

# Limiting Access to Remedies:

## Select Criminal Law and Procedure Cases from the Supreme Court's 2021-22 Term

Eve Brensike Primus & Justin Hill

### LOOK BACK

Although the most memorable cases from the Supreme Court's 2021-22 Term were on the civil side of its docket,<sup>1</sup> the Court addressed significant cases on the criminal side involving the Confrontation Clause, capital punishment, double jeopardy, criminal jurisdiction in Indian Country, and important statutory interpretation principles, such as the *mens rea* presumption and the scope of the rule of lenity.

Looking back, the Court's decisions limiting individuals' access to remedies for violations of their constitutional criminal procedure rights stand out. *Shinn v. Ramirez*<sup>2</sup> and *Shoop v. Twyford*<sup>3</sup> drastically limit the ability of persons incarcerated in state facilities to challenge the ineffectiveness of their trial counsel in federal habeas proceedings by prohibiting them from introducing new evidence to support their claims. *Egbert v. Boule*<sup>4</sup> again narrowed individuals' access to *Bivens* remedies against federal officials, and *Vega v. Tekoh*<sup>5</sup> held that individuals may not sue state officials under 42 U.S.C. § 1983 for *Miranda* violations.

Dicta in some cases suggest possible future restrictions on individuals' constitutional criminal procedure remedies. For example, in *Brown v. Davenport*,<sup>6</sup> Justice Gorsuch wrote a majority decision that reconstructed the history of federal habeas corpus review to suggest that the Great Writ should be limited to correcting jurisdictional defects. And the *Tekoh* majority dropped a footnote questioning the legitimacy of the *Miranda* decision itself.<sup>7</sup>

This was Justice Breyer's last Term on the Court, and he spent it, for the most part, writing and joining dissents. He authored powerful dissenting opinions in both the Boston Marathon bombing case<sup>8</sup> and the Second Amendment case<sup>9</sup> on the right to bear arms in public.

### HABEAS CORPUS

The term's habeas corpus cases featured some of the biggest doctrinal shifts. *Shinn v. Ramirez* was an under-the-radar blockbuster that impaired habeas petitioners' abilities to introduce the evidence needed to support ineffective-assistance-of-counsel claims. *Shoop v. Twyford* similarly emphasized that federal courts should be cautious before gathering new evidence. And *Brown v. Davenport* clarified the relationship between harmless-error doctrine and the statutory standard of review.

### INEFFECTIVE ASSISTANCE OF COUNSEL

*Shinn v. Ramirez*<sup>10</sup> significantly curtailed habeas petitioners' abilities to introduce new evidence to support ineffective-assistance-of-trial-counsel claims. Both David Ramirez and Barry Lee Jones were convicted of murder in Arizona state courts and sentenced to death. They both filed federal habeas corpus petitions alleging that their trial attorneys had been constitutionally ineffective. But their ineffective-assistance-of-trial-counsel claims were procedurally defaulted in federal court, because neither of their state postconviction attorneys had properly raised the claim in state postconviction proceedings.

Ramirez and Jones both relied on a 2012 Supreme Court decision—*Martinez v. Ryan*<sup>11</sup>—to get around their procedural defaults. *Martinez* held that a state habeas petitioner's failure to properly present a substantial ineffective-assistance-of-trial-counsel claim in state postconviction proceedings does not bar federal habeas review of the claim if (1) the state postconviction attorney performed ineffectively in failing to raise the claim, and (2) the state postconviction proceeding was the first opportunity the habeas petitioner had to raise the claim. Both the federal district court and the Ninth Circuit Court of Appeals relied on *Martinez* to look past Ramirez's and Jones's procedural defaults and consider the merits of their trial-attorney-ineffectiveness claims.

Because state postconviction counsel in both cases had failed to raise the ineffective-assistance-of-trial-counsel claims in state court, there was no evidence of counsels' ineffectiveness in the state court record. The Ninth Circuit Court of Appeals had held in both cases that the federal court had the power to consider new evidence once someone satisfied *Martinez*, but the U.S. Supreme Court disagreed.

