the parties involved were dead.” [The person who alleged Tamerlan’s role was subsequently killed; only an FBI interview statement remained.] Capital sentencing rules, and the Federal Death Penalty Act, do not require “evidentiary free-for-alls.” Trial judges may set “reasonable limits” even on mitigating evidence in death penalty sentencings. The fact that the FBI statement was “reliable enough” for the government to use in an earlier search warrant

affidavit, does not limit the judge’s discretion to “independently evaluate” it. **There is (ftnt.18) no “heightened scrutiny for evidentiary decisions in death-penalty cases.”**

Bottom line: “Dzhokar Tsarnaev committed heinous crimes,” and received “a fair trial before an impartial jury.” [Death penalty reinstated, it seems, although the Court does not explicitly say so.]

**Barrett, concurring** (with Gorsuch): “I write separately to express my skepticism that the courts of appeals possess ... supervisory powers.” Prior cases may suggest it in dicta, “but before we go further down this road, we should reexamine the map.” Even if Article III text might make it “plausible,” it “might be unsupported by the Constitution’s structure and history.”

**Breyer, dissenting** (with Sotomayor and Kagan): [In a 17-page, very fact-specific, dissent, Justice Breyer, who is of course from Boston, explains why the trial judge abused his discretion by excluding the mitigating evidence in this case.]. “Death penalty proceedings are special,” and “only one juror’s change of mind” could have blocked the death penalty here. As for the pretrial publicity question, “we do not reach” it. But “our precedents clearly recognize the existence of [a federal court’s “supervisory”] power.” Finally (Breyer alone, Sotomayor and Kagan do not join), this case is “one more example” of why the death penalty suffers from inherent problems. See my 30 page-dissent in *Glossip* (2015).

## B. Federal Criminal Sentencing

[Wooden v. United States](#), 142 S.Ct. 1063 (March 7, 2022): **Kagan** (9 (5+1+1+1+1) to 0 (**Kagan** for five; Thomas, Alito and Barrett join all but Part II-B; *Sotomayor* concurring; *Kavanaugh* concurring; *Barrett* concurring in part and joining in the judgement; *Gorsuch* concurring in the judgement and joined by Sotomayor in parts II, III, and IV), reversing 945 F.3d 498 (CA6, 2019).

**Headline: Burglary of ten storage units in a row on one night in a single storage facility constitutes “a single criminal episode”** and thus one conviction under the Armed Career Criminal Act (ACCA). The ten separate convictions were not “committed on occasions different from one another,” and separate “occasions” is the statutory requirement of the ACCA.

**Facts:** One night in 1997, Wooden and three confederates burglarized ten units in a one-building storage facility, “crushing the interior drywall” between each unit. Wooden pled guilty to ten counts of burglary under Georgia law and was sentenced to eight years’ imprisonment. “Fast forward” to 2014: Wooden was arrested as a felon in possession of a firearm. That offense simpliciter carries a *maximum* penalty of ten years in prison; but an offender with three prior “violent felony” convictions is subject to a *minimum* 15-year sentence, if the crimes were committed “on **occasions** different from one another. 18 U.S.C. 924(e)(1)(emphasis added). The district court sentenced Wooden to 16 years, rejecting Wooden’s argument that his 1997 burglaries constituted “a single criminal episode” and instead accepting the government’s argument that each locker burglary was a new “occasion” having a “discrete point at which [each] offense was completed and the [next] began.” [Wooden apparently had no other prior convictions.]. The Sixth Circuit affirmed, joining a nationwide Circuit split.

**Kagan:** [Ed. Note: Justice Kagan’s majority is 14 pages long; 25 pages of separate opinions then follow. Thus this “easy” case generates a large number of differing views, important on a general level to many possible criminal law episodes.] **“The disputed question is whether Wooden committed his crimes on a single occasion or on ten separate ones.”** Based on the ACCA’s plain meaning, and legislative context and history, we conclude **that even though the elements of ten burglary convictions are separate, in applying the federal ACCA, “multiple crimes may occur on one occasion even if not at the same moment.”**

First, this is the “ordinary meaning” of the word “occasion.” To describe Wooden’s crimes, “an ordinary person (a reporter; a police officer; yes even a lawyer)” would say “on one occasion, Wooden burglarized ten units,” not “on ten occasions, Wooden burglarized a unit.” “The occasion of a wedding, for example, often includes a ceremony, cocktail hour, dinner, and dancing. ... An occasion may encompass a number of non-simultaneous activities.” A “split second separation of events” does not



override a single “occasion.” “In select circumstances, ... multiple offenses [may occur] in a single instant.” But not here. Instead, a **“multi-factored” inquiry is required. This is often “straightforward and intuitive”**; “a range of circumstances [Kagan gives a non-exclusive list] may be relevant.” [Ed. note: this “multi-factored” test sounds like a tip of the hat by Kagan to the usual Breyer-esque analysis]. Crimes committed “a day” or “a significant distance” apart, are “nearly always” separate offenses; “there will be some hard cases in between, as under almost any legal test.” (Ftnt 4: while Justice Gorsuch criticizes this sometimes amorphous analysis, “we did not choose the test, Congress did.” And although there may be some “hard cases, Wooden’s is not one of them.”)

The ACCA’s particular “history and purposes” support our conclusion. Congress added the “occasions clause” after the Solicitor General “confessed error” (in a 1986 case called “*Petty*”) that the ACCA should not “reach multiple felonies arising out of a single criminal episode.” The SG suggested “different occasions” language found in another federal statute, and the ACCA was amended in 1988 “to reflect the Solicitor General’s construction.” (We do not suggest, as Justice Barrett characterizes our view, that Congress ratified “every jot and tittle” of the SG’s brief.). The government’s effort to distinguish the *Petty* case here, is unavailing.

Finally, the ACCA’s purpose to address the “special danger” of “a particular subset of offenders” who are “especially likely to inflict grave harm when in possession of a firearm,” simply does not fit Wooden’s unarmed burglaries of ten storage units on a single occasion.

**Sotomayor concurring:** “It is clear” that Wooden’s prior offenses do not satisfy the ACCA. I also agree with Justice Gorsuch that the “rule of lenity provides an independent basis” for reversing even in “a closer case.”

**Kavanaugh concurring:** “I join the Court’s opinion in full.” I also want to distinguish Justice Gorsuch’s “thoughtful concurrence;” the “rule of lenity has appropriately played only a very limited role in this Court’s criminal case law.” And I want to explain how the traditional “presumption of *mens rea*” can be used to ensure “fair notice in criminal law.”

The rule of lenity applies only when a statute is “grievously ambiguous;” it does not apply “when a law merely contains some ambiguity or is difficult to decipher.” Thus it should only “rarely if ever play a role” in deciding a case. “I would not ... mak[e] the ambiguity trigger any easier to satisfy.” “Front-end ambiguity is not enough; other “tools of statutory interpretation” must first be applied (see a [2016 Kavanaugh essay](#) in the *Harvard Law Review*).

Meanwhile, I agree with Justice Gorsuch that “fair notice” in federal criminal law is very important. I would apply “the deeply rooted presumption of *mens rea*” to “protect criminal defendants against arbitrary or vague federal criminal statutes.” The law might address a criminal prohibition that a defendant “reasonably may not have anticipated” by implying a requirement of “willfulness: require proof that the defendant was aware that his conduct was unlawful.” “Another solution could be to allow a mistake-of-law defense (citing the classic *Morrisette* (1952) decision).

**Barrett concurring in part and in the judgment (joined by Thomas):** “I agree with ... the ordinary meaning of the word “occasion”, ... “[b]ut I do not [agree] that Congress ratified the Solicitor General’s brief confessing error in ... *Petty*.” “[L]itigants and lower courts [should not] mine the Solicitor General’s brief for guidance on the scope of the occasions clause.” “Only ... legislative history” connects *Petty* to the occasions clause, and “the problems with legislative history are well rehearsed” (citing Justice Scalia opinions [for whom Justice Barrett clerked in OT 1997]). Footnote \*: lower courts should honor the majority’s disclaimer and understand that the Court’s reliance on *Petty* and the SG brief “are nonbinding dicta.” “The text of the occasions clause” should alone govern.

**Gorsuch concurring only in the judgment (joined by Sotomayor in parts II, III, and IV):** [Fifteen pages boils down to this:] The Court’s “multi-factor balancing test” may be an “earnest” attempt” to shape application of the vague ACCA statute; but it is nevertheless “a judicial gloss on the statute’s terms.” “Multi-factored balancing tests ... suppl[y] notoriously little guidance,” and the harsh ACCA

mandatory maximum is inconsistently applied by lower courts. The Court’s remand of Wooden’s case does not require a “foregone conclusion” that he cannot receive the longer sentence.

For me, “the key to this case does not lie as much in a multiplicity of factors as it does in the rule of lenity. . . . Because reasonable minds could differ” about Wooden’s case even under the Court’s test, “the rule of lenity demands a judgment in his favor.” [Long discourse on the rule of lenity follows]. “Lenity works to enforce a fair notice requirement,” which is “an ancient rule.” It also “vindicates the separation of powers . . . by preventing judges from . . . exploiting doubtful statutory expressions,” and “helps keep the power of punishment firmly ‘in the legislative, not in the judicial, department’” (quoting *Wiltberger*, 1820). I now offer some answers to some “misunderstandings about the rule that have crept into our law” (“grievous ambiguity” being one of them; “reasonable doubts” is better.) [His further answers are omitted here]. **“Where traditional tools of statutory interpretation yield no clear answer, the judge’s next step isn’t to legislative history or purposes. The next step is to lenity.”** Ftnt 6: I also agree with Justice Kavanaugh about the importance of the *mens rea* presumption. “Under our rule of law, punishments should never be products of judicial conjecture about this factor or that one. They should come only with the assent of the people’s elected representatives and in laws clear enough to supply ‘fair warning . . . to the world’” (quoting *McBoyle*, 1931).

[U.S. v. Taylor](#), 142 S.Ct. 2015 (June 21, 2022). **Gorsuch** (7-2); **Thomas** dissenting; **Alito** dissenting, **affirming** 979 F.3d 203 (CA4 2020).

**Headline: An attempted Hobbs Act violation does not constitute a “crime of violence” under §924(c), because it does not categorically require a “use or attempted use of physical force.”**

**Facts:** As relevant to the convoluted legal question here, Taylor admitted in a federal guilty plea to an attempted Hobbs Act crime, and also to a §924(c) offense. The Hobbs Act allows up to 20 years imprisonment for (this is the Court’s description) commit[ting] a robbery with an interstate component;” §924(c) then requires an additional 10 years for using a firearm in connection with a “crime of violence.” Taylor was sentenced to 30 years total. Taylor’s actual offense involve a robbery in which an accomplice shot someone. “Crime of violence” is statutorily defined to mean crimes that “have as an element the use, attempted us, or threatened use of physical force” (*Davis*, 2019, declared an alternative definition to be unconstitutionally vague). After *Davis*, Taylor sought habeas to vacate his §924(c) conviction, arguing that an attempted Hobbs Act violation does not meet the §924(c) “element of physical force” definition. The Fourth Circuit ultimately agreed with Taylor.

**Gorsuch (for 7):** The parties agree that we must use the “categorical” approach, which “precludes an inquiry into how any particular defendant” actually committed a crime. Rather, the question is whether the government can ever prove the crime, beyond reasonable doubt, without proving the use or attempted use of force. Because an attempt requires proof of a “substantial step” toward completing the crime, and because “mere preparation” is insufficient to prove a substantial step, the government theoretically can prove an attempted Hobbs Act violation without proving an actual use of force, even if the defendant had the intent to use force (citing an ALI *Model Penal Code* section and example). “No *element* of the Hobbs Act requires the use of force,” even if many actual cases involve that. And a “threat” of force requires more than mere preparation to use force; it requires “some form of communication.” We don’t think Congress intended anything different here; the government and dissents’ arguments are contrary to the categorical, all cases, “element” test that Congress wrote. Taylor’s conviction for attempted Hobbs Act stands; but his additional decade of imprisonment for a “crime of violence” must be vacated.

**Thomas dissenting:** Taylor and his accomplice “pulled a gun on a fellow drug dealer.” The categorical approach “has led the Federal Judiciary on a “journey Through the Looking Glass,” a “30-year excursion into the absurd.” No “rational Congress would countenance such an outcome divorced from reality.” We should at least “overrule *Davis* and adopt . . . the conduct-based approach that the

*Davis* dissent [written by Kavanaugh, who here is with the majority!] described.” (Also, Justice Alito’s “intriguing alternative,” while advocated by no party here, deserves “further briefing.”)

