2020

A Small but Mighty Docket: Select Criminal Law and Procedure Cases from the Supreme Court's 2019-20 Term

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With its 2019-20 Term disrupted by the COVID-19 pandemic, the Supreme Court released just 53 signed decisions, the fewest decisions in a Term since the Civil War.[1] But the Court's lighter docket still featured important criminal law and procedure cases touching on what constitutes reasonable individualized suspicion, the necessity of jury unanimity, and the proper form of the insanity defense.

The more conservative justices on the Court overwhelmingly shaped the development of criminal law and procedure this Term. In the 14 cases summarized in this review, the Chief Justice and Justices Thomas, Alito, Gorsuch, and Kavanaugh agreed in judgment 11 times. Justice Kavanaugh never joined or wrote a dissenting opinion, and Chief Justice Roberts and Justice Gorsuch each dissented only once. A liberal Justice provided the deciding vote in only three of the summarized cases.

FOURTH AMENDMENT

This Term's two Fourth Amendment cases concerned a substantive question about the reasonable suspicion standard in traffic stops (*Kansas v. Glover*) and a remedial question about whether the *Bivens* damages remedy should be extended to individuals harmed in cross-border, officer-involved shootings (*Hernández v. Mesa*).

Reasonable Suspicion

In *Kansas v. Glover*,[2] the Court upheld as constitutionally reasonable an investigative traffic stop conducted after a Kansas police officer ran a truck's license plate through the system and learned that the registered owner had a revoked driver's license. According to a statement of stipulated facts, the police officer did not see the truck commit any traffic violations, nor did he attempt to identify the driver of the truck before pulling it over. Instead, he initiated a traffic stop based solely on the information that the registered owner of the truck had a revoked driver's license. Upon discovering that the registered owner was indeed the driver, the officer arrested him and he was charged with driving as a habitual violator.[3] The Kansas Supreme Court affirmed the trial court's decision to suppress evidence arising from the traffic stop noting that, in its view, the officer had only a hunch that the registered owner was driving and would need to develop more particularized facts to satisfy the Fourth Amendment's requirement that officers possess reasonable, articulable, and particularized suspicion of criminal activity before initiating a stop. The Supreme Court reversed in an 8-1 decision.

Justice Thomas, writing for everyone except Justice Sotomayor, held that an investigative traffic stop is reasonable when an officer learns that the registered owner of the vehicle has a revoked driver's license so long as the officer lacks information to negate the inference that the registered owner is driving the vehicle. The majority emphasized that the reasonable-suspicion standard is less demanding than the probable-cause standard and that officers may use commonsense inferences to form reasonable suspicion. Noting that drivers with revoked licenses frequently continue to drive and that Kansas's "license-revocation scheme covers drivers who have already demonstrated a disregard for the law,"[4] the majority believed that the officer was entitled to draw a "commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop."[5] But the majority also made clear that its holding was narrow and noted that "the presence of additional facts might dispel reasonable suspicion."[6] For example, "if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties,"[7] that would dispel any reasonable suspicion.

The concurrence, written by Justice Kagan and joined by Justice Ginsburg, elaborated on what kinds of "additional facts" might dispel reasonable suspicion. In addition to "observational evidence" (which would include an observed divergence in appearance between the registered owner and the driver, the fact that a car has two or more registered owners, or observed attributes of the car suggesting that the car belongs to a car-sharing service or is a family minivan that is likely to have multiple drivers),[8] Justice Kagan emphasized that "statistical evidence"[9] could also inform the reasonableness of a stop. She noted that state and local governments often keep statistics about how often stops discover unlicensed drivers behind the wheel and individual officers may have their own "hit rates," either of which could be low enough to negate reasonable suspicion.

The concurring justices also emphasized the importance of the state driving laws when considering the reasonableness of assuming that a person with a revoked license would drive again. Kansas, they noted, "almost never revokes a license except for serious or repeated driving offenses," which means that the officer, upon discovering that Glover's license was revoked, had reason to believe that he had "already shown a willingness to flout driving restrictions."[10] Under those circumstances, it was

Footnotes

1. Adam Feldman, *SCOTUSBlog Final Stat Pack*, EMPIRICAL SCOTUS (July 13, 2020), https://empiricalscotus.com/2020/07/13/scotusblog-final-stat-pack-ot-2019/.
2. 140 S. Ct. 1183 (2020).
3. Kan. Stat. Ann. § 8-287 (2013).
4. *Glover*, 140 S. Ct. at 1188–89 (2020).
5. *Id.* at 1188.
6. *Id.* at 1191.
7. *Id.*
8. *Id.* at 1193 (Kagan, J., concurring).
9. *Id.*
10. *Id.* at 1192.

reasonable to believe that Glover would drive again. The concurring justices thought the case would be different if Glover's license had been suspended, since Kansas suspends licenses for a variety of reasons entirely unrelated to one's likelihood to violate traffic laws (i.e., for failure to pay fines, fees, or child support). An assumption that Glover would continue to drive based solely on his license suspension, therefore, would be based on a mere hunch and would be constitutionally unreasonable.

Justice Sotomayor, writing in dissent, warned that the Court had impermissibly "flip[ped] the [Fourth Amendment] burden of proof" by relieving the government of any obligation to investigate the identity of a driver when feasible.[11] According to Justice Sotomayor, the majority's analysis permits courts to rely on their own judicially supplied common sense instead of requiring an officer to look for particularized evidence that the driver of the car is the registered owner or otherwise supply evidence based on the officer's training and experience to fill that gap. This, she believes, is inconsistent with precedent emphasizing that "the reasonable officer's assessment, not the ordinary person's—or judge's—judgment, [is what] matters."[12]

The Court's decision in ***Kansas v. Glover*** leaves many unanswered questions that are sure to become the subject of future litigation. All three opinions analyze the state-law reasons for revoking a driver's license when thinking about the reasonableness of assuming that a revoked driver would continue to drive. Given the wide variation in state-driving-privilege laws, each state will have to determine whether and when the *Glover* assumption is appropriate given the state statutory scheme. And courts will have to make sense of which additional facts are sufficient to negate the inference that the vehicle's registered owner is driving the vehicle.

The Limits of *Bivens* Claims

In ***Hernández v. Mesa***,[13] the Court declined to extend the availability of ***Bivens***[14] claims to those harmed in cross-border shootings and made it clear that courts should carefully scrutinize and limit ***Bivens***'s implied private action for damages arising from civil rights violations by federal officers. According to the complaint, Hernández and his friends were running back and forth across a culvert divided by the U.S-Mexico border when Border Patrol Agent Mesa detained Hernández's friend. Hernández ran back to Mexican territory. Standing on the United States side of the border, Agent Mesa fired at least two shots at the fifteen year old, killing him. Hernández's parents brought a ***Bivens*** claim alleging Fourth and Fifth Amendment violations.