Justice Thomas, joined by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett, held that habeas petitioners raising ineffective-assistance-of-trial-counsel claims through the *Martinez* exception are limited to relying on evidence in the state court record. The majority relied on a provision in the Antiterrorism and Effective Death Penalty Act (AEDPA) that limits the availability of federal evidentiary hearings in habeas cases filed by individuals serving sentences in state prison: 28 U.S.C. § 2254(e)(2). Under § 2254(e)(2), if a person serving a state sentence "has failed to develop the factual basis of a claim in State court proceedings," a federal court may not hold an evidentiary hearing on the claim except in two lim-

### Footnotes

1. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
2. 142 S. Ct. 1718 (2022).
3. 142 S. Ct. 2037 (2022).
4. 142 S. Ct. 1793 (2022).
5. 142 S. Ct. 2095 (2022).

6. 142 S. Ct. 1510 (2022).

7. *Tekoh*, 142 S. Ct. at 2106 n.5.

8. *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022).

9. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

10. 142 S. Ct. 1718 (2022).

11. 566 U.S. 1 (2012).

ited circumstances, neither of which applied to Ramirez and Jones.<sup>12</sup>

Ramirez and Jones contended that § 2254(e)(2) should not apply to their cases because the Supreme Court held in *Williams v. Taylor*<sup>13</sup> that § 2254(e)(2)'s limitations on evidentiary hearings do not apply when a habeas petitioner is not at fault for “fail[ing] to develop” the claim in state court. In their cases, they argued, the state was responsible for the failure to develop the record, because it appointed them ineffective postconviction attorneys. Writing for the majority, Justice Thomas disagreed, noting that individuals accused of committing crimes bear the risk of attorney error in the course of representation unless their attorney is constitutionally ineffective. And because there is no constitutional right to counsel in state postconviction proceedings, habeas petitioners bear the risk of attorney errors in state postconviction proceedings, including errors that result in a failure to develop the evidentiary record. Justice Thomas emphasized that § 2254(e)(2) was enacted to restrict the availability of federal evidentiary hearings and promote AEDPA's interests in finality and respecting state court judgments. *Martinez* carved out a narrow equitable exception to a judicially crafted procedural default doctrine. It did not give the Court the power, according to Justice Thomas, to rewrite a statute.

Justice Sotomayor, joined by Justices Breyer and Kagan, dissented, calling the Court's decision “perverse” and “illogical” and accusing the majority of effectively overruling *Martinez*.<sup>14</sup> “It makes no sense,” she explained, “to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings . . . but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim.”<sup>15</sup> Section 2254(e)(2) incorporated a threshold fault-based “failure to develop” standard that the dissenters felt must be understood in conjunction with the fault-based reasoning in *Martinez*. Justice Sotomayor also criticized the majority for misrepresenting AEDPA's purposes. AEDPA struck a balance between finality and comity concerns and a desire to ensure that federal courts could continue to monitor the fairness of criminal proceedings and guard against “extreme malfunctions in the state criminal justice systems.”<sup>16</sup>

Because ineffective-assistance-of-trial-counsel claims often turn on errors of omission that require evidentiary development, the dissenters rightly predict that the Court's holding will “doom many meritorious trial-ineffectiveness claims.”<sup>17</sup> By neutering *Martinez*, the Court effectively “reduces to rubble” the right to effective assistance of trial counsel in the majority of states that

push such claims into the post-conviction context.<sup>18</sup> This doctrinal change will produce significant real-world effects, including the possible continued incarceration and potential execution of innocent people. One the petitioners in *Ramirez*—Barry Lee Jones—has substantial evidence that he did not commit the murder for which he is scheduled to be executed, but the Court's decision precludes him from presenting it.<sup>19</sup>

*Shoop v. Twyford*<sup>20</sup> built on *Ramirez* and held that a federal district court may not order the state to transport an incarcerated person to a hospital for medical testing if the results of such testing would not be admissible in later federal habeas proceedings. Raymond Twyford challenged his Ohio murder and death sentence in a federal habeas petition alleging, among other things, that his trial counsel was ineffective for failing to present evidence of a head injury that Twyford suffered as a teenager. To support this claim, Twyford filed a motion to compel the government to transport him to a medical center for brain testing. The district court granted the motion, finding that the order was appropriate under the All Writs Act, which authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>21</sup> The Sixth Circuit affirmed the transportation order after finding that the evidence was “plausibly relate[d]” to Twyford's claims.<sup>22</sup> The Supreme Court again reversed.