**Alito dissenting:** The person that Taylor and his accomplice shot actually died. To say this is not a “crime of violence” is to “veer off into fantasy land.” But I also offer a “strict reading of the text” of §924(c) that would reach Taylor’s case. **[Ed. note:** So far as I understand Alito’s argument, it is that intending to use one of the “force” means listed in the Hobbs Act, is “attempting” to use it. So intending to do it would meet the statute’s “elements” test, because the various means list in the Hobbs Act are “alternative elements.”]. I respectfully dissent from the majority’s contrary ruling.

*Concepcion v. U.S.*, 142 S.Ct 2389 (June 27, 2022). **Sotomayor** (5-4, for an unusual majority that includes Thomas and Gorsuch; Kavanaugh dissenting; reversing 991 F.3d 279 (CA 1, 2021)).

**Headline:** In resentencing crack cocaine offenders under the First Step Act (2018), a district judge may consider all intervening changes in law and fact, not just the change in required cocaine quantities.

**Facts:** Carlos Concepcion pled guilty in 2007 to distributing over five grams (13.8 grams, to be precise) of crack cocaine, with a potential sentence of 5 to 40 years. Because he qualified, at that time, as a “career offender,” his Guidelines range was increased to 262-327 months. He was sentenced to 19 years (228 months). In 2018, Congress allowed crack offenders to seek resentencing, under the 2010 Fair Sentencing Act that increased the amount of crack required to invoke the five-year mandatory minimum from 5 to 28 grams. Taylor argued that this “modified” the penalty for his offense, as the First Step Act requires for eligibility, and the Court should now resentence him not as a career offender because, he alleged, one of his prior convictions had subsequently been vacated and others were not “crimes of violence.” Concepcion also invoked evidence of his rehabilitation since entering prison. The district court ruled that the First Step Act allowed consideration only of the change in the crack cocaine amounts, and denied resentencing. The First Circuit affirmed, Barron, J., dissenting.

**Sotomayor (for 5): The First Step Act allows a resentencing court to consider other intervening changes of law ... [and] fact,” besides the crack cocaine amount changes,** based on the “longstanding tradition in American law ... that a judge at sentencing considers the whole person before him.” “Only when Congress or the Constitution limits the scope of information” is a sentencing judge’s discretion ... restrained.” For example, evidence of intervening rehabilitation is “regularly consider[ed]” be resentencing courts. The statutory requirement of the First Step Act that defendants be resented “as if” the 2010 Fair Sentencing amounts had been “in effect” at the time of the original offense, means that the higher amounts must now be applied – it does not otherwise “limit the information a district court may use to inform its decision whether and how much to reduce a sentence.” New evidence may be introduced, if relevant. If Congress wants to limit sentencing discretion, it knows how to do so, and has done so in some statutes. It has not, here.

To be clear, a resentencing judge need not accept a defendant’s rehabilitation or other arguments. It must merely “demonstrate” a “reasoned” decision. Appellate review of such decisions should be “deferential” and “not overly searching.” We appreciate the dissent’s emphasis on “finality,” but disrupting that was “the very purpose” of the First Step Act. Different defendants with different judges may get different results. But that “is a feature of sentencing law” that gives judges broad discretion.

**Kavanaugh dissenting** (joined by Roberts, Alito, and Barrett): “I respectfully disagree. The test of the First Step Act authorizes district courts to reduce sentences based only on changes to the crack-cocaine sentencing ranges.” I think the majority “sidesteps the text of the Act.” It was not intended “to unleash a sentencing free-for-all in the lower courts.”

### C. RLIUIPA (Religious Land Use and Institutionalized Persons Act)

*Ramirez v. Collier*, 142 S.Ct. 1264 (March 24, 2022). **Roberts** (8-1); *Sotomayor* concurring; Kavanaugh concurring; Thomas dissenting), reversing 10 F. 4th 561 (CA5, 2021) (per curiam).

**Headline:** Capital prisoner is **likely to prevail** on his religion-based claim that **the government must allow him to be touched and spoken to by a minister at execution.** (This is a decision on denial of a motion to stay execution, not necessarily a final judgment on the merits.)

**Facts:** John Ramirez was sentenced to death for a brutal murder committed in 2004; his conviction and sentence were affirmed in state and federal courts. In 2017, Ramirez was granted a stay less than one week before his scheduled execution, based on alleged ineffective assistance of counsel; his execution was delayed but that claim was ultimately dismissed. When Texas rescheduled Ramirez's execution in 2020, Ramirez requested that his be accompanied by his pastor in the execution chamber. Texas prison officials denied his request; Texas law at that time barred spiritual advisors from entering the chamber, in reaction to a 2019 U.S. Supreme Court decision ([\*Murphy v. Collier\*](#)) in which Texas had been ordered to allow a Buddhist spiritual advisor to be present during execution if it allowed other prison chaplains (Christian or Muslim) to be present. Ramirez then filed suit to argue that the ban on spiritual advisors violated the First Amendment and RLUIPA (the Religious Land Use and Institutionalized Persons Act). Ramirez wanted his longtime pastor to "provide spiritual comfort and guidance in his final moments," while saying that his pastor "need not touch him at any time in the execution chamber." Texas withdrew Ramirez's death warrant. Then in February 2021, Texas rescheduled Ramirez to be executed on September 8, 2021. Ramirez again filed a prison grievance requesting his pastor to be present. Texas initially denied his request, but then changed course (in response to new paster-at-execution decisions) to allow a spiritual advisor in the execution chamber subject to various procedural requirements. The new protocol said nothing about whether the spiritual advisor may pray aloud or touch an inmate; but **in the past, prison chaplains had prayed aloud and touched inmates during Texas executions.** Ramirez filed another grievance on June 11, 2021, to have his pastor pray aloud and lay hands upon him, saying that this is part of his religious faith. Texas denied that grievance on July 2, 2021, and Ramirez filed an internal prison grievance appeal July 8, 2021. When prison officials did not respond to this grievance, Ramirez filed this federal lawsuit and sought a stay of his execution. (The prison rejected Ramirez's internal appeal six days later; Ramirez then amended his lawsuit.) After the district court and Fifth Circuit denied the stay, this Court stayed his execution, granted certiorari, and expedited the case for oral argument.

**Roberts (for 8): First, Ramirez adequately exhausted his administrative remedies.** His grievance stated clearly enough a request for audible prayer. The natural understanding of his request to "pray over" him is that the prayer be audible; there would be no need for a request if it were silent. Also, praying aloud is a common type of Christian prayer, and Texas historically allowed prison chaplains to pray audibly in the execution chamber. Ramirez learned that Texas would deny on religious touch on June 8<sup>th</sup> and filed his grievance on June 11<sup>th</sup>.

On the merits, RLUIPA directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" (including state prisons) "even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden ... (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Once a plaintiff shows that a prison policy substantially burdens a sincerely held religious belief, the burden shifts to the government to show that "imposition of the burden on that person is the least restrictive means of furthering a compelling governmental interest." Here, **"Ramirez is likely to succeed in proving that his religious requests are sincerely based on a religious belief."** Although Ramirez's 2020 complaint disclaimed a need for touch, that lawsuit was dismissed without prejudice. While that might suggest that Ramirez's goal was delay, we assume that Ramirez's beliefs are sincere and the burden substantial.

As for Texas's burden, **Texas fails to show that a "ban on all audible prayer is the least restrictive means of furthering their compelling interests."** The Federal Government and Alabama

have recently allowed audible prayer during executions without incident. Texas does not explain why they cannot accommodate audible prayer despite having allowed it in the past.

Texas argues it has three compelling interests to support its ban on touch: “security in the execution chamber, preventing unnecessary suffering, and avoiding further emotional trauma to the victim’s family members.” These interests can be achieved in less restrictive ways. Under the current protocol a spiritual advisor may stand three feet from an inmate, with a security escort nearby. It is hard to see how an advisor moving slightly closer to touch part of the inmate’s body increases the risk. As for possibly interfering with an IV line, Texas could allow touch on the lower leg, distant from the IV lines. Finally, Texas agrees that touching Ramirez’s leg during prayer will not result in trauma, but Texas expresses worry about more problematic requests down the line. However, RLUIPA requires that each case be addressed one at a time, considering only the particular claimant.

Thus **at this preliminary injunction (“stay”) stage**, Ramirez is likely to prevail on his statutory RLUIPA claim, and would suffer irreparable harm in the absence of a stay. “The judgment of the ... Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.”

**Sotomayor concurring**: “Prison officials and incarcerated individuals share an obligation to act in good faith in resolving disputes: Incarcerated individuals must timely raise their claims through the prison grievance system, and prison officials must ensure that the system is a functioning one.” Thus prison officials must timely inform an individual facing execution of relevant protocols, and must swiftly address concerns to permit an individual to seek judicial review. Neither party “should unnecessarily wait to act until the end of time available to them.” Here, the prison took 39 (of its permitted 40) days to deny Ramirez’s Step 2 grievance, even though they said the protocols clearly foreclosed it. “Such delay creates an impression ... that the prison is trying to ‘thwart inmates from taking advantage of [the] grievance process’ and cut short their opportunity to obtain judicial review.” “[I]ncarcerated individuals should know that delays in raising their requests can result in denial. They should not, however, be penalized for delays attributable to prison administrators.”

**Kavanaugh concurring**: [**Ed. note**: this concurrence seems to reflect the reality of Justice Kavanaugh’s current “middle-vote” position on the Court, as well as his apparent desire to be perceived as trying to accommodate “all sides” of hard-fought emotional litigation issues.] “I join the Court’s opinion in full, and I write separately to add three points.” First, I review the “recent history” of “religious equality” litigation involving execution protocols. “The Court concludes that the State has a compelling interest in ensuring the safety, security, and solemnity of the execution room,” and the Court now makes it clear that “the State can satisfy those interests by means less restrictive than excluding religious advisors altogether ....” Second, “the compelling interest and least restrictive means standards require this Court to make difficult judgments ... Although the ... [these] standards are necessarily imprecise, history and state practice can ... help structure the inquiry and focus the Court’s assessment of the State’s arguments.” Third, “a dose of caution for the States is probably in order. ... To avoid persistent future litigation and the accompanying delays [**ed. note**: this suggestion seems a bit naïve, in light of the hostile adversary nature of anti-execution litigation history], it may behoove States to try to accommodate an inmate’s timely and reasonable requests about a religious advisor’s presence and activities in the execution room.... This would [also] serve the exceptionally powerful interests of victims’ families in finally obtaining closure.”

**Thomas dissenting**: “... Ramirez’s claims ... are procedurally barred.” He “did not comply with the PLRA by exhausting the administrative remedies.” Ramirez has engaged in insincere and dilatory litigation tactics to postpone his execution. The doors of the court should be closed to a prisoner who acts inequitably. “[B]y avoiding his sentence, Ramirez has inflicted recurrent emotional injuries on the victims of his crime.” Ramirez’s evolving litigation position is evidence of insincerity; that his current request is traditional is irrelevant to whether he actually believes it as part of his faith.

## D. Mens Rea

*Ruan v. U.S.* (consolidated with *U.S. v. Kahn*), 142 S.Ct. 2370 (June 27, 2022). **Breyer** (9 (6+3) to 0); *Alito concurring* in the judgment, joined by Thomas, and by Barrett in part), vacating 966 F.3d 1011 (CA 11, 2020) and 989 F.3d 806 (CA 10 2021).

**Headline:** Conviction of licensed doctors for distributing controlled substances “except as authorized” is vacated because **government must prove the defendant subjectively acted “knowingly or intentionally;” a “reasonable physician standard is rejected.**

**Facts:** It is a federal offense for persons to “knowingly or intentionally” distribute “controlled substances,” “except as authorized.” This “authorized” exception allows licensed doctors to sometimes prescribe controlled substances, but only (as a C.F.R. provides, not the statute itself) when a prescription is “for a legitimate medical purpose ... acting in the usual course of his professional practice.” Xiulu Ruan and Shakeel Kahn, both doctors, were separately convicted of violating this statute (and regulation); they argued that (1) their prescriptions were lawful under the exception,” and that (2) even if not, they did not subjectively know they did not meet the standards for the exception. Two different district courts here declined to give a jury instruction that the government must prove a doctor-defendant knows that their prescriptions are not legitimate; they offered instead an objective, “reasonable physician” standard for lawful conduct. The cases were consolidated for SCt argument.

**Breyer (for 6):** We conclude that “knowingly or intentionally” in the statute applies to the “except as authorized” clause; and further, that this means that **the government must prove beyond reasonable doubt that a doctor-defendant personally knew they were acting in an unauthorized manner.** Federal law, like the common law, starts from a longstanding presumption ... that Congress intends to require ... a culpable mental state. *Morissette* (1952). Thus we often read into silent federal statutes, a *mens rea* element (often “knowledge”). Moreover, **when a statute has a general *mens rea* element, we have held that it applies to every element** that “separates wrongful from innocent acts” (*Rehaif* (2019); *X-Citement Video* (1994); *Liparota* (1985)), although maybe not to “jurisdictional elements.” The regulatory definition of “authorized” is “ambiguous” and “difficult to distinguish from the gray zone of socially acceptable.” So “a strong scienter requirement” is appropriate.