The Supreme Court, in an opinion written by Justice Alito and joined by the Chief Justice and Justices Thomas, Gorsuch, and Kavanaugh, affirmed the Fifth Circuit Court of Appeals's dismissal of the complaint. Justice Alito began by framing ***Bivens*** as the product of an era when the Court "routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated."[15] Relying on its recent decision in ***Ziglar v. Abbasi***,[16] the Court reasoned that ***Bivens*** claims should not be made available to Hernández because the cross-border context is meaningfully different from all presently recognized ***Bivens*** actions, and "respect for the separation of powers"[17] counseled against extending the remedy to the cross-border context. The Court felt that potential effects on foreign relations and national security concerns argued in favor of judicial restraint.

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Justice Thomas, joined by Justice Gorsuch, wrote a concurring opinion urging the Court to discard ***Bivens*** altogether. Reasoning that "[t]he foundation for ***Bivens***—the practice of creating implied causes of action in the statutory context—has already been abandoned,"[18] and noting that the Court has refused to extend ***Bivens*** for 40 years, Justice Thomas wrote that "nothing is left to do but overrule it."[19]

Justice Ginsburg, joined by Justices Breyer, Kagan, and Sotomayor, would have reversed the Fifth Circuit's dismissal of Hernández's claim. Noting that the Fourth Amendment constrains state action and that ***Bivens***'s primary purpose is to deter malfeasance, the dissenters argued that what really matters when determining whether Hernández's claim arises under a new context is the officer's conduct, not "Hernández's location at the precise moment the bullet landed."[20] Because both Hernández's claim and Bivens's claim concern excessive force in violation of the Fourth Amendment, the dissent would have held the claim governed by ***Bivens***. The dissent noted that extending ***Bivens***'s damage remedy to the cross-border context was necessary given that petitioners had no alternative remedies, and the dissenters were unpersuaded by the majority's separation-of-powers argument, reasoning that there are no foreign policy or national security implications in extending a damages remedy to deter rogue U.S. officers.

The dissent also defended ***Bivens***'s doctrine against the concurring justices' attack, pointing out that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"[21] and noting that ***Abbasi*** made clear that its opinion was "not intended to cast doubt on the continued force, or even the necessity, of ***Bivens*** in the search-and-seizure context in which it arose."[22]

11. *Id.* at 1196 (Sotomayor, J., dissenting).
12. *Id.*
13. 140 S. Ct. 735 (2020).
14. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
15. ***Hernández***, 140 S. Ct. at 741 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017)).
16. 137 S. Ct. 1843 (2017) (emphasizing the limited reach of ***Bivens*** actions, noting that ***Bivens*** will not be extended to a new context if there are "special factors counselling hesitation," and describing the special factors analysis as animated by separation-of-powers principles).
17. ***Hernández***, 140 S. Ct. at 749.
18. *Id.* at 750 (Thomas, J., concurring).
19. *Id.* at 752.
20. *Id.* at 756 (Ginsburg, J., dissenting).
21. *Id.* at 755 (quoting ***Bivens***, 403 U.S., at 389, 395–396).
22. *Id.* at 756 (quoting ***Abbasi***, 137 S. Ct. at 1856).

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FOURTEENTH AMENDMENT

Two highly anticipated Fourteenth Amendment cases made their way to the Supreme Court this term. In these cases, the Court heard arguments about whether the Due Process Clause mandates a particular form of the insanity defense (*Kahler v. Kansas*) and whether the Sixth Amendment right to a jury trial should be incorporated against the states (*Ramos v. Louisiana*).

Due Process and the Insanity Defense

In *Kahler v. Kansas*,[23] the Supreme Court once again rejected a constitutional challenge to a state restriction on the insanity defense. Building on its prior decisions in *Leland v. Oregon*[24] and *Clark v. Arizona*,[25] the Court upheld Kansas's limitation of the insanity defense to evidence that would negate the *mens rea* of the crime and refused to require Kansas to adopt an insanity test that turned on a defendant's ability to recognize that the crime was morally wrong.

At Kahler's capital murder trial, he wanted to argue that he should be found not guilty by reason of insanity because he could not tell the difference between right and wrong when he committed the crime. Kahler's desired defense has been recognized in common-law jurisdictions for centuries, was elevated to canonical status by the watershed *M'Naghten's Case*,[26] and is currently accepted by a majority of states. But such a defense is futile in Kansas, which (along with four other states) recognizes only a narrow form of the insanity defense that requires defendants to show that mental illness barred them from forming the requisite criminal intent.

The trial court rejected Kahler's argument that Kansas's narrow conception of insanity violates the Fourteenth Amendment's Due Process Clause, and Kahler was sentenced to death despite his argument at the sentencing stage that he could not tell the difference between right and wrong when committing his crime. The Kansas Supreme Court agreed with the trial court's ruling and the United States Supreme Court affirmed in a 6-3 decision.

All of the justices agreed that a successful Due Process challenge against a state rule about criminal liability must show that the rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[27] This history-driven test led the Justices to survey the insanity defense in common-law jurisdictions, with the majority and dissent ultimately disagreeing about what the record revealed.

Justice Kagan, writing for the majority and joined by the Chief Justice and Justices Thomas, Alito, Gorsuch, and Kavanaugh, analyzed the archives and concluded that the "historical record is, on any fair reading, complex—even messy."[28] Although Justice Kagan acknowledged that the insanity defense itself is well established in early English and American jurisprudence, she found that no particular form of the defense is so well established as to be considered fundamental. Rather than finding a unified core of the insanity defense that turns on whether a defendant can tell the difference between right and wrong, Justice Kagan saw "various formulations of the insanity defense, with some favoring a morality inquiry and others a *mens rea* approach."[29] Ultimately, the majority reasoned that this "motley sort of history cannot provide the basis for a successful due process claim."[30]

Though the majority believed that the Constitution permits Kansas to disregard a defendant's capacity to recognize right from wrong at the guilt phase, it deemed it significant that such evidence becomes relevant at sentencing. At the sentencing phase in Kansas, the defendant may argue to the judge that mental illness precluded them from differentiating between right or wrong when committing the crime, and the judge may use that information when deciding the defendant's sentence. Therefore, Justice Kagan reasoned, "Kansas does not bar, but only channels to sentencing, the mental health evidence that falls outside its intent-based insanity defense."[31]

Justice Breyer, writing in dissent for himself and Justices Ginsburg and Sotomayor, was thoroughly unconvinced by this argument, reasoning that "our tradition demands that an insane defendant should not be found guilty in the first place."[32] Unlike the majority, the dissenters thought the historical record was clear. Turning to English and early American sources, Justice Breyer remarked that "with striking consistency, they all express the same underlying idea: A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime."[33] Disputing a central tenet of the majority's argument that common-law insanity defenses ranged from focusing on moral culpability to *mens rea*, the dissent reasoned that "[a]t common law, the term *mens rea* ordinarily incorporated the notion of 'general moral blameworthiness' required for criminal punishment."[34] Therefore, whether framed in terms of *mens rea* or moral culpability, Justice Breyer believed common-law jurists' reasoning "linked criminality to the presence of reason, free will, and moral understanding."[35] The dissent found the moral incapacity defense equally accepted by early American jurists and, tracing the test through the present, observed that "45 States, the Federal Government, and the District of Columbia continue to recognize an insanity defense that retains some

23. 140 S. Ct. 1021 (2020).
24. 343 U.S. 790 (1952) (holding that the Constitution does not require adoption of the "irresistible impulse" test).
25. 548 U.S. 735 (2006) (holding that Arizona could rely on an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong).
26. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H. L. 1843).
27. *Kahler*, 140 S. Ct. at 1027 (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).
28. *Id.* at 1032.
29. *Id.*
30. *Id.* at 1032 n.8.
31. *Id.* at 1031.
32. *Id.* at 1049 (Breyer, J., dissenting).
33. *Id.* at 1039.
34. *Id.* at 1042.
35. *Id.* at 1040.

inquiry into the blameworthiness of the accused."[36] Summing these various factors, the dissent concluded that Kansas has "eliminated the core of a defense that has existed for centuries"[37]—a core which the dissenting Justices would have held is mandated by the Fourteenth Amendment's Due Process Clause.