Chief Justice Roberts, joined by Justices Thomas, Alito, Kavanaugh, and Barrett, wrote for the majority, noting that an order that requires the state to transport someone in custody to aid in the gathering of useless evidence is both potentially dangerous for the state and runs contrary to AEDPA's purposes of ensuring finality and respecting state court judgments. The majority held that federal courts must determine whether any new evidence could be admissible in a petitioner's habeas case before facilitating its development.

According to the Court, the order in this case was erroneously issued, because any medical evidence Twyford obtained would not have been admissible in his later habeas proceedings. AEDPA foreclosed any attempt to supplement the state court record for claims that were adjudicated on the merits in state court,<sup>23</sup> and,

**“[F]ederal courts must determine whether any new evidence could be admissible in a petitioner's habeas case before facilitating its development.”**

12. The two exceptions involve claims based on a new and previously unavailable rule of constitutional law made retroactively applicable by the U.S. Supreme Court and claims based on a factual predicate that could not have been discovered before through the exercise of due diligence. A petitioner who relies on one of those two exceptions must also show by clear and convincing evidence that no reasonable factfinder would have convicted them of the crime. See 28 U.S.C. § 2254(e)(2).

13. 529 U.S. 420 (2000).

14. *Martinez*, 142 S. Ct. at 1740 (Sotomayor, J., dissenting).

15. *Id.*

16. *Id.* at 1748–49 (Sotomayor, J., dissenting) (quoting *Harrington v.*

*Richter*, 562 U.S. 86, 102–03 (2011)).

17. *Id.* at 1746 (Sotomayor, J., dissenting).

18. *Id.* at 1750 (Sotomayor, J., dissenting).

19. See Liliana Segura, *His Conviction Was Overturned Amid Evidence of Innocence. The Supreme Court Could Throw It All Out.*, THE INTERCEPT (July 31, 2021), <https://theintercept.com/2021/07/31/death-penalty-supreme-court-arizona-barry-jones>.

20. 142 S. Ct. 2037 (2022).

21. *Id.* at 2042; see also 28 U.S.C. § 1651(a).

22. *Twyford*, 142 S. Ct. at 2042.

23. See 28 U.S.C. § 2254(d)(2); see also *Cullen v. Pinholster*, 563 U.S. 170 (2011) (limiting claims under § 2254(d)(2) to record evidence).

**“Perhaps the most important part of the case is how Justice Gorsuch set the stage for future narrowing of the scope of the Great Writ.”**

after *Ramirez*, Twyford could not use new evidence to support a defaulted ineffective-assistance-of-trial-counsel claim unless he had a plausible argument that his case fit within one of § 2254(e)(2)'s two narrow exceptions which he did not.

Justice Breyer dissented, joined by Justices Sotomayor and Kagan. He argued that the Supreme Court lacked jurisdiction over the case,

because it involved the appeal of an interlocutory order, which the Court generally does not permit.<sup>24</sup> Justice Gorsuch agreed that the Court lacked jurisdiction and wrote separately to note that he would have dismissed the case as improvidently granted.<sup>25</sup>

### HARMLESS ERROR

In *Brown v. Davenport*,<sup>26</sup> the Supreme Court held that a federal court may not grant habeas relief to a convicted state prisoner whose constitutional rights were violated at trial unless that prisoner satisfies *both* the judicially created *Brecht v. Abrahamson*<sup>27</sup> harmless-error standard *and* AEDPA's statutory barriers to habeas relief.<sup>28</sup> Ervine Davenport was convicted of murder and sentenced to life in prison without the possibility of parole after standing trial while visibly shackled in front of the jury. On appeal, the Michigan appellate courts found that the shackling violated Davenport's due process rights,<sup>29</sup> but determined that the error was harmless. Davenport then filed a federal habeas corpus petition, which the federal district court denied, relying on AEDPA's deferential standard of review for previously adjudicated claims. Under 28 U.S.C. § 2254(d), habeas relief is precluded for claims adjudicated on the merits in state court unless the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or involved an unreasonable determination of the facts.