Although a separate section (§885) says the government need not “negative any exemption or exception in any indictment,” that **does not mean it is not an “element” the government must prove** for a conviction. Section 885 may place “the burden of production” on a defendant, but once that burden is satisfied [here, by prescriptions written by the defendants], the final burden of proof beyond reasonable doubt for “lack of authorization” rests on the government. And neither the statutory text nor traditional criminal principles suggests that a “general” reasonable physician” standard, as opposed to an individual, personal (subjective) mental state is required. “As we have said before, the more unreasonable a defendant’s asserted beliefs or misunderstandings are, the more likely the jury will find the government has carried its burden of proving knowledge.” We leave for remand arguments that the jury instructions in these cases actually conveyed the subjective *mens rea* standard we identify today.

*Alito concurring in the judgment* (joined by Thomas fully, and all except one part by Barrett): There is an important and well-recognized distinction in criminal law, between elements of a crime and affirmative defenses. The “new hybrid” of these that the majority recognizes, on a “sufficiently like an element” four factor analysis, is unnecessary, not textually required, and may lead to “confusion and disruption.” The four factors do not “withstand analysis” [the details of Alito’s argument are omitted here.]. I would apply a “good faith” defense we recognized long ago in this same context (*Linder*, 1925), and vacate and remand for its application here. “Elements” must be alleged in the indictment, and the Court recognizes that §885 says that is not required for “lack of authorization.” Instead, that section explicitly creates an affirmative defense that the defendant must “establish.” [And here is the part that Barrett does not join:] placing the burden on the government to prove the exception beyond reasonable doubt is atextual and not the common law norm for affirmative defenses. At most, it should

be a preponderance burden on the government. I now examine “text, structure, and history” of the statutes, to describe how the affirmative “good faith” defense should work [details omitted here].

### III. HABEUS CORPUS

*Shoop v. Twyford*, 142 S.Ct. 2037 (June 21, 2022). **Roberts** (5-4 (3+1)); Breyer dissenting for three; Gorsuch dissenting alone), reversing 11 F.4<sup>th</sup> 518 (CA6, 2021).

**Headline:** A district court on habeas **may not use the All Writs Act** to order the transportation of a state prisoner, **absent a showing that evidence sought would be admissible** on the habeas claims.

**Facts:** Raymond Twyford was sentenced to death in Ohio for a 1992 aggravated murder. He was committed to state prison and his conviction and sentence became final after appeals. State habeas courts rejected later claims of ineffective assistance for failing to raise evidence of a head injury to Twyford as a teenager, and also youthful abuse. In this federal habeas, filed in 2003, the district court ordered Ohio to transport Twyford to a medical facility for testing on the head injury claim. Twyford argued that testing “could plausibly lead to the development of” relevant evidence. The district court issued its order under the “All Writs Act,” 28 U.S.C. §1651(a), which authorizes federal courts to issue “all writs necessary or appropriate in aid of their respective jurisdictions.” The Sixth Circuit affirmed, on the State’s interlocutory appeal, saying that the court was not required to “consider the admissibility of any resulting evidence” before ordering the State to transport Twyford.

**Roberts (for 5):** Such an order is not “necessary or appropriate in aid of” the federal court’s resolution of the habeas case, without first considering whether the evidence sought would be admissible on habeas claims that are not procedurally barred. (We do not address the State’s argument that such transportation orders are not authorized at all.). We also agree (ftnt.1) that transportation orders are immediately appealable, interlocutorily, although contrary to the normal “collateral order” jurisdictional rule, because of the immediate “public safety risks and burdens on the State that cannot be remedied after final judgment.”

The federal statute that restricts federal habeas review of state criminal judgments (AEDPA) expressly limits the federal court to “evidence presented in the State court proceeding,” and this means (we ruled in *Pinholster*, 2011) “the record that was before the state court.” There are two “limited” exceptions, but for both the federal court “must first take into account these restrictions” before granting and evidentiary hearing or “otherwise consider[ing] new evidence.” ***Shinn v. Ramirez*** [decided four weeks earlier this Term, see below], 2022), slip op. at 21. Otherwise the court is unlawfully “prolong[ing] federal habeas proceedings with no purpose” (*id.*). The All Writs Act cannot be used to “circumvent” these requirements. **“Fish[ing] for unusable evidence” is neither “necessary [n]or appropriate” in aid of a federal court’s limited habeas jurisdiction.** It would “frustrate the State’s interests in finality” (*Calderon*, 1998), as well as “present serious risks of public safety” [ftnt.2 cites a June 4, 2022, newspaper article!]. It is difficult to see how Twyford’s proposed testing could be admissible on the merits in light of the “state court record” and other limits on federal habeas review.

**Breyer dissenting (joined by Sotomayor and Kagan):** I would not reach the merits here, because there should be no jurisdiction to hear this interlocutory appeal. There is no “important” reason to extend our normal final judgment rule (*Cohen*, 1949) to habeas transportation orders. We have previously ruled that there is no interlocutory jurisdiction over discovery orders even when allegedly privileged information will be revealed. *Mohawk* (2009). The order here is really no more than such a discovery order, and we have never recognized an exception to *Mohawk* for States. There is no special risk; States often transport prisoners to medical facilities. Will the rule today forbid federal courts from ordering state prisoners to federal court for trials or hearings? Interlocutory review of an issue that will again be raised after final judgment is “duplicative and inefficient.”

**Gorsuch dissenting:** The jurisdictional argument under the “collateral order” doctrine “became clear” only after we granted review on the All Writs Act question. Exceptions to the final judgment rule are supposed to be “narrow and selective” and we have expressed “caution,” to allow “rulemaking” to decide when immediate appeals should be allowed. *Mohawk* (2009). We did not take this case to extend *Cohen* (1949), yet the Court does that, in a footnote. “Respectfully,” I would dismiss the case, now, as improvidently granted.

*Kemp v. U.S.*, 142 S.Ct. 1856 (June 13, 2022). **Thomas** (8-1); *Sotomayor concurring*; *Gorsuch dissenting*, affirming 857 Fed. Appx. 573 (CA11, 2021).

**Headline:** A judge’s errors of law are “mistakes” under Federal Rule of Civil Procedure 60(b)(1), not “any other reason” for reopening a judgment under 60(b)(6) – so the habeas petitioner here loses under the shorted (b)(1) limitations period.

**Facts:** A federal jury convicted Dexter Kemp of drug and gun crimes in 2011. The Eleventh Circuit affirmed in 2013 (with seven co-defendants), and Kemp did not seek rehearing or petition the Supreme Court for *certiorari*. In 2015, Kemp petitioned to vacate his sentence under 28 U. S. C. §2255, but the district court dismissed that petition as untimely because §2255 motions must be made within one year of “the date on which the judgment of conviction becomes final.” The district court ruled that Kemp’s judgment had become final in February 2014, 90 days after the Eleventh Circuit affirmed his conviction and he failed to petition for *certiorari*, so Kemp’s §2255 claim filed in April 2015 was two months late. Two years later, in 2018, Kemp moved to reopen his §2255 dismissal under Federal Rule of Civil Procedure 60(b) he invoked subsection (b)(6) of Rule 60, which permits reopening a final judgement for “any other reason that justifies relief” so long as the motion is filed “within a reasonable time.” Kemp argued that the district court had mistakenly determined when his judgment was “final,” because some codefendants had continued to appeal and petition in the same case even after Kemp’s own appeal had ended. Indeed, **the Eleventh Circuit said (in rejecting Kemp’s petition) that it was true that Kemp’s original §2255 motion “appeared to have been timely.”** Nevertheless, the district court and the Eleventh Circuit both ruled that Kemp’s Rule 60(b) motion to reopen was properly dismissed as untimely, because Kemp’s argument was based on a “mistake” that falls under subsection (b)(1) -- which is governed by a one-year limitations period – and not (b)(6), which is governed by a “reasonable time” limit. This added to a **“longstanding” Circuit split on whether errors of law are encompassed as “mistakes” under subsection (b)(1).**

**Thomas (for 8):** “Under Rule 60(b)(1), a party may seek relief based on ‘mistake, inadvertence, surprise, or excusable neglect,’” while “(b)(6) provides a catchall for ‘any other reason that justifies relief.’” Motions under either subsection must be filed in a reasonable time, but (b)(1) motions may not exceed one year. **“As a matter of text, structure, and history,” a mistake under Rule 60(b)(1) includes a judge’s errors of law.** When the rule was adopted in 1938 and revised in 1946, the ordinary and legal definitions of “mistake” included a judge’s mistakes of law. The drafters could have drafted language to narrow the meaning if they had intended. The drafters also could have excluded mistakes from judges; in fact, the 1938 version read that way: 60(b) initially referred to “his” mistake, apparently not including judicial errors. “In 1946, however, the Rule’s amenders deleted the word ‘his,’ thereby removing any limitation on whose mistakes could qualify.” Kemp’s argument that our interpretation creates some confusing overlap among Rule 60(b) rules is unpersuasive because the same overlap could exist under his interpretation. **“[N]othing in the text, structure, or history of Rule 60(b) persuades us to narrowly interpret the otherwise broad term ‘mistake’ to exclude judicial errors of law.”** Thus even if Kemp’s §2255 petition was erroneously dismissed, his 60(b) motion filed two years later was untimely under (b)(1)’s one-year limitation. So Kemp loses.

**Sotomayor concurring:** “I join the Court’s opinion with the understanding that nothing in it casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law.” “I [also] do not understand the Court’s opinion to break any



new ground as to Rule 60(c)(1), which requires that all Rule 60(b) motions be ‘made within a reasonable time.’”

**Gorsuch dissenting:** We should have DIGed this case (“dismissed as improvidently granted”). “[G]ranting review was a questionable use of judicial resources.” This case turns on a unique set of circumstances, and “this dispute presents a policy question about the proper balance between finality and error correction,” which is “best resolved ... through the rulemaking process.”

*Shinn v. Ramirez* (consolidated with *Shinn v. Jones*), 142 S.Ct. 1718 (May 23, 2022). **Thomas** (6-3); Sotomayor dissenting), reversing 937 F.3d 1230 and 943 F.3d 1211 (both CA9, 2019)

**Headline: Ineffective assistance of post-conviction counsel in developing state court record is not equitable “cause”** that allows a federal habeas court to consider or develop new evidence.

**Facts:** *Martinez v. Ryan* (2012) equitably recognized that ineffective assistance of post-conviction counsel can constitute “cause” to overcome procedural default of a habeas claim, where state court rules make a postconviction proceeding the first time such a claim can realistically be raised. Here, in two different federal habeas cases challenging Arizona capital convictions, the Ninth Circuit ruled that allegations of such post-conviction ineffective assistance also allows development of new evidence in aid of the claim that the original state trial lawyers were ineffective. Ramirez’s court considered new evidence, but then ruled against Ramirez on the merits (finding counsel not ineffective). Jones’s district court ruled in Jones’s favor after allowing development of new evidence in a 7-day evidentiary hearing. The Ninth Circuit affirmed in both (with eight CA9 judges dissenting from denial of rehearing *en banc* in *Jones*). [Ramirez and Jones are both under death sentences; the district judge in *Jones* actually found that Jones might not be guilty of his offense.]

**Thomas (for 6):** “To respect our system of dual sovereignty, the availability of habeas relief is narrowly circumscribed” [citing *Brown v. Davenport*, decided this Term a month earlier [and summarized below]. “Only rarely may a federal habeas court hear a claim of consider evidence that a prisoner did not previously present to the state courts.” AEDPA sets explicit restrictions (§2254(e)(2)), as do our precedents [lengthy review omitted here]. *Martinez v. Ryan* (2021) recognized a “narrow exception to the rule that attorney error cannot establish ‘cause’ to excuse a procedural default, unless it violates the Constitution.” But *Martinez* does not state an exception to AEDPA’s “stringent requirements” limiting new evidence to “two limited scenarios.” And “even if all those requirements are satisfied, a federal habeas court is not *required* to hold a hearing or take any [new] evidence.” “Principles of comity and finality” must still be observed.