Kahler leaves the insanity defense in considerable peril. Beyond its consequences for the contours of an insanity defense, *Kahler* is instructive for understanding how the Supreme Court conceives of the Constitution's role in constraining the states' criminal laws. Though the majority and dissent agreed that the Due Process Clause requires the states to recognize elements or defenses "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[38] the two opinions' treatment of this standard differed. For Kahler to prevail, the majority required him to prove that the moral incapacity defense is "so old and venerable—so entrenched in the central values of our legal system—as to prevent a state from ever choosing another."[39] Therefore, when the Justices in the majority turned to the historical record, they looked to a "settled consensus favoring Kahler's preferred insanity rule."[40] Finding no such consensus, the majority rejected Kahler's claim.

The implications of *Kahler*, therefore, extend well beyond the insanity defense. The majority's conception of the Fourteenth Amendment's Due Process Clause requires states to adhere only to that which is supported by a settled consensus and entrenched in the central values of our legal system. This standard for constitutionalizing criminal elements and defenses is quite demanding and leaves a great deal of discretion to state legislatures. It remains to be seen how the states will respond to *Kahler*, but it is likely that the Court's decision has diminished the Due Process Clause's capacity to constrain them.

Incorporating the Unanimous Jury Trial Right

In *Ramos v. Louisiana*,[41] the Supreme Court overruled *Apodaca v. Oregon*[42] and held that the Fourteenth Amendment's Due Process Clause incorporates the Sixth Amendment right to a unanimous jury verdict against the states. Ramos was convicted of a second-degree murder based on a 10-2 jury verdict. In 48 states and the federal courts, that vote would have resulted in a mistrial. But Ramos was tried in Louisiana, a state which, alongside Oregon, permitted convictions by nonunanimous juries.[43] Ramos argued that the Sixth Amendment right to a unanimous jury was fundamental and should be incorporated against the states, and the Supreme Court agreed.

Justice Gorsuch wrote the opinion of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh. The majority began by pointing out the racist origins of state laws permitting convictions by nonunanimous juries, emphasizing how Louisiana and Oregon both wanted to use the nonunanimous jury rule to "establish the supremacy of the white race" and suppress the votes of minority jurors.[44]

"Kahler leaves the insanity defense in considerable peril."

Turning next to the text and history, the majority concluded that a unanimity requirement was a fundamental part of the Sixth Amendment's right to a jury trial. The Court then had to address its 1972 decision in *Apodaca*, which upheld Oregon's nonunanimous jury verdict rule. As the *Ramos* majority put it, *Apodaca* was a "badly fractured" decision.[45] Five justices in *Apodaca* agreed that unanimous verdicts were constitutionally required by the Sixth Amendment. But one of those five—Justice Powell—defected on the incorporation question. Although he agreed that "history and precedent" supported unanimity, Justice Powell had his own dual-track theory of incorporation (which had already been rejected by the Court majority). Thus, based on his own outdated view of incorporation, Justice Powell joined the four justices who did not think that "unanimity serves an important 'function' in 'contemporary society'"[46] and upheld Oregon's nonunanimous jury rule. Citing "the prior 400 years of English and American cases requiring unanimity,"[47] "the fact [that] this Court has said 13 times over 120 years that the Sixth Amendment *does* require unanimity,"[48] and the fact that "five Justices in *Apodaca* said the same,"[49] the *Ramos* majority rejected the *Apodaca* plurality's cost-benefit, functionalist analysis as inappropriate, noting that "it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain" because fundamental constitutional rights cannot be "balance[d] away aided by no more than social statistics."[50] After a ***stare decisis*** analysis, the majority agreed to overturn *Apodaca* and held that convictions by nonunanimous juries in state courts are unconstitutional.

Justices Sotomayor and Kavanaugh both wrote separate concurring opinions espousing their views on ***stare decisis***. Justice Sotomayor emphasized that overruling *Apodaca* was not necessary because a majority of justices disagreed with it, but because it was "an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision,"[51] referring to the Court's recognition that the Sixth Amendment requires unanimity and its thorough rejection of Justice Powell's dual-track theory of incorporation. Justice Kavanaugh noted that ***stare decisis*** is more strict in statutory cases than constitutional ones, but that in

36. *Id.* at 1046.
37. *Id.* at 1038.
38. *Id.* at 1027 (quoting *Leland*, 343 U.S. 790, 798 (1952)).
39. *Id.* at 1028.
40. *Id.* at 1034.
41. 140 S. Ct. 1390 (2020).
42. 406 U.S. 404 (1972).
43. Louisiana began mandating unanimous jury verdicts for crimes committed after January 1, 2019, but defendants accused of crimes committed before that date were still subject to convictions by nonunanimous juries. *See* 2018 La. Reg. Sess., Act 722.
44. *Ramos*, 140 S. Ct. at 1394.
45. *Id.* at 1397.
46. *Id.* at 1398 (quoting *Apodaca*, 406 U.S. at 410).
47. *Id.* at 1400.
48. *Id.* at 1399.
49. *Id.*
50. *Id.* at 1402.
51. *Id.* at 1409 (Sotomayor, J., concurring).

"When defense counsel announced he had no other mitigation witnesses, the trial judge questioned that decision..."

either case the Court needs "a special justification or strong grounds"[52] to justify overruling precedent. He then listed factors that the Court has looked to find such a justification or ground: "the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent."[53] Finally, he expressed his view that these factors fold into three broad considerations: (1) "[I]s the prior decision not just wrong, but grievously or egregiously wrong?" (2) "[H]as the prior decision caused significant negative jurisprudential or real-world consequences?" (3) "[W]ould overruling the prior decision unduly upset reliance interests?"[54] Applying his test to *Apodaca*, Justice Kavanaugh found that the decision was "egregiously wrong," "causes significant negative consequences" (including putting a stamp of approval on the racist origins of the practice), and "would not unduly upset reliance interests."[55]

Concurring in the judgment only, Justice Thomas took the same approach to incorporation that he took in *Timbs v. Indiana*[56] last Term. He would incorporate the right via the Privileges and Immunities Clause instead of relying on the Due Process Clause.