The Sixth Circuit Court of Appeals reversed, finding that Davenport's shackling had a “substantial and injurious effect or influence on the verdict,” and was therefore not harmless under the *Brecht v. Abrahamson* harmless-error standard for federal habeas review. Once *Brecht* was satisfied, the Sixth Circuit held that Davenport need not also satisfy AEDPA to obtain relief, because prior Supreme Court cases had said that the *Brecht* test “subsumed” the § 2254(d) standard.<sup>30</sup> The Supreme Court reversed in a 6-3 decision.

Justice Gorsuch, joined by the Chief Justice and Justices Thomas, Alito, Kavanaugh, and Barrett, held that habeas petitioners must satisfy *both* *Brecht* and § 2254(d) to obtain relief. According to the majority, AEDPA represented “a sea change in

federal habeas law” that was designed to restrict the availability of relief, and an AEDPA analysis is “different in kind” from a *Brecht* analysis.<sup>31</sup> “[W]here AEDPA asks whether *every* fairminded jurist would agree that an error was prejudicial, *Brecht* asks only whether a federal habeas court *itself* harbors grave doubt about the petitioner's verdict.”<sup>32</sup> Additionally, the majority noted, the legal materials that a court may consult when addressing the two inquiries are distinct: AEDPA requires courts to focus on U.S. Supreme Court holdings that existed at the time of the relevant state court decision, whereas *Brecht* permits courts to draw on circuit precedent, dicta in Supreme Court cases, and cases that were decided after the relevant state court decision to reach a decision. Applying AEDPA to Davenport's case, the majority did not believe that the Michigan appellate courts' finding of harmlessness was unreasonable. Therefore, Davenport was not entitled to relief.

The Court's decision will make it marginally harder for individuals challenging the legality of their state incarceration to obtain relief, because they will have to jump over two hurdles rather than one, but it is unlikely to affect the outcome in most cases. Perhaps the most important part of the case is how Justice Gorsuch set the stage for future narrowing of the scope of the Great Writ.

According to the Court majority, habeas was historically a writ used to test the legality of an executive detention but not a means of challenging a final judgment of conviction, unless the judgment was issued by a court that lacked jurisdiction over the accused person or his offense. Those who ascribe to this narrower view of habeas history believe that habeas is not meant to be a tool for error correction and argue that, originally, it was not so used. That changed, according to the majority, when the Supreme Court decided *Brown v. Allen*<sup>33</sup> in 1953 and permitted federal courts to re-adjudicate postconviction constitutional claims filed by those serving state prison sentences. This shift, Justice Gorsuch wrote, unmoored habeas from its traditional function, and “[f]ull-blown constitutional error correction became the order of the day.”<sup>34</sup> Justice Gorsuch then explained how the Supreme Court and Congress's subsequent attempts to limit the scope of federal habeas review of state court criminal convictions—including the adoption of *Brecht's* harmless-error standard and the enactment of AEDPA—were a necessary response to the flood of petitions courts received after *Brown v. Allen*.

Justice Kagan, joined by Justices Breyer and Sotomayor, authored a fiery dissent, arguing that none of the majority's “amateur,” “law-chambers history” was necessary to the resolution of Davenport's case.<sup>35</sup> Justice Kagan accused the majority of planting seeds now to “yield more succulent fruit in cases to come”—namely, a narrowing of the scope of the writ in future cases.<sup>36</sup> According to the dissenters, however, the historical picture that the majority presented is wrong. Justice Kagan listed a number of

24. *Twyford*, 142 S. Ct. at 2047 (Breyer, J., dissenting).

25. *Id.* at 2050–51 (Gorsuch, J., dissenting).

26. *Brown v. Davenport*, 142 S. Ct. 1510 (2022).

27. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

28. 28 U.S.C. § 2254(d)(2).

29. *See* *Deck v. Missouri*, 544 U.S. 622 (2005).

30. *Davenport*, 142 S. Ct. at 1526–28 (referencing *Fry v. Pliler*, 551 U.S.

112 (2007), and *Davis v. Ayala*, 576 U.S. 257 (2015)).

31. *Id.* at 1524–25.

32. *Id.*

33. 344 U.S. 443 (1953).

34. *Davenport*, 142 S. Ct. at 1522.