We conclude that **even when *Martinez* post-conviction ineffective assistance is alleged, “a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record.”** “State postconviction counsel’s ineffective assistance in developing the state court record is **attributed to the prisoner,**” “**because [Ed. note: because?] there is no constitutional right to counsel in state postconviction proceedings.**” [Ed. note: Justice Thomas and Scalia dissented in *Martinez* on this same ground. The only difference now, it seems, is the addition of three more conservative Justices in the past four years.] “A state prisoner is responsible for counsel’s negligent failure to develop the state postconviction record.” [*Michael*] *Williams v. Taylor* (2000); *Holland* (2004 *per curiam*); and *Keeney* (1992, before AEDPA). *Martinez* provides “no authority to amend” a statute (§2254(e)(2)), (citing a Scalia dissent in *McQuiggin*, 2013). We think a prisoner is “at fault” under our precedents, even if the prisoner’s postconviction counsel was negligent – so the narrow exceptions to §2254(e)(2) cannot apply. So even if *Martinez* excuses a failure of postconviction counsel to raise a claim of ineffective trial counsel assistance, we do not think it excuses counsel’s failure to evidentiarily develop that claim. “We simply cannot square [a different] result with AEDPA [the statute] or our precedents.” [Ed. note: the three dissenters manage to “square” it, of course. It is a matter of interpretation, not ineluctable logic.] We don’t agree that Congress intended to leave “open” any “liberaliz[ation]” of habeas, or that we can “rewrite” §2254(e)(2) as the dissent suggests, to allow

ineffective assistance as a narrow exception. “We lack this [equitable] authority.” Although *Martinez* noted that “evidence outside the trial record” may often be needed for ineffective assistance claims, it did not “prescribe largely unbounded access to new evidence.” The “sprawling evidentiary hearing” in Jones’s case, which was a “wholesale relitigation of Jones’s guilt” [i.e., the district court concluded Jones’ might not be guilty] is an example of the “improper burden . . . on the States” that the dissent would invite. Even if §2254(e)(2) were read to allow an evidentiary hearing on “cause,” it cannot be considered on the merits of a claim. **Perhaps our decision “renders many *Martinez* hearings a nullity,” but that is not a reason to set §2254(e)(2) aside.** Instead, it “is “a reason to dispense with *Martinez* hearings altogether.” [! **This seems to say that *Martinez* should be overruled.**] Thomas closes his opinion by raising the old, and empirically highly questionable, fear of habeas counsel “sandbagging” state courts by intentionally omitting some claims just for federal habeas review.]

**Sotomayor dissenting (with Breyer and Kagan):** The Court “all but overrules” *Martinez* (2012) and *Trevino* (2013 [a follow-on to *Martinez*]). It allows capital defendants whose lawyers have been ineffective, to be executed even if new evidence would demonstrate their innocence. “This decision is perverse. It is illogical”; and it “arrogates power from Congress,” because §2254(e)(2) can easily be read to allow the development of new evidence on a *Martinez* claim. “It makes illusory the protections of the Sixth Amendment.” For example, the district court in Jones found that there was a reasonable probability that Jones would not have been convicted had trial counsel not been ineffective. When the state has provided defendants with ineffective lawyers and no way to challenge it, the defendant simply cannot be described as being “at fault” for failing to develop the record. “Any other reading hollows out” *Martinez* and other precedent; the Court’s contrary reading is “irrational.” Indeed, **the majority simply “recycle[s] claims rejected by *Martinez*.”** AEDPA strikes a “careful balance” between finality and fundamental fairness; it is not a “single-minded focus” on finality “at all costs.” [In the interests of “summarizing,” further details of Sotomayor’s 20-page dissent are omitted here.]. “Make no mistake:” this “devastating outcome” is not “compelled by statute.” “The responsibility . . . lies not with Congress, but with this Court.”

***Brown v. Davenport***, 142 S.Ct 1510 (April 21, 2022). **Gorsuch** (6-3); **Kagan** dissenting), **reversing** 964 F.3d 448 (CA6 2020).

**Headline:** When a state court has ruled on the merits of a state prisoner’s claim, **a federal habeas court must apply both the AEDPA (1996) and *Brecht* (1993) tests before it may grant relief.**

**Facts:** Ervine Davenport was convicted of first-degree murder for killing a woman in 2007. On appeal, the Missouri Supreme Court determined that Davenport had been unconstitutionally shackled during his trial; but on remand the trial court found this error was harmless beyond a reasonable doubt (under *Chapman*, 1967), the appellate court agreed, and the Missouri Supreme Court denied review. On federal habeas, the district court denied relief AEDPA, §2254(d), because the state courts’ application of *Chapman* was not “unreasonable.” But the Sixth Circuit reversed (and voted 8-7 to deny rehearing en banc), saying that the habeas standard from *Brecht* (1993) (“a substantial and injurious effect or influence on the outcome of the trial”) should govern, not AEDPA’s “unreasonable” standard.

**Gorsuch (for 6): Both *Brecht* and §2254(d) apply, and both must be satisfied before a federal habeas court may grant relief.** AEDPA is easy: it says a federal habeas court “shall not . . . grant” relief, regarding a claim that has been adjudicated by the state on the merits, “unless” unreasonable. When *Brecht* is implicated -- in a constitutional “harmless error” case -- then the federal habeas court must also ensure that the prisoner has carried that burden too. **But “*Brecht* is only a necessary, not a sufficient, condition to relief.”** [Justice Gorsuch uses this opportunity to write out his own 8-page understanding of federal habeas history; Kagan says it is “wrong,” in her dissent.] In 1996, Congress, apparently finding the Court’s [own developed] equitable doctrines insufficient,” enacted AEDPA. But it also “left intact the equitable discretion traditionally invested in federal courts by preexisting” law. Thus, this Court’s prior precedents, including *Brecht*, still apply.

We reject the contention that *Brecht* and AEDPA are the same standard; they are “entirely different in kind,” both in meaning and in the materials a habeas court may consider (AEDPA is more restrictive than *Brecht*). We also reject the claim that some “carefully curated snippet[s]” from two of our cases require a different result (*Fry*, 2007, and *Ayala*, 2015). Neither case anticipated the case here. Meanehile, *stare decisis* requires “judicial humility” and “respecting the limits” of precedents: “the language of an opinion is not always to be parsed as though [it] were ... a statute.” “We neither expect nor hope that our successors will comb these pages for stray comments and stretch them beyond their context ... to justify an outcome inconsistent with” the Court’s reasoning as well as Congress’s instructions. The dissent expresses “an exalted view of this Court’s every passing remark” that we do not share.

Finally, we think Davenport’s claim fails under AEDPA. It was not unreasonable to conclude that Davenport’s shackling error was harmless, nor was it “contrary to” *Holbrook* (1986), which addressed only relying on prospective juror’s views of security forces in a courtroom might affect them, a “different evidentiary record” not present here.

**Kagan dissenting (with Breyer and Sotomayor):** In both *Fry* and *Ayala*, we “made clear” that a habeas court addressing a state court ruling that an error was harmless, “need apply only the standard prescribed in *Brecht*.” We said that “the *Brecht* standard obviously subsumes the more liberal AEDPA one.” “Today the court disregards those crystal-clear statements.” Moreover, it consigns future federal habeas courts to “pointless make work,” because ADEPA “will never lead to a different result” once *Brecht* is applied. [The details of Kagan’s not-implausible arguments are omitted here]. When the majority says what *Fry* “more precisely meant,” **it maligns “the greatest wordsmith in modern Supreme Court history” [Scalia!]**. “The majority departs from those two decisions because it disagrees with what they said.” “Just go read them.” “Our prior decisions got the question here right.”

By the way, the majority’s “unprompted, from Blackstone onward law-chambers history,” which is irrelevant to this case, “is wrong.” It “has nothing to do with resolving this case.” The view that federal habeas is limited to “jurisdictional” claims, rather than “errors in adjudication,” shows “the perils of looking at history through a 21<sup>st</sup>-century lens.” The majority is “perhaps hoping that the seeds it sows now will yield more succulent fruit in cases to come.” It may be “entertaining to play amateur historian,” but we should stick to “the technical issue before us.”

#### IV. NATIVE AMERICAN TRIBAL AUTHORITY

*Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (June 29, 2022). **Kavanaugh** (5-4); Gorsuch dissenting, reversing (Okla. Ct. Crim. App. 2021, which relied on 484 P.3d 286 (Okla. Ct. Crim. App., 2021).

[**Ed. note:** contrast the 5-4 vote here with the *Yselta* opinion issued two weeks earlier (below). Justice Barrett’s vote is the difference between the two decisions.]

**Headline:** The federal and state governments have concurrent jurisdiction to try crimes committed in “Indian country” by non-Indians against Indians. “Indian country is part of a state, not separate from it.” [Gorsuch dissent: this refuses to recognize the force of my opinion in *McGirt v. Oklahoma* (2020), which found 43% of Oklahoma to still be “Indian country.”]

**Facts:** The State of Oklahoma charged and convicted Victor Manuel Castro-Huerta of horribly severe child neglect. Castro-Huerta was sentenced to 35 years in prison. The victim was an Indian tribe member, and Tulsa Oklahoma, is, *McGirt* ruled in 2019, “Indian country,” because the Court determined that the treaty-established Creek Reservation spanning 43% of Oklahoma had never been “disestablished” by Congress. After *McGirt*, Oklahoma courts decided that only the federal government has jurisdiction [that is, “exclusive” jurisdiction] to charge and try crimes committed on Indian territory. So Castro-Huerta’s state conviction and sentence was vacated (a concurrent federal

sentence of 7 years remains in place). The “sudden significance” of *McGirt*, affecting 18,000 state criminal prosecutions per year, created an “urgent” need to review this issue.

**Kavanaugh (for 5):** It is a longstanding and consistent rule that a State may exercise jurisdiction in Indian country within its borders, “except as forbidden by federal law.” *Egan* (1962); *Hagan* (1845); but see *Worcester v. Georgia* (1832) (ruling that the Cherokee Nation “is a distinct community occupying its own territory”). The question, then, is whether federal law “preempts” the State’s jurisdiction here. We say that it does not; and neither do “principles of tribal self-governance” preclude state prosecution of non-Indians, even for crimes against Indians committed in Indian country. The General Crimes Act (1834) allows the federal government to prosecute crimes committed in Indian country; and Public Law 280 (1953) grants States additional jurisdiction over crimes in Indian country. Neither statute “pre-empts” a State’s general jurisdiction to prosecute crimes within its borders (despite some contrary “tangential *dicta*” in the past). History shows no such unexpressed Congressional intent; and Indian country is not a “federal enclave” where federal jurisdiction would be exclusive. Finally, the *Bracker* (1980) balancing test, that prohibits state jurisdiction if it “would unlawfully infringe upon tribal self-government,” does not preclude state jurisdiction here. [Further details of this 25-page opinion are omitted here.]. The dissent’s emphasized “history of mistreatment of American Indians” does not answer the question here. [Ed. note: the majority here does seem to simply revisit and reinterpret Treaty history that went the other way in *McGirt*, as Gorsuch says in his dissent here. The difference today is that Justice Ginsburg joined Justice Gorsuch’s majority in 2019, but has now been replaced by Justice Barrett.]. **“The dissent employs extraordinary rhetoric in articulating its deeply held policy views about what Indian law should be.”** That is not this Court’s “proper role.”

**Gorsuch dissenting, joined by Breyer, Sotomayor and Kagan):** [This 42-page dissent, with much interesting history and citations, disagrees with the majority on every point. Only a brief flavor of it can be given here.]. This ruling “intrude[s] on a feature of tribal sovereignty recognized since the founding.” The Court “wilts” in denying the force of Chief Justice Marshall’s 1832 “foundational” opinion in *Worcester*. And Public Law 280 requires tribal consent before a State may assume jurisdiction over crimes by or against Indians on tribal lands. We rejected many of the State’s argument in our [my] opinion in *McGirt* (2019). Today’s decision is contrary to *McGirt* and is (like other unhappy instances in our history) an “unlawful power grab” by Oklahoma. The real party-interest here is “the Cherokee, a Tribe of 400,000 members with its own government” – yet now they have no jurisdiction [Ed note: unclear why they would have “no” jurisdiction, as opposed to concurrent with the State?] over crimes committed against tribe members by non-Indians, even when committed on the tribe’s land. **“A more ahistorical and mistaken statement of Indian law would be hard to fathom. “One can only hope that the political branches and future courts will do their duty to honor this Nation’s promises even as we have failed to day to do our own.”**

[\*Ysleta del Sur Pueblo v. Texas\*](#), 142 S.Ct. 1929 (June 15, 2022). **Gorsuch**, 5-4 (Barrett joins); **Roberts** dissent with Thomas, Alito and Kavanaugh, [vacating](#) 955 F.3d 408 (5<sup>th</sup> Cir. 2020).

**Headline: Only those gaming activities entirely prohibited by Texas law are also banned from Tribal lands** under federal law.