Justice Alito, joined by the Chief Justice and Justice Kagan, dissented. The dissenters would have retained *Apodaca* because of the "enormous reliance the decision has engendered."[57] Louisiana and Oregon have tried thousands of cases without unanimous jury verdicts in reliance on *Apodaca*, and these states now "face a potential tsunami of litigation on the jury unanimity issue."[58] The majority acknowledged that Oregon and Louisiana may have to retry hundreds of defendants whose cases are currently pending on direct appeal and that will "surely impose a cost," but the Court noted that "new rules of criminal procedures usually do" impose costs and emphasized that prior convictions in only two States will be affected.[59]

Just how expensive this will be for Oregon and Louisiana will be determined next Term. The Court has agreed to hear *Edwards v. Vannoy*,[60] which will address whether *Ramos* should apply retroactively to cases on collateral review. Interestingly, three of the five opinions in *Ramos* discuss the retroactivity question. Justice Gorsuch, joined by Justices Ginsburg, Breyer, and Sotomayor, declined to rule on the retroactivity question but acknowledged that *Teague v. Lane*[61] "left open the possibility of [applying a new criminal procedure rule on collateral review] for 'watershed rules' 'implicat[ing] the fundamental fairness [and accuracy] of the trial.'"[62] Justice Kavanaugh does not think *Ramos* is a "watershed" rule and would bar its application on collateral review. And Justice Alito, joined by the Chief Justice and Justice Kagan, questions whether *Ramos* would even be considered a "new rule" for purposes of a *Teague* analysis given some of the Justices' stated views that *Apodaca*'s fractured nature means it was not binding precedent. We will have to wait until next Term to see how the Court will rule.

SIXTH AMENDMENT

Andrus v. Texas[63] marks the fifth time in the last 20 years that the Court has recognized deficient performance by a trial attorney in a capital case based on counsel's failure to investigate and properly prepare for a capital-sentencing hearing.[64] A surprise addition to the Court's docket, *Andrus* was never argued. Instead, the Court issued a per curiam opinion that granted certiorari, held that trial counsel's performance was constitutionally deficient, and remanded the case to the Texas Court of Criminal Appeals to decide whether counsel's ineffective representation prejudiced Andrus at the punishment phase of his trial.

Andrus was twenty years old when he was charged with capital murder for shooting and killing two individuals during a failed carjacking attempt while high on PCP-laced marijuana. At trial, his attorney readily conceded Andrus's guilt, made no opening statement, presented no defense case, and instead informed the jury that the trial will "boil down to the punishment phase."[65] But, at the punishment stage, trial counsel again presented no opening statement, failed to lodge any objections to the state's case in aggravation, and only briefly cross-examined the State's witnesses. When it was time to present mitigation evidence, defense counsel was woefully unprepared. He asked Andrus's mother to testify even though he had been forewarned that she might be hostile to Andrus's case (and she in fact then lied on the stand saying that Andrus had no access to drugs in her home). Counsel then asked Andrus's father to testify, even though counsel met the father for the first time in the courtroom and the father had not seen his son for more than six years and had only lived with him for a year. Defense counsel never met with Andrus's other family members, nor did he investigate Andrus's mental health, despite a mitigation expert raising mental health as an issue before trial. When defense counsel announced he had no other mitigation witnesses, the trial judge questioned that decision, which prompted defense counsel to call three additional witnesses: an expert who testified that drug use during adolescence alters the human brain; a prison counselor who explained that Andrus had begun to

52. *Id.* at 1414 (Kavanaugh, J., concurring).
53. *Id.*
54. *Id.* at 1414–15.
55. *Id.* at 1416–19.
56. 139 S. Ct. 682, 691–98 (2019) (Thomas, J., concurring).
57. *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).
58. *Id.* at 1436.
59. *Id.* at 1406.
60. Edwards v. Vannoy, No. 19-5807.
61. 489 U.S. 288 (1989).
62. *Ramos*, 140 S. Ct. at 1407 (quoting *Teague*, 489 U.S. at 311).
63. 140 S. Ct. 1875 (2020).
64. *See also* Porter v. McCollum, 558 U.S. 30 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).
65. *Andrus*, 140 S. Ct. at 1878.

demonstrate remorse when the trial started; and Andrus himself. Andrus explained that his mother was a drug dealer, that he spent much of his childhood alone, and that he had been heavily using drugs since the age of 15, but his testimony was short, undeveloped, and contradicted his mother's testimony. The jury recommended a death sentence.

During state habeas proceedings, Andrus alleged that his trial attorney had been constitutionally ineffective at the sentencing phase and a "tidal wave of information . . . with regard to mitigation"[66] came out. Andrus's childhood was marked by physical abuse, hunger, an absent father, and a drug-addicted and constructively absent mother. Andrus was diagnosed with affective psychosis at the age of ten or eleven and was placed in juvenile detention at the age of sixteen for serving as a lookout while his friends stole a purse. While in detention, Andrus was medicated and subjected to long periods of isolation "for purported infractions like reporting that he had heard voices telling him to do bad things."[67] He became suicidal and later tried to take his own life in prison while awaiting his capital murder trial.

The trial court recommended that Andrus be granted habeas relief in the form of a new sentencing hearing, but the Texas Court of Criminal Appeals disagreed, concluding that Andrus "had 'fail[ed] to meet his burden under *Strickland v. Washington*.'"[68] Andrus then petitioned the Supreme Court for relief.

In its per curiam decision, the Court thought it "clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*"[69] for three reasons: (1) "[C]ounsel performed virtually no investigation"[70] and offered no tactical reasons for this failure; (2) "[M]uch of the so-called mitigation evidence that [counsel] offered unwittingly aided the State's case in aggravation," which "confirms the gaping distance between his performance at trial and objectively reasonable professional judgment;"[71] and (3) "Counsel also failed to conduct any independent investigation of the State's case in aggravation [and therefore] could not, and did not, rebut critical aggravating evidence."[72] Having found deficient performance by trial counsel, the per curiam decision remanded the case to the Texas Court of Criminal Appeals for a prejudice determination after noting that the state court had not fully considered whether counsel's performance prejudiced Andrus at the sentencing phase.

Justices Alito, Thomas, and Gorsuch dissented from the per curiam decision, because they believed that the lower court found that any deficient performance was not prejudicial, and they agreed with that assessment.

Like most *Strickland* ineffectiveness holdings, *Andrus* is fact specific in its analysis of trial counsel's failure. But the Court's willingness to decide this case summarily and the consistency with which the Court has intervened to stop trial counsel ineffectiveness at capital sentencing hearings suggests a broader principle. At least with respect to failures to investigate and prepare for capital-sentencing hearings, "[m]uch of the Court's language . . . seems to ignore the *Strickland* presumption that defense counsel's decisions are strategic [instead] flip[ping] that presumption [and] suggesting that the failure to investigate will result in a finding of deficient performance absent the government's ability to make a strong showing of strategic reasons for the failure."[73]

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EIGHTH AMENDMENT

In *Barr v. Lee*[74] and *Barr v. Purkey*[75] the Supreme Court granted the federal government's emergency applications for relief and summarily vacated several decisions by lower courts that would have put federal executions on hold long enough for the lower courts to address inmates' Eighth Amendment challenges. In so doing, the Court paved the way for the federal government to execute individuals for the first time in 17 years. *Barr v. Lee*, like last term's decision in *Bucklew v. Precythe*,[76] rejected an Eighth Amendment claim that using pentobarbital sodium to execute prisoners would constitute cruel and unusual punishment. And *Barr v. Purkey* rejected without an opinion a federal inmate's claim that he was mentally incompetent and should not be executed under *Ford v. Wainwright*.[77] Both decisions were made overnight and drew sharp dissents from multiple justices.

Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented in *Lee* to criticize the majority's decision as dangerously speedy. Observing that the parties had produced hundreds of pages of briefs and that the District Court had the benefit of two weeks to deliberate before making its decision, Justice Sotomayor believed that the majority's overnight decision was made without proper consideration.[78] In *Purkey*, Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, would have held that the Government had not met its heavy burden of vacating a stay based on the ample evidence suggesting that Purkey's Alzheimer's Disease left him unfit to be executed.[79] Justice Breyer, joined by Justice Ginsburg, wrote separately in both cases to emphasize the problems of delay and arbitrariness that infect the capital punishment regime and urged the Court "to directly examine the question whether the death penalty violates the Constitution."[80]

66. *Id.* at 1879.
67. *Id.* at 1880.
68. *Id.* at 1881.
69. *Id.* at 1878.
70. *Id.* at 1883.
71. *Id.*
72. *Id.*
73. Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1635 (2020) (discussing this pattern).
74. 140 S. Ct. 2590 (2020).
75. 140 S. Ct. 2594 (2020).
76. 139 S. Ct. 1112 (2019).
77. 477 U.S. 399 (1986) (prohibiting the execution of the mentally incompetent as cruel and unusual under the Eighth Amendment).
78. *Lee*, 140 S. Ct. at 2593 (Sotomayor, J., dissenting).
79. *Purkey*, 140 S. Ct. at 2598-99 (Sotomayor, J., dissenting).
80. *Lee*, 140 S. Ct. at 2592-93 (Breyer, J., dissenting); *see also Purkey*, 140 S. Ct. at 2596-97 (Breyer, J., dissenting).

"[T]he Fifth Circuit had erroneously applied plain-error doctrine to a preserved error."

PLAIN-ERROR REVIEW

The Supreme Court unanimously vacated two Fifth Circuit Court of Appeals cases this Term to correct that Circuit's misapplication of plain-error doctrine. In *Davis v. United States*,[81] the Supreme Court issued a per curiam opinion to clarify that plain-error review applies to unpreserved factual as well as legal arguments. The Fifth Circuit Court of Appeals had refused to even engage in a plain-error analysis in Davis's case, because his unpreserved argument—that his state and federal offenses were part of the "same course of conduct" such that his sentences should run concurrently rather than consecutively under the federal sentencing guidelines—was factual in nature. Noting that "there is no legal basis for the Fifth Circuit's [outlier] practice of declining to review certain unpreserved factual arguments for plain error,"[82] the Supreme Court made clear that "[t]he text of Rule 52(b) does not immunize factual errors from plain-error review."[83]

In *Holguin-Hernandez v. United States*,[84] the Supreme Court again unanimously vacated a Fifth Circuit Court of Appeals decision in a case involving plain-error doctrine. This time the Fifth Circuit had erroneously applied plain-error doctrine to a preserved error. While on supervised release, Holguin-Hernandez was convicted of drug trafficking and sentenced to five years in prison. The government asked the district court to find that Holguin-Hernandez had violated the terms of his supervised release and asked for an additional 12-to-18-month consecutive sentence under the federal sentencing guidelines. Holguin-Hernandez's counsel argued that there was no reason for additional prison time and asked the court to impose either no additional time or less time than the government's proposal. The district court imposed a 12-month consecutive sentence, drawing no further objections from defense counsel. Holguin-Hernandez appealed arguing that the 12-month sentence was unreasonably long under 18 U.S.C. § 3553(a), but the Fifth Circuit Court of Appeals held that he had not properly preserved this claim because he failed to "object in the district court to the reasonableness of the sentence imposed."[85]

Justice Breyer, writing for the Court, held that a defendant preserves an objection to the substantive reasonableness of a sentence under 18 U.S.C. § 3553(a) by advocating for a shorter sentence at the sentencing hearing. The majority first noted that Federal Rule of Criminal Procedure 51, which lays out the process for preserving claims of error, "intended to dispense with the need for formal 'exceptions' to a trial court's rulings."[86] Thus, when Holguin-Hernandez advocated for no additional sentence, "judges . . . would ordinarily understand"[87] that he was arguing that a longer sentence would not achieve the purposes of sentencing. "Nothing more is needed to preserve the claim that a longer sentence is unreasonable."[88]

Justice Alito wrote a brief concurrence, joined by Justice Gorsuch, to emphasize that this case decided only that Holguin-Hernandez had properly preserved his generalized, substantive unreasonableness claim, not that "a generalized argument in favor of less imprisonment will insulate ***all*** arguments regarding the length of a sentence from plain-error review."[89] This case, he noted, did not address how to preserve a claim that the trial court employed improper procedures, nor did it rule that Holguin-Hernandez properly preserved particular substantive-reasonableness arguments.

STATUTORY INTERPRETATION

The Supreme Court considered two statutory interpretation cases this Term, both of which resulted in unanimous decisions. First, in ***Shular v. United States***,[90] the Supreme Court again interpreted a sentencing enhancement in the Armed Career Criminal Act (ACCA). The ACCA requires that those convicted of unlawful possession of a firearm be given a minimum 15-year sentence if they have three prior convictions for certain violent or serious drug offenses.[91] 18 U.S.C. § 924(e)(2)(A)(ii) states that "serious drug offenses" include any "offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance."[92] When Shular pled guilty to being a felon in possession of a firearm, his sentence was enhanced under the ACCA on the basis of prior Florida drug convictions that involved selling cocaine and possessing cocaine with the intent to sell it. Shular objected to the enhancement, noting that Florida law does not require knowledge of the illicit nature of the substance to convict. He argued that "serious drug offenses" must have a ***mens rea*** element, and Florida law offered only an affirmative defense based on lack of knowledge. He encouraged the Supreme Court to employ "a generic offense matching exercise" under which it would "define the elements of the generic offenses identified in § 924(e)(2)(A)(ii), then compare those elements to the elements of the state offense."[93] Because Shular's prior offenses did not contain a ***mens rea*** element, unlike the generic offense that likely would have been produced by such an exercise, Shular hoped that the Supreme Court would invalidate the sentence enhancement.