35. *Id.* at 1531–35 (Kagan, J., dissenting).

36. *Id.* at 1531 (Kagan, J., dissenting).

mid-19th-century cases to show that federal courts extended habeas relief to individuals in prison serving state sentences long before *Brown v. Allen*. And she quoted language from articles, treatises, and modern Supreme Court cases acknowledging that history. Whose view of the history will prevail in future cases remains to be seen, but it is significant that Justice Gorsuch has now managed to get his more constricted view of the scope of the Great Writ into a majority decision.

On the merits of Davenport’s case, Justice Kagan argued for the dissenters that the *Brecht* test is more stringent than § 2254(d), so prior cases correctly described the *Brecht* test as “subsuming” § 2254(d), although Justice Kagan noted (and Davenport did not contest) that a federal court may be limited to considering only the state-court record in applying the *Brecht* test.

## REMEDIES

### MIRANDA VIOLATIONS AND § 1983

In *Vega v. Tekoh*,<sup>37</sup> the Court held that *Miranda* violations are not typically cognizable in 42 U.S.C. § 1983 proceedings. Sheriff’s Deputy Carlos Vega questioned Terence Tekoh, a certified nursing assistant, after a female patient accused Tekoh of sexually assaulting her. Vega did not give Tekoh any *Miranda* warnings but elicited a written confession that was used against Tekoh at trial. After he was acquitted of criminal charges, Tekoh brought a § 1983 action against Vega seeking damages for the *Miranda* violation. Tekoh asked for an instruction that would tell jurors they were required to find that Vega violated the Fifth Amendment if they determined that he took a statement from Tekoh in violation of *Miranda* and that statement was used against Tekoh at trial. The trial judge declined to give this jury instruction because, in his view, *Miranda* was a prophylactic rule that could not establish § 1983 liability by itself. The jury ultimately found in Vega’s favor and Tekoh appealed. The Ninth Circuit Court of Appeals reversed, finding that *Miranda* was “a right secured by the Constitution” such that a *Miranda* violation alone could give rise to liability under § 1983.<sup>38</sup> The Supreme Court reversed.

Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett, characterized *Miranda* as a prophylactic protection that is broader than necessary to protect the Fifth Amendment privilege against self-incrimination. Because a *Miranda* violation “does not necessarily constitute a violation of the Constitution,”<sup>39</sup> a mere *Miranda* violation without more does not constitute “the deprivation of a right secured by the Constitution” under § 1983. *Dickerson v. United States*,<sup>40</sup> which reaffirmed *Miranda*, did not change anything according to Justice Alito. *Dickerson* merely recognized that *Miranda* was “constitutionally based,” but that does not make it constitutionally required.<sup>41</sup>

Of course, § 1983 provides a cause of action for more than just constitutional violations—it also protects against the “deprivation of any rights, privileges, or immunities secured by [fed-

eral] laws.”<sup>42</sup> But the majority was quick to point out that every violation of federal law by a state actor does not give rise to § 1983 liability. To determine whether to extend § 1983 liability to a judicially created prophylactic federal rule like *Miranda*, the majority conducted a cost-benefit analysis. The Court found that the benefit of safeguarding the right against self-incrimination was already served by suppression of the incriminating statements at trial, so the marginal benefit of extending liability was low. In contrast, the majority noted that holding police officers accountable for *Miranda* violations would impose significant costs by undermining interests in judicial economy, comity, and federalism, because it would force federal judges to relitigate questions already decided in state criminal courts. Because the costs of permitting liability outweighed the benefits, the Court declined to hold that mere *Miranda* claims were cognizable under § 1983.

Justice Alito, writing for the majority, also dropped a footnote that questioned *Miranda*’s legitimacy.<sup>43</sup> He wrote that *Miranda* asserted a “bold and controversial claim of authority” and questioned whether the Court has the authority to create constitutionally based prophylactic rules that bind federal and state courts. The majority noted that, “for the purpose of deciding this case, we follow [*Miranda*’s] rationale.”<sup>44</sup> It remains to be seen whether the Court will revisit *Miranda*’s constitutional status down the line.