**Facts:** The federal Restoration Act of 1987 prohibits “all gaming [gambling] activities which are prohibited by the laws of the State of Texas;” a separate federal law permits Tribes to offer certain gambling games in States that “permit such gaming for any purpose.” After much negotiation and litigation with Texas, the Ysleta del Sur Pueblo Tribe decided in 2016 to offer electronic bingo. Texas objected, saying that although its laws permit bingo, it is only under various restrictions that the Ysleta was not following. The Fifth Circuit had previously ruled (*Ysleta I*, 1994) that all of “Texas’s gaming laws and regulations ... operate as surrogate federal law on the Tribe’s reservation.” The district court here ruled that *Ysleta I* required enjoining the tribe’s new bingo gaming, but suggested that *Ysleta I* might be reconsidered. But the Fifth Circuit affirmed the district court’s ruling enjoining the tribe.

**Gorsuch:** “Native American Tribes possess inherent sovereign authority;” and “under our constitution, treaties and laws, Congress too bears vital responsibilities in the field of tribal affairs.” [Justice Gorsuch then provides 5 pages of interesting history, demonstrating his now-evident deep concern for Native American history and sovereignty.]. Here, there is no evidence [that] Congress endowed state law with anything like the power Texas claims.”

Texas permits “charitable bingo operations,” but no bingo otherwise. The dispute with the Yselta over bingo dates back to at least 1983. In an unrelated 1983 decision (*Cabazon*), we ruled that if a state *prohibits* a particular game, it can ban that game on tribal lands too; but not if it “merely *regulates* a games availability.” In 1987, Congress enacted the Restoration Act specifically for the Yselta tribe, and a separate Indian Gaming Regulatory Act for all federal tribal relations. These laws seemed to adopt our *Cabazon* “dichotomy” between state prohibition versus regulation. But “a quarter century of confusion and litigation followed.”

Prohibition and regulation are “not synonymous.” And “we find hard to see” Texas’s argument that it “prohibits” bingo “unless” its regulations are followed. That would “render[] the Restoration Act a jumble.” Moreover, section (b) of that Act states that “nothing” in it “shall be construed as a grant of ... regulatory jurisdiction to the State of Texas.” We reject the dissent’s contrary arguments. We assume that when Congress writes legislation, “is aware of this Court’s relevant precedents.” Here, the 1987 Act was written just six months after we issued *Cabazon*. We cannot “fairly read” the Act other than as having endorsed our *Cabazon* distinction. Moreover, Congress has endorsed other States’ regulations as applicable to tribes, but it expressly did not do so for Texas. Whether our ruling will prove “workable” on remand remains to be seen, but that is “irrelevant” to the question before us.

**Roberts dissenting (joined by Thomas, Alito and Kavanaugh):** In sum, “I disagree” that the majority’s reading of the statutory text is “the better one.” It also “makes a hash of” the statutory structure and history. [Further details of his 16-page opinion are omitted here.]. I don’t believe Congress intended to authorize “casino-style gaming” on Yeslta land in its “careful” 1987 compromise.

[\*Denezpi v. U.S.\*](#), 142 S.Ct. 1838 (June 13, 2022), **Barrett**, 5-4; [Gorsuch](#) dissenting (unusual dissent combo, with Sotomayor and Kagan; Breyer votes with majority), affirming 979 F.3d 777 (CA10 2020).

**Summarized under “Fifth Amendment,” above:** No double jeopardy when federal authorities prosecute both a tribal offense and a federal crime with the same elements; separate sovereigns are the “source” of each offense, so they are not the “same offense.”

## V. IMMIGRATION LAW

[\*Biden v. Texas\*](#), 142 S.Ct. 2528 (June 30, 2022). **Roberts** (6-3; 5-4 on jurisdiction); *Kavanaugh concurring*; [Alito dissenting](#) with Thomas and Gorsuch; [Barrett dissenting](#) on jurisdiction only), [reversing](#) 20 F.4<sup>th</sup> 928 (CA5 2021).

**Headline:** The Executive branch has authority to rescind the trump “Remain in Mexico” policy. Also, §1252(f)(1) [see *Garland v. Aleman-Gonzalez* (2022), summarized below] does not limit the jurisdiction of this Court to consider the question.

**Facts:** In 2019 the trump Administration announced a new policy (captioned the Migrant Protection Protocols or “MPP”) that non-Mexican immigrants arrested after entering the United States unlawfully through Mexico, would be returned to Mexico pending disposition of any challenges they might have to their final removal. This was pursuant to a section (§1225(b)(2)(C)) of the INA (Immigration and Nationality Act)) that says “the Attorney General may return” such persons. On President Biden’s inauguration day (January 2021), the Dept of Homeland Security announced that the policy would be suspended; they later (in June) explained the basis for that change in a memorandum. The States of Texas and Missouri sued to block this change in federal court. They argued that the

statute, §1225, requires the “return to Mexico” policy, and that that the suspension of the policy violated the Administrative Procedure Act (APA). The Texas district court agreed and imposed a nationwide injunction, ordering that the trump MPP be followed. Stays of that ruling were denied; DHS then issued an even more detailed explanation for the suspension, responding in part to the district court’s ruling. DHS said that the “benefits do not justify the costs,” and it detailed one “cost” of the policy as creating difficulties in “diplomatic engagements with Mexico.” The Fifth Circuit ruled that this new explanation was not a new “final agency action,” affirmed the district court ruling and injunction, and denied a stay. We then expedited this appeal.

**Roberts (for 6 on the merits, for 5 on jurisdiction):** First, we have jurisdiction to review this case. We ruled on the meaning of §1252 two weeks ago in *Aleman-Gonzalez*, and the district court’s injunction clearly violated that provision. That provision is not a “subject matter” jurisdictional bar; it merely says district courts lack “jurisdiction ... to grant a particular form of relief.” The parenthetical in §1252 (“other than the Supreme Court”) clearly preserves this Court’s jurisdiction. We reviewed a similar case before (*Nielsen v. Preap*, 2019) – Justice Barrett “misses the point” that that case also involved a district court granting and injunction, and yet we “resolved it on the merits.”

On the merits, the word “may” in §1225 “*clearly* connotes discretion,” so the MPP is not required by law. Even we assume that another section of the statute requires detention of these noncitizens, and that the Biden Administration is violating it, the “expressly discretionary term” in §1225 as well as the history of the provision, “confirms the plain meaning of its text”: “return” is discretionary. Any other interpretation here would be inconsistent with “every Presidential administration” in the provision’s 26 years. Also, the “foreign affairs consequences” counsel that we “take care to avoid the danger of unwarranted judicial interference in the conduct of foreign policy” (*Kiobel*, 2013). Section 1225 “means what it says: ‘may’ means ‘may.’” Also, the final DHS explanatory memorandum constitutes “reviewable ‘final agency action,’” so we can refer to it. [The Court’s detailed analysis of this point, while undoubtedly important to administrative law (e.g. ftnt.8), is omitted here.]

**Kavanaugh concurring:** Note that Justice Barrett’s “dissent” actually agrees with the majority on the merits of the meaning of §1225. I briefly (3 pages) “elaborate on my understanding” of the INA provisions here. “Nothing ... suggests that Congress wanted the Federal Judiciary to improperly second-guess the President’s Article II judgment with respect to American foreign policy and foreign relations.” I also note “the multi-decade inability of the political branches to provide” enough resources to respond to the influx of noncitizens.

**Alito dissenting, joined by Thomas and Gorsuch:** Section 1225 says that aliens “*shall* be detained.” The “may return” provision simply states one of two required alternatives, and if DHS does not individually “parole” such persons, than it must return them. “DHS does not have the capacity to detain” all the persons that fit the provision. But if that is so, it cannot then also “forgo” the return option and “release into this country untold numbers of aliens” who may then never “show up” for their later removal hearings. The majority also errs in resolving the “difficult jurisdictional question” with only “hurried briefing;” and it ought not endorse “the government’s last-minute attempt” to “derail the ordinary” process with the late explanation. [Further details of Alito’s 19-page opinion are omitted.]

**Barrett dissenting in part (joined by Thomas, Alito and Gorsuch “as to all but the first sentence”):** “**I agree with the Court’s analysis of the merits** – but not with its decision to reach them.” Instead, I would vacate and remand for lower court reconsideration in light of *Aleman Gonzalez*.

**Garland v. Gonzalez** (consolidated with *Garland v. Tejada*), 142 S.Ct. 2057 (June 13, 2022). **Alito** (6-3); **Sotomayor** dissenting in part, concurring in the judgment in part), **reversing** 955 F.3d and 954 F.3d 1254 (both CA9, 2020).

**Headline:** A section of the Immigration and Nationality Act (INA), **§1252(f)(1), deprives district courts of jurisdiction to consider class-wide relief** for aliens arrested for illegally reentering the

United States after having previously been ordered removed, **to seek release on bond** pending disposition of their claims after six months of detention.

**Facts:** Three non-citizen plaintiffs here were all previously removed from the United States. They re-entered unlawfully, were arrested for that, and their prior orders of removal were reinstated. They sought withholding of removal, alleging torture or persecution if returned to their countries (Mexico and El Salvador). They were detained [imprisoned] pending disposition of their status, and they sued in these two cases, demanding a bond [bail] hearing after 180 days (six months) of detention, under §1231(a)(6) of the INA. The Ninth Circuit affirmed injunctions which granted this relief, on behalf of a larger class, from two district courts. The government (trump administration) petitioned for certiorari on the bond question. But the Court *sua sponte* directed the parties to address whether §1252(f)(1) deprives lower federal courts of jurisdiction over such lawsuits.

**Alito:** The [lengthy] text of §1252(f)(1) provides [in part, with many ellipses omitted here] that “regardless of the claim or the parties, **no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain** the operation of the provisions of this subchapter, other than [regarding] the application of such provisions to an individual...” We have previously ruled that this section “prohibits federal courts from granting class-wide injunctive relief,” but because of the “individual application” part, it “does not extend to individual cases.” *Reno* (1999). **[Ed. note:** that is apparently how *Johnson-Arteaga* can come out in favor of the non-citizen in the companion decision filed this same day, and discussed in the next Summary.] We reject the argument that “operation” is limited to “proper” operations, so that “improper” operations can be enjoined.” **Even improper operations of the statute can’t be class-wide enjoined.** And even though all members of a class are “individuals,” that does not avoid the jurisdictional bar on class-wide injunctions. And a neighboring provision that expressly prohibits class certifications (§1252(e)(1)(B)) cannot bear the “negative inference” that this provision allows it.

**Sotomayor, dissenting in large part and concurring only in the judgment (joined by Breyer and Kagan):** I concur in the judgement only because the government has prevailed today in [my opinion in *Johnson v. Arteaga-Martinez*]. But the majority’s opinion today is “blinkered” and “elevates piecemeal dictionary definitions and policy concerns over plain meaning and context.” [Further details of Sotomayor’s 18-page opinion is largely omitted here.] The section does not prohibit enjoining the government from “implementing” a statute unlawfully; and unlawful agency actions are not part of the “operation” of the statute as Congress intended. Congress used the word “implementation” in other parts of the statute; it is a careful choice about words. If there is ambiguity, then our precedents reserve to federal courts their “traditional equitable authority” (*McQuiggin*, 2013). That authority allows a court to do what the courts here did: order that the unlawful denial of bond hearings, cease for all similarly-situated individuals. Congress may have intended to prohibit actions filed by organizations; but individual actions can proceed, even if for a class. Finally, the Court’s policy concerns clearly motivate their decision. Meanwhile, “many vulnerable noncitizens,” not just in this particular bond context, will be “depriv[ed] of any meaningful opportunity to protect their rights.” “Practical realities” will make many individual noncitizens unaware of whether or how to argue for their rights. They cannot afford counsel and will have none available. “Systemic violations” will go undetected, and unchallenged. And “judicial economy” is not furthered by duplicative individual actions on the same topic. (I close by noting that possible Administrative Procedure Act challenges, and declaratory rather than injunctive relief, may still be possible.)

[\*Johnson v. Arteaga-Martinez\*](#), 142 S.Ct. 1827 (June 13, 2022). **Sotomayor** (8-1); *Thomas concurring* (joined by Gorsuch); **Breyer dissenting** in part and concurring in part), reversing (unpublished op., CA3 2019).

**Headline:** §1231(a)(6) of the INA “**does not require the Government to offer noncitizens bond hearings after six months of detention** in which the Government bears the burden of proving by clear

and convincing evidence that a noncitizen poses a flight risk or a danger to the community.” Constitutional and other arguments are left open for remand.

**Facts:** Arteaga-Martinez is a non-citizen who has entered the United States unlawfully four times. He states he was beaten by a criminal gang upon his return to Mexico and reentered the United States again in September 2012, fearing he would be further persecuted or tortured in Mexico. Most recently he lived and worked in the United States for six years without incident, until ICE arrested him, “reinstated” his prior removal order, and detained him without an opportunity for bond [bail]. Arteaga-Martinez applied for withholding of removal, alleging persecution in Mexico if returned there. After four months of detention without a hearing, Arteaga-Martinez filed for habeas corpus, challenging his detention without bond on statutory and constitutional grounds. The Third Circuit had previously ruled that a noncitizen facing prolonged detention is entitled to a bond hearing under §1231(a)(2), and must be released unless the Government establishes by clear and convincing evidence that the noncitizen is a flight risk or danger to the community (*Guerro-Sanchez*, 2018). In 2018 the district court ordered a such a bond hearing for Arteaga-Martinez; after such a hearing, he was released on bond and remains on bond today while his application for withholding removal is still pending.