The Supreme Court rejected his argument and held that § 924(e)(2)(A)(ii)'s "'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute."[94] Writing for the Court, Justice Ginsburg reasoned that

81. 140 S. Ct. 1060 (2020).
82. *Id.* at 1062.
83. *Id.* at 1061.
84. 140 S. Ct. 762 (2020).
85. 746 Fed. Appx. 403 (5th Cir. 2018) (per curiam).
86. *Holguin-Hernandez*, 140 S. Ct. at 766.
87. *Id.*
88. *Id.*
89. *Id.* at 767 (Alito, J., concurring) (emphasis in original).
90. 140 S. Ct. 779 (2020).
91. 18 U.S.C. § 924(e) (2012).
92. 18 U.S.C. § 924(e)(2)(A)(ii).
93. *Shular*, 140 S. Ct. at 784.
94. *Id.* at 782.

drug offenses lack universal terminology, so one cannot read the subsection and automatically conclude that it refers to generic drug offenses. In this way, she explained, it is different from the enumerated-offense clause of the ACCA's "violent felony" provision where the statute refers to "burglary, arson, or extortion"—offenses that more readily lend themselves to a generic-offense-matching analysis.

Further, the Court focused on the word "involv[e]" in the statute, noting that it is "natural to say that an offense 'involves' or 'requires' certain conduct."[95] Had Congress intended to refer to generic offenses, Justice Ginsburg reasoned, it would have substituted "is" for "involving," as it had done elsewhere within the statute.[96] Believing the statute to be sufficiently clear, the majority also rejected Shular's plea to invoke the rule of lenity. Justice Kavanaugh wrote a brief solo concurrence to agree with this last point and emphasize that "the rule of lenity [only] applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means."[97]

In a second statutory construction case—*Kelly v. United States*[98]—the Supreme Court reversed the convictions of those involved in the notorious "Bridgegate" scandal,[99] holding that the federal fraud statutes only criminalize deceptive schemes that have money or property as their object and that the prosecution had not proven that the Bridgegate perpetrators had such goals. In 2013 New Jersey's then-Governor Chris Christie sought to build a bipartisan coalition of mayors endorsing his reelection campaign. When the mayor of Fort Lee refused to support the Governor, two members of Gov. Christie's political team conspired with the Deputy Executive Director of the Port Authority to punish him and send him a message. They planned to reduce the typical three lanes reserved for Fort Lee's drivers entering the George Washington bridge to one lane, hired an extra toll collector to ensure that drivers would still be able to enter the bridge when the only lane's toll collector needed a break, mobilized government employees to funnel traffic into one lane, devised a cover story that the lane shift was part of a traffic study, told Port Authority engineers to collect some data to support their cover story, and then watched as Fort Lee became stuck in gridlock for four days.

When the scheme was uncovered, all three members of the conspiracy were indicted on charges of wire fraud,[100] fraud on a federally funded program or entity,[101] and conspiracy to commit those crimes. One of the scheme's participants pled guilty to conspiracy and agreed to cooperate with the Government and the other two defendants were found guilty at trial.

"[T]he Supreme Court reversed the convictions of those involved in the notorious 'Bridgegate' scandal."

In a unanimous opinion authored by Justice Kagan, the Supreme Court reversed the defendants' convictions. The Court recognized that the scheme was deceitful and corrupt, but noted that the issue in the case was whether the defendants committed property fraud. Both the federal wire fraud statute and the federal-program-fraud statute require the Government to show that the officials in question not only engaged in deception "but that an 'object of the[ir] fraud [was] "property."'"[102] As the majority put it, the federal fraud statutes are not a mechanism to police local and state officials, but rather are construed as "limited in scope to the protection of property rights."[103] Cast in this light, the Supreme Court made clear that corrupt schemes violate the federal fraud statutes only when their aim is to obtain money or property.

The Government offered two distinct, failing arguments that the petitioners sought to obtain money or property. First, it argued that the defendants' plot intended to take control of the bridge lanes themselves, and so had property as its object. The Supreme Court rejected this argument by explaining that the lane realignment was "a quintessential exercise of regulatory power."[104] Referring to *Cleveland v. United States*,[105] which had reversed another set of federal fraud convictions predicated on a public employee's corruption, Justice Kagan noted that it is settled that "a scheme to alter . . . a regulatory choice is not one to appropriate the government's property."[106]

Second, the prosecution alleged that the defendants' scheme sought the Port Authority's money because of the costs of mobilizing its employees to effectuate the scheme. The Court did not find that argument persuasive either, noting that misuse of the government employees' time and labor was not the petitioners' object but instead "only an incidental byproduct of the[ir] scheme."[107] Justice Kagan reasoned that if this incidental byproduct was enough to sustain a conviction, every regulatory decision would be subject to prosecution since these decisions tend to depend on the time and labor of government employees. Such a result would be contrary to the Supreme Court's repeated instruction that federal prosecutors cannot police state and local public officials' conduct with federal fraud statutes. As the Court put it, "federal fraud law leaves much public corruption to the States (or their electorates) to rectify,"[108] including the conduct at issue in the Bridgegate scandal.

95. *Id.* at 785.
96. *See, e.g.,* 18 U.S.C. §924(e)(2)(B)(ii).
97. *Shular*, 140 S. Ct. at 789 (Kavanaugh, J., concurring).
98. 140 S. Ct. 1565 (2020).
99. Kate Zernike, *The Bridge Scandal, Explained*, N.Y. TIMES, May 1, 2015, https://www.nytimes.com/2016/11/04/nyregion/george-washington-bridge-scandal-what-you-need-to-know.html.
100. 18 U.S.C. § 1343.
101. 18 U.S.C. § 666(a)(1)(A).
102. *Kelly*, 140 S. Ct. at 1571 (quoting Cleveland v. United States, 531 U.S. 12, 26 (2000) (alterations in original)).
103. *Id.*
104. *Id.* at 1572.
105. 531 U.S. 12 (2000).
106. *Kelly*, 140 S. Ct. at 1572.
107. *Id.* at 1573.
108. *Id.* at 1571.

"[T]he Supreme Court issued an important immigration-habeas decision that may effectively cut off federal judicial review for millions of people facing summary deportation."

HABEAS CORPUS

The Supreme Court decided one immigration-habeas case and two post-conviction cases this Term. In *Department of Homeland Security v. Thuraissigiam*, the Supreme Court issued an important immigration-habeas decision that may effectively cut off federal judicial review for millions of people facing summary deportation. In the post-conviction context, the Court decided *Banister v. Davis*, which addressed the scope of the successive petition barrier, and *McKinney v. Arizona*, which considered the application of the Court's retroactivity doctrine.

Immigration Habeas

In *Department of Homeland Security v. Thuraissigiam*,[109] the Supreme Court rejected Suspension Clause and Due Process challenges to statutory restrictions on the ability of an asylum seeker to obtain federal habeas corpus review of expedited administrative removal proceedings. In so doing, Justice Alito, joined by the Chief Justice and Justices Thomas, Gorsuch, and Kavanaugh, held that the Suspension Clause does not give noncitizens an opportunity to resort to federal habeas corpus review to assert their rights to remain lawfully in the country.

Thuraissigiam is a Sri Lankan national who crossed into the United States without authorization and was apprehended within 25 yards of the border. He sought asylum, but failed to persuade immigration officials that he had a "credible fear of persecution" if he was returned to Sri Lanka. As a result, he was subjected to "expedited removal" under 8 U.S.C. § 1252(e)(2) and was statutorily barred from seeking habeas review of the "credible fear" determination in federal court under § 1252(a)(2)(A)(iii).