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented, arguing that “*Miranda* is set in constitutional stone.”<sup>45</sup> The dissenters emphasized the language in both *Miranda* and *Dickerson* indicating that *Miranda* was a “constitutional decision” and noted that *Miranda* had been applied to the states and in federal habeas review. In response to the majority’s argument that *Miranda* extends beyond the Fifth Amendment’s core guarantee, the dissenters wrote, “[i]t remains a constitutional rule . . . [a]nd it grants the defendant a legally enforceable entitlement—in a word, a right—to have his confession excluded. . . . Whether that right to have evidence excluded safeguards a yet deeper constitutional commitment makes no difference to § 1983.”<sup>46</sup> Finally, the dissenters discussed the prospect of an innocent person being wrongly convicted and spending years in prison because of an improperly obtained, unwarned statement and then having no redress. The majority, Justice Kagan wrote, “injures the right by denying the remedy.”<sup>47</sup>

By removing the prospect of civil liability for *Miranda* violations, *Tekoh* removes some incentives that state officials had to comply with *Miranda*’s requirements. It may also change how police are trained and instructed with respect to *Miranda* invocations.<sup>48</sup> If so, due process constraints may have to play a larger

**“Justice Alito, writing for the majority, ... questioned *Miranda*’s legitimacy.”**

37. 142 S. Ct. 2095 (2022).

38. *Tekoh v. Los Angeles*, 985 F.3d 713, 720 (2021).

39. *Tekoh*, 142 S. Ct. at 2106.

40. 530 U.S. 428 (2000).

41. *Tekoh*, 142 S. Ct. at 2105.

42. 42 U.S.C. § 1983.

43. *Tekoh*, 142 S. Ct. at 2106 n.5.

44. *Id.*

45. *Id.* at 2109 (Kagan, J., dissenting).

46. *Id.* at 2110 (Kagan, J., dissenting).

47. *Id.* at 2111 (Kagan, J., dissenting).

48. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998) (discussing how training manuals incorporate Supreme Court holdings and encourage officers to question “outside *Miranda*”).

**“Egbert v. Boule drastically limited the availability of *Bivens* actions...”**

role in future confession law cases. The federal due process voluntariness test is a notoriously vague case-by-case standard, but it is amenable to future clarification.<sup>49</sup> Additionally, some states have—and others may choose—to be more protective of suspects’

*Miranda* rights as a matter of state law.

**BIVENS**

*Egbert v. Boule*<sup>50</sup> drastically limited the availability of *Bivens*<sup>51</sup> actions seeking damages based on alleged violations of individuals’ constitutional rights by federal officials. Robert Boule operated a bed-and-breakfast on land that straddled the border between Washington and Canada. Boule used the business to aid individuals smuggling drugs or noncitizens across the border, and worked at times as an informant for the federal government. After Boule informed Border Patrol Agent Egbert that a Turkish guest was coming, Egbert went to Boule’s driveway to check the guest’s papers. According to Boule, he told Egbert to leave his property, but Egbert refused and instead threw Boule against a car and to the ground.

Boule lodged a grievance with Egbert’s supervisor and filed an unsuccessful administrative claim with Border Patrol under the Federal Tort Claims Act.<sup>52</sup> Boule then filed a lawsuit in federal court against Egbert, bringing two *Bivens* claims: (1) a Fourth Amendment claim for excessive force and (2) a First Amendment claim for unlawful retaliation predicated on Boule’s claim that Egbert retaliated against him for the complaints he filed by prompting a tax audit of his business and reporting his license plate to the state’s licensing department. The district court held that these claims were not cognizable under *Bivens*, but the Ninth Circuit Court of Appeals reversed.

The Supreme Court held in a 6-3 decision that *Bivens* did not provide a cause of action for either claim. Justice Thomas wrote the majority opinion and was joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Barrett. Justice Thomas began by emphasizing that, because “creating a cause of action is a legislative endeavor,” recognizing a *Bivens* claim is “a disfavored judicial activity.”<sup>53</sup> Ultimately, the majority instructed courts faced with *Bivens* claims to ask if there is any reason to think that Congress might be better equipped to weigh the costs and benefits of allowing a damages action to proceed. If there is any rational reason to think “yes”—which will basically always be the case—then no *Bivens* action may lie. Such a test effectively dooms most *Bivens* claims.