**Sotomayor (for 8):** §1231(a)(2) states the government “shall” detain noncitizens for 90 days while “securing removal.” After that time, the Government “may” detain certain categories of people: “(1) those who are “inadmissible” on certain specified grounds; (2) those who are “removable” on certain specified grounds; (3) those it determines “to be a risk to the community”; and (4) those it determines to be “unlikely to comply with the order of removal.”” §1231(a)(6) does not specify how long detention may last beyond the 90-days. The statute further states that while some noncitizens ordered removed “may be detained beyond the removal period ... **if released** [they] shall be subject to terms of supervision.” We have previously ruled that while some criminal noncitizens may be detained without periodic bond hearings (*Jennings*, 2018), “indefinite detention” can raise “a serious constitutional problem” (*Zadvydas*, 2001). **The Third Circuit’s additional requirements for bond hearing under §1231 requires that we answer the question presented here “in the negative;”** the statute says nothing about requiring convincing proof or placing the burden on the government. The government [now, after change in Administration] says that it will usually give administrative bond hearings after 90 days; and that “constitutional challenges remain” possible. We leave arguments about these unresolved arguments “for the lower courts to consider” on remand.

**Thomas concurring** (joined by Gorsuch): “I join the Court’s opinion because it correctly decides that §1231(a)(6) does not require periodic, 6-month bond hearings.” [**Ed. note:** it is not clear that this is a correct reading of the majority.] I write to make three additional arguments: First, this Court lacks jurisdiction, because we may only review a “final order” of removal, or when §1252 otherwise grants jurisdiction. Neither applies; I would dismiss for lack of jurisdiction. Second, “the Due Process Clause does not apply to laws governing the removal of aliens.” The Court should revisit this *Zadvydas* question whether the Due Process Clause applies at all; and *Zadvydas* should be overruled. “An ill-defined, quasi-constitutional command of ‘reasonableness’ inevitably encourages courts to fashion procedural rules with no basis in statutory text.”

**Breyer dissenting** [all by himself] in part and concurring in part: “In my view, *Zadvydas* controls the outcome here.” There we held that an alien’s post removal period detention must be reasonably necessary to bring about the alien’s removal. The period reasonably necessary is presumptively six months. *Jennings* does not dictate the result of this case because it relates to a different statute. On remand, “the parties are free to argue about the proper way to implement *Zadvydas*’ standard.”

**Patel v. Garland**, 142 S.Ct. 1694 (Mar. 4, 2021). **Barrett** (5-4); **Gorsuch** dissenting [with the three “liberal” Justices], **affirming** 917 F.3d 1258 (2020).

**Headline:** District court has **no jurisdiction to review factual findings made in a discretionary adjustment of status** proceeding.



**Facts:** Patel entered the United States illegally in the 1990s. In 2007, Patel applied for an adjustment of his status, which would have excused his unlawful entry and made him a lawful permanent resident. While his application was pending, Patel applied for a Georgia driver's license and checked a box stating that he was a U.S. citizen, which he was not. His adjustment application was denied on the basis that he had falsely represented himself to be a citizen. [Nevertheless, he remained in the United States, undocumented but without incident, for more years.]

Several years later, DHS [under Trump] initiated removal proceedings based on Patel's illegal entry years earlier. Patel acknowledged that he had checked the wrong box years earlier, but said he had done so by accident, thus lacking the "subjective intent of obtaining [a] benefit," a requirement to deny eligibility for adjustment of status. But the Immigration Judge found Patel's testimony "evasive" and not credible and, again, denied any adjustment of Patel's illegal status. On appeal, the Board of Immigration Appeals ("BIA") determined this fact-finding was not "clearly erroneous" and denied Patel's appeal. Patel sought review at the Eleventh Circuit, arguing that "any reasonable judge" would have found that he was credible and had simply made an "honest mistake." But CA11 ruled that it could not even consider this claim, because a statutory section (§1255) prohibits judicial review of "any judgment regarding the granting of [adjustment of status] relief." On rehearing *en banc* [after Biden took office], the government argued that CA 11 had erred in interpreting §1255 to bar judicial review. That was rejected; we appointed a private amicus to argue in defense of the Eleventh Circuit's ruling.

**Barrett (for 5):** We think the word "judgment" in §1255 applies here to strip the federal courts of jurisdiction over "*any judgment relating to the granting of relief.*" We reject the government's view that it refers only to decisions requiring discretion; and we reject Justice Gorsuch's view that it should apply only to the final decision of whether to grant relief or not. We think our view is "the only one that fits" the statute's "text and context." Relief from removal is always a matter of grace and can be denied even if the noncitizen meets established eligibility requirements; and "Congress has sharply circumscribed judicial review of th[at] discretionary relief process." The word *any* has an expansive meaning and *regarding* has a broadening effect. §1255 encompasses not just the granting of relief but also judgments *relating to* the granting of relief, **including factual findings**. Congress added a section clarifying that prohibition of judicial review does not preclude "review of constitutional claims or questions of law." "If Congress made such questions an exception, it must have left something within the rule. The major remaining category is questions of fact."

**Gorsuch dissenting [at length, 19 pages], joined by Breyer, Sotomayor, and Kagan:** "**It is no secret that** when processing applications, licenses, and permits **the government sometimes makes mistakes.**" "[S]ometimes a bureaucratic mistake can have life-changing consequences." Assuming the truth of Patel's account, the government rejected his application "based on a glaring factual error." But "today the Court holds that a federal bureaucracy can make an obvious factual error ... and nothing can be done about it." That is "an eye-catching conclusion." It is not required by the text and contexts of various immigration statutes read together. Yet it "swallow[s] up **the law's general rule guaranteeing individuals the chance to seek judicial review to correct obvious bureaucratic mistakes.**" It "turns an [administrative] agency ... into an authority unto itself." That "is hardly the world Congress ordained." The statute here does not "do the work the majority demands of it." Requests for adjustment of status require two steps, first determining statutory eligibility and then deciding whether to grant an adjustment request. The law only insulates the second step from judicial review, allowing courts to entertain challenges to factual findings and legal analysis related to the eligibility determination. "Any judgement regarding the granting of relief comes only at step two ...." "If subparagraph (B)(i) operated as the majority imagines, Congress would have had no need to deny courts jurisdiction over 'any judgment regarding the granting of relief under section 1255.' Congress could have ... denied jurisdiction over 'any judgement under section 1255.'" "[T]hose additional words must do something."

## VI. CIVIL CASES RELATED TO CRIMINAL TOPICS

*Golan v. Saada*, 142 S.Ct. 1880 (June 15, 2022). **Sotomayor** (9-0), vacating and remanding 833 Fed. Appx. 829 (CA2 2020, based on 930 F.3d 533 (CA2 2019)).

**Headline:** Once a court has found that returning a child to a foreign country under **the Hague Convention** would expose the child to a **“grave risk of harm,”** the court is **not required to categorically consider all ameliorative measures before denying** a petition to return.

**Facts:** Narkis Golan, a citizen of the United States, lived with her husband (Isacco Saada) and her young son (B.A.S.) in Milan, Italy. The relationship between Golan and Saada was abusive; much of the abuse occurred in front of their son. In July 2018, Golan returned to the United States with her son to attend her brother’s wedding. Rather than return to Italy, Golan moved into a domestic violence shelter with her son. Saada filed two cases in Italy: a criminal case for kidnapping and a civil case for sole custody. He also filed a petition in federal District Court under the Hague Convention and the International Child Abduction Remedies Act (ICARA), seeking an order to return B.A.S. to Italy. The district court found that Italy was B.A.S.’s habitual residence and that “Golan had wrongfully retained B.A.S. in the United States.” However, **the court also found that returning B.A.S. to Italy would expose the child to a “grave risk” of harm because of Saada’s violent history.** Nevertheless, the district court ordered B.A.S.’s return, because Second Circuit precedent obligated the court to “examine the full range of options that might make possible the safe return” and to order return “if at all possible.” Under that standard (and some back and forth with the Second Circuit), the district court found that some ameliorative measures (such as therapy, separate residences, financial support and an Italian one-year protective order) could “reduce the occasions for violence” and make an Order of return “possible.” Certiorari was then granted to decide whether district courts are “properly required, after a grave-risk finding, to examine a full range of possible ameliorative measures ... and to resolve ... whether ameliorative measures must be considered [at all] after a grave-risk finding.”

**Sotomayor (for 9):** The Hague Convention generally requires the district court to order the return of a child that has been wrongfully removed or retained from his country of habitual residence. However, **under the Convention, a court is not bound to order the child’s return if the party opposing it has established that the child’s return would expose him to grave risk of physical or psychological harm.** “Nothing in the Convention’s text either forbids or requires consideration of ameliorative measures in exercising this discretion.” Although “a district court has no obligation ... to consider ameliorative measures ..., it ordinarily should address ameliorative measures raised by the parties.” **The Convention is designed to protect children as well as parents, and sometimes that may not favor a child’s return. “Consideration of ameliorative measures must prioritize the child’s physical and psychological safety,** [and] a court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave.” In addition, “any consideration of ameliorative measures must accord with the Convention’s requirement that courts act expeditiously in proceedings for the return of children.” “Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to [expeditiously] address the parties’ substantive arguments and its specific obligations under the Convention.” Here, although the district court proceedings have already lasted many months, remand is appropriate to apply the correct legal standard. “Remand will as a matter of course add further delay to a proceeding that has already spanned years longer than it should have” but the delay “cannot be undone.” We “trust that the District Court will move as expeditiously as possible to reach a final decision without further unnecessary delay.”

*Thompson v. Clark*, 142 S.Ct. 1332 (April 4) (**summarized above under “Fourth Amendment”**): For a claim of “malicious prosecution” under §1983, a plaintiff need not show that a prosecution ended with “affirmative indication of innocence,” but only that the prosecution ended without a conviction

*FBI v. Fazaga*, 142 S.Ct. 1051 (March 4, 2022). **Alito**, (9-0), reversing 965 F.3d 1015 (CA9 2020).

**Headline:** The Foreign Intelligence Surveillance Act (“FISA”)’s **protection and disclosure rules do not “displace” the protections of the state secrets privilege.**

**Facts:** Three Muslim plaintiffs have filed this class action, alleging that the FBI surveilled Muslim groups illegally because of their religion. The FBI defended on, among other reasons, that the state secrets privilege required dismissal of most of the claims. Attorney General Holder so asserted in a Declaration, as did an Assistant Director of the FBI. The district court agreed and dismissed the lawsuit, but the Ninth Circuit reversed (over dissents of 10 *en banc* judges), ruling that “Congress intended” FISA [the Foreign Intelligence Surveillance Act] to displace the states secrets privilege.

**Alito (for 9):** We have “repeatedly” recognized a state and military secrets privilege (citing cases back to *Totten*, 1876). In 1978, Congress enacted FISA to address “special national security concerns” in wiretapping. And FISA’s **Section 1806(a) expressly says that “no otherwise privileged communication [obtained under FISA] shall lose its privileged character.”** Moreover, we see no “clash” between FISA and the state secrets privilege (although there may be “procedural differen[ces].” **Even “unlawfully obtained” information may still be protected by the privilege.** “Congress did not eliminate, curtail, or modify the state secrets privilege when it enacted” FISA. Other questions not addressed here are left for the Ninth Circuit to resolve on remand.

*U.S. v. Zubaydah*, 142 S.Ct. 959 (March 3, 2022). **Breyer** (7 (2+2+1+2) to 2 (five separate opinions); *Thomas concurring* in part; *Kavanaugh concurring* in part; *Kagan concurring* in part and dissenting in part; *Gorsuch dissenting* (with *Sotomayor*), reversing 938 F.3d 1123 (CA9 2019).

**Headline:** The “state secrets” privilege protects the government from **having to confirm or deny the location of a CIA detention site** (even if the location is believed known through other sources).

**Facts:** In March 2002, the CIA gained custody in Pakistan of Zubaydah, whom it believed was a senior al Qaeda lieutenant in connection with the Sept. 11, 2001, terrorist attacks. The CIA moved Zubaydah to a secret foreign location and subjected him to “enhanced interrogation techniques” [torture] like water-boarding. **The CIA has never confirmed the location of its foreign interrogation sites, although other public sources identify one** as being in Poland. In a later Polish prosecution, legal proceeding, Zubaydah’s lawyers requested information from the private contractors who allegedly had worked with the CIA, under 28 U.S.C. §1782. That statute allows federal district courts to order discovery in foreign legal proceedings. The CIA intervened and invoked the “states secrets” protection against such discovery; §1782(a) protects “legally applicable privilege[s].” A declaration from the Director of the CIA said that the district court should not allow anything that might “confirm or deny” Polish cooperation with the CIA because it would “significantly harm our national security.” The district court agreed and dismissed Zubaydah’s §1782 request under the “state secrets” privilege. The Ninth Circuit reversed (over 12 *en banc* dissenting judges), saying that some information could be disclosed, including “already publicly known” information.