Thuraissigiam filed a federal habeas petition alleging that he satisfied the credible-fear test but that he had been denied a full and fair opportunity to demonstrate that in the administrative process. He argued that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) provision restricting his ability to challenge the credible-fear determination in federal court was unconstitutional and that he should be given a new opportunity to present his asylum claim. The District Court dismissed his claims, but the Ninth Circuit Court of Appeals reversed after holding that § 1252(a)(2)(A)(iii) violates the Suspension Clause. The Supreme Court majority disagreed and reversed, instructing the lower court to dismiss Thuraissigiam's petition.

Justice Alito began the majority opinion by emphasizing the limited nature of the Court's analysis: both parties had agreed that the fate of Thuraissigiam's constitutional Suspension Clause claim rested on whether the claim would have been cognizable in 1789. Thus, the Court did not decide whether the scope of the Clause has expanded since then. With that limitation in mind, the Court rejected Thuraissigiam's claim because habeas at the Founding was "a means of contesting the lawfulness of restraint and securing release"[110] and did not encompass requests "to enter or remain in a country or to obtain administrative review potentially leading to that result."[111] For this reason, the majority did not find the historical body of precedent Thuraissigiam offered relevant since none of the cited cases demonstrated a Founding-era conception of habeas as the appropriate tool for permitting someone to enter, or potentially enter, a country. The majority then dispensed with cases from the late 19th and early 20th century by interpreting them as based "not on the Suspension Clause but on the habeas statute and the immigration laws then in force."[112]

As for Thuraissigiam's Due Process argument, the majority rejected the claim that he was owed more Due Process rights than those who have yet to enter the country because he made it 25 yards beyond the southern border. Instead, Justice Alito wrote that, "[w]hile aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause."[113]

Justice Thomas joined the majority but wrote a separate concurrence to explain his understanding of the Suspension Clause's original meaning. According to him, the Founders understood the habeas privilege "to guarantee freedom from discretionary detention, and a 'suspen[sion]' of that privilege likely meant a statute granting the executive the power to detain without bail or trial based on mere suspicion of a crime or dangerousness."[114] Because the expedited removal procedure in the IIRAIRA does not authorize detention "based on mere suspicion of a crime or dangerousness,"[115] it does not, he wrote, amount to a suspension.

Justice Breyer, joined by Justice Ginsburg, concurred only in judgment and would have narrowly confined the case's holding to Thuraissigiam's as-applied challenge for three reasons. First, because Thuraissigiam was apprehended just 25 yards from the border, he was owed less process than those who had established residence in the United States. Second, although styled as raising legal error, the concurrence understood Thuraissigiam's petition to be based on allegations of factual error, and the concurring justices thought that precluding habeas review of removal proceedings' factual findings was permissible. Finally, Justice Breyer emphasized that Thuraissigiam's procedural claims concern "not the outright denial (or constructive denial) of a process, but the precise way in which the relevant procedures were administrated," which raises "fine-grained questions of

109. 140 S. Ct. 1959 (2020).
110. *Id.*
111. *Id.* at 1969.
112. *Id.* at 1976.
113. *Id.* at 1963–64.
114. *Id.* at 1983 (Thomas, J., concurring).
115. *Id.* at 1988.

degree" that are not the traditional function of the "'limited role' that habeas has played in immigration cases similar to this one."[116]

Justice Sotomayor, joined by Justice Kagan, dissented and accused the majority of "flout[ing] over a century of this Court's practice."[117] She took issue with the majority's attempt to frame Thuraissigiam's petition as claiming "a right to enter or remain in a country."[118] Instead, she maintained that Thuraissigiam raised mixed questions of fact and law and legal challenges to procedural defects in the removal procedures, which are precisely the kinds of claims that courts have historically entertained in habeas proceedings. Justice Sotomayor also took issue with the majority's originalist approach, describing the majority's search for a common-law analogue at the time of the Founding as "an exercise in futility"[119] given that no analogous immigration restrictions existed at the Founding. For the dissenters, it was enough "that common-law courts at and near the founding granted habeas to noncitizen detainees to enter Territories not considered their own."[120] Finally, with respect to Thuraissigiam's Due Process claims, the dissent proclaimed that "[n]oncitizens in this country … undeniably have due process rights."[121] Given that "presence in the country is the touchstone for at least some level of due process protections,"[122] the dissent regarded Thuraissigiam's immigration status as no bar to his claim for constitutional protections. Raising the alarm that the majority's contrary assertion lacked any sound limiting principle, Justice Sotomayor warned that the majority's holding "is not administrable, threatens to create arbitrary divisions between noncitizens in this country subject to removal proceedings, and, most important, lacks any basis in the Constitution."[123]

Post-Conviction Habeas

In *Banister v. Davis*,[124] the Supreme Court held that a motion to alter or amend a district court's habeas judgment filed under Federal Rule of Civil Procedure 59(e) does not qualify as a successive petition. For Banister, the distinction was important because it determined whether his appeal from the federal district court's denial of his habeas petition was timely filed. If his filing was a motion to alter or amend the original judgment under Rule 59(e), the 30-day time limit for filing an appeal would be tolled until the federal district court ruled on the motion, and his appeal would be timely. But the Fifth Circuit Court of Appeals deemed his filing a successive habeas petition and, as a result, dismissed his appeal as untimely. The Supreme Court voted 7-2 to reverse the Fifth Circuit's ruling and held that Rule 59(e) motions are not successive petitions but are "part and parcel of the first habeas proceeding."[125]

In an opinion authored by Justice Kagan and joined by all but Justices Thomas and Alito, the Court looked to historical precedents and the purposes of the statutory successive petition barrier to conclude that Rule 59(e) motions are not successive. As a historical matter, the majority noted that Rule 59(e) was derived from the common-law practice of amending judgments; courts historically exercised this practice in habeas and non-habeas cases alike; and these motions were routinely treated as "attendant on the initial habeas application"[126] rather than collateral or successive attacks on a judgment.

"[T]he Court looked to historical precedents and the purposes of the statutory successive petition barrier to conclude that Rule 59(e) motions are not successive."

Turning to the Antiterrorism and Effective Death Penalty Act's (AEDPA) purposes and the point of its successive petition barrier, the majority noted that treating Rule 59(e) motions as part of the initial habeas application furthers rather than undermines AEDPA's aims of "reducing delay, conserving judicial resources, and promoting finality."[127] Rule 59(e) motions must be filed shortly after the initial judgment, may not contain arguments that could have been raised before, improve the efficiency of the judiciary by permitting district courts to either quickly dispose of meritless claims or rectify their mistakes before the appeal, and consolidate appellate proceedings thereby avoiding piecemeal appellate review. For these reasons, the majority noted, Rule 59(e) motions are different from motions for relief from judgment under Federal Rule of Civil Procedure 60(b). A Rule 60(b) motion is a separate, collateral attack on a judgment that can be filed long after the original federal district court decision, and courts have historically treated 60(b) motions that raise new substantive arguments as successive petitions in the habeas context.[128] The majority did not consider itself bound by the Court's previous holding in *Gonzalez v. Crosby*[129] that substantive Rule 60(b) motions are successive habeas petitions. Instead, the majority announced that Rule 59(e) motions are simply "a limited continuation of the original proceeding—indeed, a part of producing the final judgment granting or denying habeas relief."[130]