With respect to Boule’s Fourth Amendment claim, the majority felt that “Congress is better positioned to create remedies in

the border-security context, and the Government already has provided alternative remedies that protect plaintiffs like Boule.”<sup>54</sup> The Court also closed the door on Boule’s First Amendment retaliation claim, theorizing that extending *Bivens* would expose the government to massive liability, because plaintiffs might find a retaliation claim in any adverse action taken by government officials.

Justice Gorsuch concurred in the judgment, but wrote separately to argue that the Court should not give plaintiffs false hope of remaining *Bivens* remedies. He would “forthrightly return the power to create new causes of action” to Congress and get rid of *Bivens* claims explicitly.<sup>55</sup>

Finally, Justice Sotomayor, joined by Justices Breyer and Kagan, concurred in part and dissented in part. Although they agreed that *Bivens* should not be extended to provide a cause of action for Boule’s retaliation claim, the dissenters criticized the majority for narrowing the *Bivens* test and refusing to recognize a Fourth Amendment claim that closely mirrored the facts of *Bivens* itself. Justice Sotomayor emphasized that the Court had not overruled *Bivens*, and she urged lower courts not to read the majority’s decision as “render[ing] *Bivens* a dead letter.”<sup>56</sup> At the same time, she noted that border patrol agents “are now absolutely immunized from liability,” and she lamented the majority’s choice to “close[] the door to *Bivens* suits by many who will suffer serious constitutional violations at the hands of federal agents.”<sup>57</sup>

**QUALIFIED IMMUNITY**

The Court continued its trend toward limiting access to remedies for alleged constitutional violations this Term when it relied on qualified immunity doctrine to dispose of two § 1983 actions alleging Fourth Amendment excessive force claims. In *Rivas-Villegas v. Cortesluna*,<sup>58</sup> police responded to a 911 call from a crying 12-year-old girl who said that Ramon Cortesluna was threatening to hurt her and her mother (his girlfriend) with a chainsaw. When police arrived, Cortesluna came to the door with a knife in his pocket. Officers ordered him to get down and keep his hands up. When Cortesluna instead lowered his hands, officers shot him twice with beanbag rounds and ordered him to the ground again. At that point, Officer Rivas-Villegas straddled Cortesluna, kneeling on his back near where the knife was located for eight seconds while the knife was removed.

Relying on a case from the Ninth Circuit Court of Appeals that held an officer liable for deliberately digging his knee into a person’s back while arresting them in response to a noise complaint, Cortesluna filed a § 1983 action alleging that Rivas-Villegas used excessive force when he kneeled on his back.<sup>59</sup> The Ninth Circuit Court of Appeals rejected the officer’s qualified immunity claim, but the Supreme Court reversed in a per curiam opinion, noting that “[s]pecificity is especially important in the Fourth Amend-

49. See Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015).

50. 142 S. Ct. 1793 (2022).

51. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

52. See 28 U.S.C. § 2675(a).

53. *Egbert*, 142 S. Ct. at 1802–03.

54. *Id.* at 1804.

55. *Id.* at 1810 (Gorsuch, J., concurring).

56. *Id.* at 1823 (Sotomayor, J., concurring in part and dissenting in part).

57. *Id.* at 1821, 1824 (Sotomayor, J., concurring in part and dissenting in part).

58. 142 S. Ct. 4 (2021) (per curiam).

59. *Id.* at 7 (relying on *LaLonde v. Cnty. of Riverside*, 204 F.3d 947 (9th Cir. 2000)).

ment context” and emphasizing that the facts in the prior Ninth Circuit case were distinguishable such that there was no clearly established federal law to give Rivas-Villegas notice that his specific conduct was illegal.<sup>60</sup>

*City of Tahlequah, Oklahoma v. Bond*<sup>61</sup> involved officers responding to a woman’s 911 call that her ex-husband was intoxicated and would not leave her home. When the officers attempted to speak with her ex-husband, he expressed a concern that they would take him to jail. When they entered to speak with him further, he picked up a hammer and held it like a baseball bat that he was ready to swing. Officers drew their weapons and told him to drop the hammer, but he did not. When he raised the hammer as if he was going to throw it at the officers or charge them with it, they fired and killed him.