**Breyer: *Reynolds* (1953) recognizes a states secrets privilege, protecting information that would harm national security.** The judiciary properly decides what is included, but should be “reluctant” to intrude upon executive and military assessments. **We “obviously condone neither torture nor terrorism,” but this case addresses a “narrow evidentiary dispute.”** And we believe (contrary to Justice Thomas) that the proper analysis is to first determine the validity of the government’s interest, before examining whether the requester has made a “strong showing of necessity.” On the “specific discovery requests” here, we conclude that anything that would constitute U.S. confirmation or denial of a CIA detention facility in Poland **is protected from disclosure by the privilege, even if that same information has “entered the public domain”** from other sources (like the European Court of Human Rights). A “CIA insider’s” confirmation (even a “former insider”) is different than confirmation from other sources, and could reasonably harm U.S. interests. Meanwhile,

“Zubaydah’s need is not great.” We affirm dismissal of his request (not send it back for further proceedings, as Justices Kagan and Gorsuch would do). Perhaps Zubaydah can file a “different discovery request;” we don’t address that here.

**Thomas concurring in part and in the judgment (joined by Alito):** Zubaydah’s need for the discovery here is “dubious” and that supports dismissal “regardless of the Government’s reasons.” [Ed. note: Thomas’s detailed 18-page opinion reads like it possibly started as a draft majority that later lost votes.]

**Kavanaugh concurring in part (joined by Barrett):** I join all but part II-B-2 of the Court’s opinion, and give my brief analysis here of how the “compromise” analysis of *Reynolds* (1953) should work.

**Kagan concurring in part but dissenting on the judgment of dismissal:** I agree with “much of the Court’s analysis,” but because the dangerous information sought can be “segregated” from other proper information, I would remand for further specific analysis of Zubaydah’s discovery requests.

**Gorsuch dissenting, joined by Sotomayor [which is unusual]:** “We should not be ignorant as judges or what we know to be true as citizens.” The events of CIA torture in dark locations are two decades old and are well known. “We should not pretend that [this] will safeguard any secret.” “This Court’s duty is to the rule of law and the search for truth. We should not let our shame obscure our vision.” [The details of Justice Gorsuch’s typically loquacious 30-page opinion are omitted here.]

**Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.**, 142 S.Ct. 941 (February 24, 2022). **Breyer** (6-3); **Thomas dissenting**, joined by Alito in full, and Gorsuch except as to Part II), **vacating and remanding** 959 F. 3d 1194 (CA9 2020).

**Headline:** “**Lack of knowledge of either fact or law can excuse** an inaccuracy in a copyright registration.”

**Facts:** Unicolors owns copyrights in various fabric designs and sued H&M for infringement. H&M argued the copyright was invalid because they filed a single application for 31 separate works that were not included in the same “publication” as required by statute, and Unicolor knew they would not be published in the same publication. The District Court dismissed this argument, but **the Ninth Circuit determined that the statute only applied to good faith mistakes of facts, not law.**

**Breyer (for 6):** “Section 411(b)(1) says that Unicolors’ registration is valid “regardless of whether the [registration] certificate contains any inaccurate information, unless . . . the inaccurate information was included on the application for copyright registration **with knowledge that it was inaccurate.**”” Unicolor claims it was not aware that their 31 designs registered together did not meet the “single unit of publication” requirement. If Unicolor was not aware of the legal requirement, then it did not have knowledge that it’s application was inaccurate. “Nothing in the statutory language suggests that this straightforward conclusion should be any different simply because there was a mistake of law as opposed to a mistake of fact.” **The maxim that “ignorance of the law is no excuse” does not apply to this civil case concerning safe harbor because the maxim normally applies to a defendant that has the requisite mental state for the elements of a crime but claims to be unaware his conduct is illegal.**

**Thomas dissenting, with Alito and [mostly] Gorsuch:** “I would dismiss the writ of certiorari as improvidently granted.” “Unicolors has abandoned the question presented by the cert petition, and instead now presses novel arguments in favor of reversal.” None of Unicolor’s points were raised in the courts below. “[T]he Court imposes an actual-knowledge-of-law standard [in this case] that is **virtually unprecedented except in criminal tax enforcement.**” “That the Court does so without permitting any other court in the country to first consider the question is unwise.”

## SUMMARY REVERSALS (Opinions without full briefing or argument)

*Rivas-Villegas v. Cortesluna*, 142 S.Ct 4 (October 18, 2021), 9-0, **per curiam** (reversing the Ninth Circuit): Officer who “briefly [“no more than 8 seconds”] paced his knee on [a person’s] back” while arresting and disarming him of a knife, was entitled to qualified immunity. “Even assuming that controlling Circuit precedent” can constitute “clearly established law,” the one case the Circuit cited here “did not give fair notice” to the officer. [The Court reminds us of caselaw governing qualified immunity, and that “specificity is especially important in the Fourth Amendment” excessive force context. “Precedent involving similar facts can help,” but the facts of the precedent here are “materially distinguishable.”

*City of Tahlequah, Oklahoma v. Bond*, 142 S.Ct 9 (October 18, 2021), 9-0, **per curiam** (reversing Tenth Circuit): Officers who confronted and followed an intoxicated man into his garage, and then shot and killed the man when he moved to apparently throw a hammer at them, were entitled to qualified immunity. Qualified immunity shields officers from civil liability if their conduct does not violate “clearly established” statutory or Constitutional rights. The Circuit erred by defining the “clearly established law” at “too high a level of generality.” The three Circuit-level cases they cited do not even “come close to establishing that the officers’ conduct was unlawful.” Perhaps the “reckless creation” of a situation requiring deadly force can lose qualified immunity; but “that formulation of the rule is much too general” to inform officers here that their conduct might violate the Fourth Amendment.

## VII. WRITINGS RELATED TO ORDERS

(such as Stay applications and dissents from denial of *certiorari*)

### A. Applications for Stays

*Smith v. Dunn* (October 21, 2021): **Sotomayor respecting denial of the application for stay.** “Smith is sentenced to die tonight by lethal injection in Alabama. [He] seeks instead to be executed by nitrogen hypoxia, which has been a statutorily approved method of execution in Alabama since 2018.” Smith alleges he missed the window to elect a method because his intellectual disabilities prevented him from understanding the form. “The law compels denial of Smith’s request for a stay of execution,” but I am concerned with the “State’s compressed timeline for notifying eligible inmates and haphazard approach to doing so.... Once a State has determined that individuals on death row should have a choice as to how the State will execute them, it should ensure that a meaningful choice is provided.”

*Hamm v. Reeves* (January 27, 2022): **Kagan, joined by Breyer and Sotomayor, dissenting to the grant of an application to vacate a stay of execution.** [The Order also notes that Barret would deny the application, so the vote is 5-4]. Reeves, set for execution this evening, alleges his cognitive disabilities prevented him from understanding the method of execution election form provided to him. “Four judges on two courts have decided ... that Matthew Reeves’s execution should not proceed as scheduled tonight.” “The District Court, and a three-judge panel of the Eleventh Circuit, all voted to stay the execution. “This Court should have left the matter there.”

### B. Denials of *Certiorari* in Death Penalty & Other Cases

*Buntion v. Lumpkin* (October 4, 2021, **Breyer “respecting” the denial of *certiorari*, and again on April 21, 2022, **dissenting from denial of a stay of execution**): Buntion is the oldest (77) inmate on Texas death row; he has been on death row for 30 years and has spent the last 20 years in solitary confinement. “His lengthy confinement, and the confinement of others like him, calls into question the**

constitutionality of the death penalty and reinforces the need for this Court, or other courts, to consider that question in an appropriate case.”

**Gann v. U.S.** (October 4, 2021): **Sotomayor “respecting” the denial of certiorari.** Gann argued his burglaries under Tennessee law did not constitute generic “burglary” as defined in the ACCA. I agree to deny certiorari because the Sixth Circuit did not address Gann’s argument; however, “I would expect the Sixth Circuit to give the argument full and fair consideration in a future case.”

**Thomas v. Payne** (October 4, 2021): **Sotomayor “respecting” the denial of certiorari.** On habeas, Thomas argued that defense counsel failed to present mitigating evidence during the penalty phase. The District Court agreed, but “the Court of Appeals reversed on the basis of a procedural default.” This “denial of certiorari should not be understood to endorse the Court of Appeals’ failure to” give Thomas a meaningful opportunity to dispute the underlying argument.

**James v. Bartelt** (October 4, 2021): **Sotomayor dissenting from denial of certiorari.** “On May 24, 2011, Willie Gibbons was shot and killed by a police officer.” It is undisputed that the officer was aware Gibbons had a mental illness with a gun to his own head and never threatened the officer in any way. Other facts were disputed, so the District Court denied qualified immunity to the officer. When the Third Circuit reversed and granted qualified immunity, it improperly resolved factual disputes in the officer’s favor and overlooked binding precedent. **Qualified immunity “does not protect an officer who inflicts deadly force on a person who is only a threat to himself. . . . That proposition is so ‘apparent’ that any reasonable officer is surely ‘on notice’ that such a use of force is unlawful. . . . I would grant the petition and summarily reverse the Third Circuit’s judgment.”**

**Simmons v. U.S.** (November 1, 2021): **Sotomayor, joined by Kagan, respecting denial of certiorari.** “Simmons alleges that he was unable to file a habeas petition within one year of his federal conviction, the general deadline for seeking such relief, because the state prisons where he was imprisoned had no materials about federal habeas law.” The Sixth Circuit concluded that Simmons’s *pro se* filing failed to “allege a causal connection” between the lack of materials and his inability to file. “I write separately to stress that . . . *pro se* filings must be liberally construed.” The Sixth Circuit’s reasoning appears questionable, and that court likely imposed an inappropriately high bar on a *pro se* filing. “It is rarely a reason to find a *pro se* habeas petition time barred on the pleadings. I trust the courts of appeals will do so only where our liberal pleading standards warrant such a harsh result.”

**Coonce v. U.S.** (November 1, 2021): **Sotomayor, joined by Breyer and Kagan, dissenting from the denial of certiorari.** Coonce Jr. seeks to avoid his death sentence by alleging he has an intellectual disability. The District Court denied Coonce a hearing and the Eighth Circuit affirmed because they relied on a definition of intellectual disability that required the onset of a disability to manifest before age 18; Coonce’s disability did not manifest until age 20. But after Coonce submitted his petition for certiorari, the definition has changed to include impairments before age 22. **Both parties in this case urge the Court to grant certiorari, vacate the judgement, and remand (GVR).** A GVR is particularly warranted given that this is a capital case. “[T]he material change in the leading definition of intellectual disability plainly warrants a GVR. . . . **To my knowledge, the Court has never before denied a GVR in a capital case where both parties have requested it,** let alone where a new development has cast the decision below into such doubt.”

**Guerrant v. U.S.** (January 10, 2022): **Sotomayor, joined by Barrett, respecting denial of certiorari.** Defendants with two prior felony convictions for “controlled substance offenses” face harsher sentences under the “career offender” Federal Sentencing Guidelines. There is a split within the Courts

of Appeals over the definition of “controlled substance offense” -- some Circuits apply federal law and others apply state law. The Sentencing Commission must “address this division to ensure fair and uniform application of the Guidelines.”

**Ortiz v. Breslin** (February 22, 2022): **Sotomayor respecting the denial of certiorari.** Certain New York sex offenders are prohibited from residing within 1000 feet of any school (this is nearly impossible in New York City). Ortiz was unable to find housing that met this criterion and spent over two additional years incarcerated. “Although Ortiz’s petition does not satisfy this Court’s criteria for granting certiorari, I write to emphasize that New York’s residential prohibition, as applied to New York City, raises serious constitutional concerns.” “New York should not wait for this Court to resolve the question whether a State can jail someone beyond their parole eligibility date, or even beyond their mandatory release date, solely because they cannot comply with a restrictive residency requirement.” “I hope that New York will choose to reevaluate its policy in a manner that gives due regard to the constitutional liberty interests of people like Ortiz.”

**Holcombe v. Florida** (February 28, 2022): **Sotomayor dissenting from the denial of certiorari.** “An attorney jointly represented four codefendants in a criminal case.” Two of the defendants took plea deals and agreed to testify against the other two. This **created a conflict of interest that the prosecutor raised as nonwaivable -- but the trial court failed to inquire into the conflict [!!]**. At trial, the defense counsel cross-examined his former clients that were testifying against his other clients. This Court’s precedents require vacating the resulting convictions; I would summarily reverse.