The dissent, written by Justice Alito and joined by Justice Thomas, chided the majority for putting too much stock in how a motion is labeled and would have treated Banister's motion under the rubric set forth in *Gonzalez* for Rule 60(b) motions for relief from judgment. Under that regime, if the motion asserts a substantive habeas claim by attacking the court's prior decision on the merits, the dissenters would deem it a successive petition,

116. *Id.* at 1992 (Breyer, J., concurring in judgment only).
117. *Id.* at 1993 (Sotomayor, J., dissenting).
118. *Id.* at 1994.
119. *Id.* at 1998.
120. *Id.* at 2001.
121. *Id.* at 2012.
122. *Id.*
123. *Id.* at 2013.
124. 140 S. Ct. 1698 (2020).
125. *Id.* at 1702.
126. *Id.* at 1707.
127. *Id.*
128. *See* Gonzalez v. Crosby, 545 U.S. 524 (2005).
129. *Id.*
130. *Banister*, 140 S. Ct. at 1710.

"Finally, in *McKinney v. Arizona*, the Court confronted a thorny retroactivity question..."

but if it raises only a nonmerits, procedural problem with the underlying decision, it would not be successive. Because Banister's motion made substantive arguments, Justice Alito would have deemed it successive and the resulting appeal untimely.

Finally, in *McKinney v. Arizona*,[131] the Court confronted a thorny retroactivity question that turned on whether an Arizona resentencing procedure occurred on direct or collateral review. In 1993, after having been convicted on two counts of first-degree murder, James McKinney was sentenced to death based on a judicial finding of the existence of aggravating circumstances and a judicial determination that the aggravating circumstances outweighed the mitigating circumstances. The Arizona Supreme Court affirmed the sentence in 1996 after conducting an independent review required by state law. McKinney then sought federal habeas relief alleging that the Arizona courts violated *Eddings v. Oklahoma*[132] by refusing to consider McKinney's post-traumatic stress disorder as a mitigating factor. In 2015 the Ninth Circuit Court of Appeals sitting en banc agreed and sent the case back for Arizona to correct its error. But the legal landscape on capital sentencing had changed between 1996 and 2018 when the Arizona Supreme Court issued its second decision. In 2002 the Supreme Court held in *Ring v. Arizona*[133] that the Sixth Amendment jury-trial right entitles capital defendants to a jury determination on the existence of any aggravating circumstances that might qualify them for a death sentence. And in 2016 the Supreme Court decided *Hurst v. Florida*,[134] which relied on *Ring* to strike down Florida's capital-sentencing scheme as impermissibly allowing a judge to find aggravating circumstances independent of the jury's factfinding. McKinney argued that, because the Arizona Supreme Court was now going to reopen his direct appeal, *Ring* and *Hurst* should apply, and he should be entitled to a jury determination on the aggravating circumstances. The state argued that McKinney's case was on collateral review and, thus, he was not entitled to retroactive application of *Ring* and *Hurst*.[135] The Arizona Supreme Court agreed with the state, reweighed the aggravating and mitigating circumstances, including consideration of McKinney's PTSD, and reinstated the death sentence. McKinney petitioned for certiorari and the United States Supreme Court, in a 5-4 decision, agreed with Arizona and affirmed.

Justice Kavanaugh, joined by the Chief Justice and Justices Thomas, Alito, and Gorsuch, held that *Ring* and *Hurst* did not apply to McKinney's case. The majority accepted the Arizona Supreme Court's statement that it was conducting an independent review in a collateral proceeding, noting "we may not second-guess the Arizona Supreme Court's characterization of state law."[136] The majority then held that the Arizona Supreme Court had acted in accordance with *Clemons v. Mississippi*[137] when it reweighed the aggravating and mitigating circumstances itself, refusing McKinney's attempt to distinguish *Clemons* because his case concerned a court impermissibly ignoring a mitigating circumstance whereas *Clemons* involved an improper weighing of aggravating circumstances. According to the majority, there is "no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side."[138]

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented from the majority's refusal to apply *Ring* and *Hurst*. The dissenters emphasized that the nature of McKinney's 2018 proceeding before the Arizona Supreme Court "is a question of federal constitutional law, not an issue subject to state governance."[139] Observing that McKinney's most recent proceeding was analyzed *de novo* under the same docket number and with the same docket entries as McKinney's original appeal, Justice Ginsburg wrote that "the Arizona Supreme Court was . . . rerunning direct review to correct its own prior harmful error"[140] such that *Ring* and *Hurst* should have applied.

A LOOK AHEAD

The 2020-21 Term features an interesting slate of criminal law and procedure cases. In addition to addressing the retroactivity of *Ramos* in *Edwards v. Vannoy*, the Court will consider *Torres v. Madrid* and address whether an officer's unsuccessful attempt to detain a suspect by using physical force is a seizure or if the officer's use of force must be successful for an individual to be seized under the Fourth Amendment.[141] Next Term will also include *Jones v. Mississippi*, in which the Court will consider whether juveniles must be found "permanently incorrigible" to be constitutionally sentenced to life in prison without parole under the Eighth Amendment.[142] And the Court will hear its first big Computer Fraud and Abuse Act (CFAA) case in *Van Buren v. Unites States*[143] to address whether a person who is authorized to access computer information for some purposes violates the CFAA by accessing the same information for an improper purpose.

The upcoming term's criminal-law docket is also notable for not including any cases concerning qualified immunity. During the second half of the 2019-20 Term, America experienced a widespread movement in support of racial equality and against systemic injustice against Black Americans. Sparked by the police

131. 140 S. Ct. 702 (2020).
132. 455 U.S. 104 (1982) (holding that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence).
133. 536 U.S. 584 (2002).
134. 136 S. Ct. 616 (2016).
135. *See* Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring* does not apply retroactively on collateral review).
136. *McKinney*, 140 S. Ct. at 708.
137. 494 U.S. 738 (1990) (holding that a state appellate court can uphold a death sentence based in part on an invalid or improperly defined aggravating circumstance by reweighing the valid aggravating circumstances against the mitigating evidence).
138. *McKinney*, 140 S. Ct. at 707.
139. *Id.* at 712 (Ginsburg, J., dissenting).
140. *Id.*
141. *Torres v. Madrid*, No. 19-292.
142. *Jones v. Mississippi*, No. 18-1259.
143. *Van Buren v. United States*, No. 19-783.

killing of George Floyd, the Black Lives Matter movement pushed police brutality and the laws and systems that facilitate it into the public eye. So when a series of cases concerning the scope of qualified immunity knocked on the Supreme Court's door, many wondered whether the Supreme Court would answer. It did not.[144] Dissenting from the denial of certiorari, Justice Thomas indicated that he believes the qualified immunity had become unmoored from its common-law roots and that there "likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe."[145] We will have to wait for another Term to see if a majority of the Court will ultimately agree with him.

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144. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

145. *Id.* at 1864 (Thomas, J., dissenting).