**Love v. Texas** (April 18, 2022): **Sotomayor, joined by Breyer and Kagan, dissenting from the denial of summary vacatur.** “The seating of a racially biased juror . . . can never be harmless.” Love, a black man, claims one juror in his capital trial was racially biased. “The Texas Court of Criminal Appeals never considered Love’s claim on the merits” and thereby “deprived Love of any meaningful review of his federal constitutional claim.” “[T]he Sixth and Fourteenth Amendments guarantee . . . the right to an impartial jury.” “The task of reviewing the record to determine whether a juror was fair and impartial is challenging, but it must be undertaken, especially when a person’s life is on the line.”

**Smith v. Shinn** (May 23, 2022): **Breyer, respecting the denial of certiorari.** Smith was sentenced to death more than 44 years ago. (His sentence was vacated and he was resentenced to death twice.) He has petitioned this Court three times now to **argue that the delay of his execution is unconstitutional.** “I continue to believe that the excessive length of time that Smith and others have spent on death row awaiting execution raises serious doubts about the constitutionality of the death penalty.”

**Andrus v. Texas** (June 13, 2022): **Sotomayor, joined by Breyer and Kagan, dissenting from the denial of certiorari.** “A state habeas court recommended vacating Andrus’ death sentence after an 8-day hearing that uncovered a plethora of mitigating evidence that trial counsel had failed to investigate or present.” “The Court of Criminal Appeals of Texas reversed; this Court summarily vacated and remanded.” “On remand, the Court of Criminal Appeals . . . failed to follow this Court’s ruling.” “Such defiance of vertical *stare decisis*, if allowed to stand, substantially erodes confidence in the functioning of the legal system.” “In view of the egregious nature of the errors below, the overwhelming record evidence, the unparalleled stakes for Andrus, and the importance of protecting and enforcing vertical *stare decisis*, I would not leave such errors unresolved, and I respectfully dissent.”

**Shoop v. Cassano** (June 21, 2022): **Thomas, joined by Alito, dissenting from the denial of certiorari.** Cassano murdered a cellmate while serving a life sentence for a separate murder. Cassano made written and verbal requests to represent himself during his trial. Ohio’s trial court rejected his

request and Ohio's appellate and supreme court affirmed the trial court's decision. Cassano filed a federal habeas petition and Sixth Circuit reversed and granted his petition. The Sixth Circuit erred and should have applied deference to the Supreme Court of Ohio's decision. "Because the Court of Appeals' decision was obviously wrong and squarely foreclosed by our precedent, this case merits summary reversal."

**Canales v. Lumpkin** (June 30, 2022): **Sotomayor, dissenting from the denial of certiorari.** A jury sentenced Canales to death with defense counsel presenting barely a shred of mitigating evidence. The jury had no opportunity to hear the large quantity of available mitigating evidence to assess whether life in prison would suffice. The Fifth Circuit found Canales's defense counsel did not prejudice him because the State's arguments for death were so strong. "Here, there is more than a reasonable probability that the undisclosed mitigating evidence would have led at least one juror to choose life in prison rather than death. The legal errors ..., involving life-or-death stakes, are so clear that I would summarily reverse."

**Hill v. Shoop** (June 30, 2022): **Sotomayor, joined by Breyer and Kagan, dissenting from the denial of certiorari.** "Hill was convicted of murder and sentenced to death before this Court's decision in *Atkins v. Virginia*, 536 U. S. 304 (2002), which held that it is unconstitutional to execute people with intellectual disabilities." On habeas the trial court ruled that Hill was not intellectually disabled, despite a "mountain of evidence" to the contrary. The Sixth Circuit disagreed and granted relief, but the *en banc* court vacated that decision. "I would summarily reverse the *en banc* court's denial of habeas relief.... There is overwhelming record support for the fact that Hill has intellectual disabilities, as the state courts recognized at his trial and on direct appeal."

**Storey v. Lumpkin** (June 30, 2022): **Sotomayor respecting the denial of certiorari.** Prosecutors failed to disclose information and then lied during closing argument about that information. The defendant was unaware of this until he had already filed a habeas petition. Yet Fifth Circuit precedent holds that "second-in-time habeas petitions are successive, regardless of whether the petitioner knew of the alleged suppression when he filed his first habeas petition." "The Fifth Circuit's rule contravenes this Court's precedent." This case "illustrates the injustice that can flow from an overbroad view, unsupported by precedent, of what constitutes a "second or successive" habeas petition."

**Ramirez v. Guadarrama** (June 30, 2022): **Sotomayor, joined by Breyer and Kagan, dissenting from the denial of certiorari.** **Qualified Immunity for law enforcement:** When a person doused himself in gasoline and threatened to commit suicide and burn down the house, his wife called the police. When officers arrived, they discharged their tasers despite training that tasers ignite gasoline and a warning from an officer that the man would light on fire if they tased him. The wife (Ramirez) sued the police on Fourth Amendment grounds, and the officers argued that qualified immunity shielded them from liability. The District Court denied qualified immunity due to factual disputes, but the Fifth Circuit reversed. We dissent. "This Court's precedent establishes that the 'reasonableness' of a particular seizure depends not only on when it is made, but also on how it is carried out.... Using deadly force that knowingly effectuate[s] the exact danger to be forestalled is clearly unreasonable."

**Cope v. Cogdill** (June 30, 2022): **Sotomayor, dissenting from the denial of certiorari.** **Qualified Immunity for law enforcement:** Jail officials placed a man in an isolation cell that contained a 30-foot telephone cord, after the man had attempted suicide twice the previous day. The man wrapped the cord around his neck and died from this the next day. The lone jailer watched for 10 minutes and waited for his supervisor to arrive, before calling for medical services as trained. The Fifth Circuit granted qualified immunity; "I respectfully dissent from the Court's refusal to summarily reverse."



### C. Orders to Grant *Certiorari*, Vacate, and Remand (GVRs)

*Grzegorzcyk v. U.S.* (June 30, 2022): **Kavanaugh, joined by Roberts, Thomas, Alito, and Barrett, respecting the denial of certiorari** [ed. note: 5-4, with Gorsuch not joining this majority]: The defendant pled guilty to murder-for-hire and firearms crimes after hiring hitmen to murder six people. His plea deal was unconditional and waived any right to challenge his conviction. After his plea, the Court decided *Johnson*, that might support the defendant’s argument challenging his firearms conviction and the District Court denied his motion and the Seventh Circuit affirmed because the defendant’s “guilty plea precluded any argument based on new caselaw.” The Solicitor General asks us to GVR, but we “ha[ve] no appropriate legal basis to vacate the Seventh Circuit’s judgment.” The President may pardon the defendant or commute his sentence if the executive branch has concluded this defendant’s conviction should be vacated.

**Sotomayor, joined by Breyer, Kagan, and Gorsuch, dissenting from the denial of a grant, vacate, and remand order.** “Neither the Federal Government nor federal courts are immune from making mistakes.” **The Solicitor General concedes that the defendant’s crime is not a crime of violence** under §924(c)(3)(A), so that he is entitled to a reduced sentence. “In view of Grzegorzcyk’s liberty interests, and consistent with the Government’s responsibility to ensure that the laws are applied fairly and accurately, the Solicitor General asks this Court to afford the Government and the courts below a chance to address this concern.... Yet the Court declines to do so..... I respectfully dissent.”

## VIII. CRIMINAL LAW *CERTIORARI* GRANTS for the Upcoming 2022-23 Term

As of August 2022, the Court has granted review in 31 cases for the upcoming Term. Even applying my broad definition of “criminal or related,” only 8 of these are criminally relevant. This is a bit low; the docket is usually between a quarter and a third criminal cases. I would expect more criminal cases to be added at the “end of the summer” conference in September, as well as later in the Term. But the Court does, it seems, have more interest in non-criminal cases for its docket these days.

Here are brief descriptions (either the parties’, the Court’s, or my own) of the questions presented in the criminal-and-related cases that have been granted for review in OT 2022:

### A. Cases Already Scheduled for Argument

1. **Reed v. Goertz** (to be argued on Oct. 11): Does the **statute of limitations**, for a §1983 claim seeking DNA testing, run from the end of the state court litigation, or from the earlier denial of DNA testing in state litigation that continues beyond that date?

### B. Cases Not Yet Scheduled for Argument (as of August 10, 2021)

2. ***Cruz v. Arizona***: [Question written by the Court:] On **habeas**, where a later USSCt decision appears to invalidate petitioner’s state death sentence, is the State Supreme Court’s ruling that a state rule of criminal procedure bars relief, an “adequate and independent state ground” that precludes federal review now?

3. ***Jones v. Hendrix***: May a prisoner challenge his conviction [on **habeas**] after the Supreme Court has determined that the statute did not criminalize their activity, when

the prisoner earlier did not challenge his conviction because Circuit precedent was firmly against that argument?

4. *Bittner v. U.S.*: **Bank Secrecy Act**. It is one violation, or many, when person files a single form that fails to report many foreign accounts?

5. *US ex rel Polonsky v. Executive Health Resources*: **False Claims Act**. May govt dismiss a *qui tam* action after initially deciding to proceed; and if so, what standard governs that action?

6. *Percoco v. U.S.*: Does **federal “theft of honest services” fraud** reach private persons who have a “right to control” government operations?

7. *Cimineilli v. U.S.*: Is the Second Circuit’s “right to control” theory of **federal wire fraud** valid, which treats a withholding of accurate information relevant to an economic decision [here, a construction bid-rigging scheme] to be property fraud?

8. *United States v. Texas* (cert granted before judgment, on stay application): Do the parties have standing to challenge certain Executive branch **immigration enforcement policies**; and were those policies unlawfully put in place by agency action.

## “WHO WROTE WHAT”

### in CRIMINAL-and-related Cases in the 2021-22 Term

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

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

#### ROBERTS

Ramirez  
Shoop  
Biden v. Texas  
Ysleta

#### THOMAS

Egbert  
Breun  
Tsarnaev  
Kemp  
Shinn  
*Johnson*  
*Zubaydah*  
Hemphill  
Taylor

#### BREYER

Ruan  
Zubaydah  
Unicolors  
Breun  
Tsarnaev  
Shoop  
Johnson

#### ALITO

Vega  
Aleman Gonzalez  
*Fazaga*  
*Ruan* (dissent/rationale)  
Thompson  
Taylor  
Ramirez  
Biden v. Texas  
Unicolors

#### SOTOMAYOR

Hemphill  
Concepcion  
Johnson  
Golan  
*Wooden*  
*Ramirez*  
*Kemp*  
Egbert  
Shinn  
Aleman Gonzalez

#### KAGAN

Nance  
Wooden  
*Zubaydah*  
Vega  
Brown

#### KAVANAUGH

Thompson  
Castro-Huerta  
*Wooden*  
*Ramirez*  
*Biden v. Texas*  
*Zubaydah*  
Concepcion

#### GORSUCH

Taylor  
Brown.  
Ysleta  
*Egbert*  
*Wooden*  
Shoop  
Kemp  
Castro-Huerta  
Patel  
Zubaydah

#### BARRETT

Patel  
*Tsarnaev*  
*Wooden*  
Nance  
Biden v. Texas

Plus 2 Per curium summary reversals (no individual author): *Rivas-Villegas & City of Tahlequah*.

**Total Criminal-and-Related Decisions** in argued and unargued cases: 27 (25 unargued plus 2 SRs)

**Total WRITINGS** in argued Criminal Law-and-Related cases: 49

#### Criminal Law comments and “Workhorses”

1. With the shift to a conservative majority, a few “workhorse” points: (a) Thomas receives the most majorities (all from the Chief). (b) There is no single “workhorse,” that title is now shared (10 each) among Sotomayor (clearly the most liberal) and Gorsuch, one of the most conservative. Thomas and Alito had 9 writings – and the 12 dissents among the three most conservative Justices reflects the slightly more “moderate” results of the criminal docket this year.

2. Clearly **the most interesting observation of this Term is that 6 cases were decided in favor of the defendant** (*Wooden, Ramirez, Nance, Taylor, Concepcion & Ruan*). You might add to that 3 additional “liberal” results in “quasi-criminal” cases (*Thompson, Biden & Johnson*). That is a very different picture than the civil side of the docket this past Term.

3. Finally, none of the criminal cases were unanimous one-opinion decisions (*Ruan* had a three-Justice concurrence; *Wooden* had four separate concurrences), and only three “quasi-criminal” (*Golan, Fazaga* and *Johnson*) were decided 9-0 (and Breyer had a partial dissent in *Johnson*). Thus the divided nature of the Court is well-demonstrated on the criminal side of the docket.