His estate filed a § 1983 suit alleging excessive force. The district court granted the officers’ motion to dismiss, but the Tenth Circuit Court of Appeals reversed, relying on circuit precedent suggesting that the officers’ conduct was unlawful. The Supreme Court reversed again in a per curiam opinion, noting that the officers did not violate any clearly established law and that the circuit precedent was distinguishable. Once again, the Court admonished the courts “not to define clearly established law at too high a level of generality.”<sup>62</sup>

## MALICIOUS PROSECUTION

Although the Court elsewhere restricted remedies for constitutional violations by police, *Thompson v. Clark*<sup>63</sup> kept the door open for plaintiffs to sue police for malicious prosecution. Officers responded to Larry Thompson’s apartment after his mentally impaired sister-in-law called 911 claiming that he had abused his infant daughter. Thompson told police they could not enter his home without a warrant, but they entered anyway. After a brief scuffle, police handcuffed and arrested Thompson for obstructing governmental administration and resisting arrest. Even though it was clear there had been no abuse, Thompson remained in custody for two days before being released. The prosecution moved to dismiss the charges, and the trial judge dismissed the case without explanation.

Thompson sued the police for malicious prosecution under 42 U.S.C. § 1983. The district court dismissed his claim, noting that a malicious prosecution claim under the Fourth Amendment required the prior criminal prosecution to end in the accused person’s favor. Under circuit precedent, that element required an affirmative indication of the accused person’s innocence. The prosecutor dropping the charges without explanation did not satisfy that requirement. The Second Circuit Court of Appeals affirmed. The Supreme Court reversed in a 6-3 decision.

Justice Kavanaugh, joined by Chief Justice Roberts and Jus-

tices Breyer, Sotomayor, Kagan, and Barrett, held that a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. The majority began by noting that Supreme Court precedent recognized a Fourth Amendment claim

for malicious prosecution.<sup>64</sup> To determine the elements of that claim, Justice Kavanaugh explained, the Court must “look to the elements of the most analogous tort as of 1871 when § 1983 was enacted, so long as doing so is consistent with ‘the values and purposes of the constitutional right at issue.’”<sup>65</sup> The elements of the analogous tort of malicious prosecution are (i) the suit or proceeding was instituted without any probable cause; (ii) the motive in instituting the suit was malicious, which was often defined in this context as without probable cause and for a purpose other than bringing the accused person to justice; and (iii) the prosecution terminated in the acquittal or discharge of the accused.<sup>66</sup> Only the third element was at issue in this case—namely, what constituted a favorable termination.

The Court analyzed 1871 case law, concluding that the majority of jurisdictions agreed that a favorable termination existed as long as the prosecution ended without a conviction.<sup>67</sup> The majority also believed that such a rule better served the “values and purposes” of the Fourth Amendment.<sup>68</sup> Justice Kavanaugh did not believe that the question of whether a person was wrongfully charged should depend on whether the prosecutor or court explained its reasoning. In fact, the majority felt it perverse that a case in which the arrest was so patently wrong as to prompt dismissal before trial would be disfavored as compared to a closer case that went to trial. The Court also did not believe that its interpretation would expose officers to unwarranted civil suits, because qualified immunity and the plaintiff’s burden of showing the absence of probable cause provided sufficient protection.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. The dissenters argued that Supreme Court precedent never officially recognized a Fourth Amendment malicious prosecution claim and that such a claim does not and should not exist. Justice Alito argued that the elements of the two claims are wholly distinct—malicious prosecution can happen without any search or seizure, and Fourth Amendment violations can happen without any later prosecution. The dissenters believed that Thompson should have been limited to Fourth Amendment claims for false arrest, excessive force, and unlawful entry.<sup>69</sup>

**“Thompson v. Clark kept the door open for plaintiffs to sue police for malicious prosecution.”**

60. *Id.* at 8 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam)).

61. 142 S. Ct. 9 (2021) (per curiam).

62. *Id.* at 11.

63. 142 S. Ct. 1332 (2022).

64. *Id.* at 1337 (quoting *Manuel v. Joliet*, 580 U.S. 357 (2017)).

65. *Id.* (quoting *Manuel*, 580 U.S. at 370).

66. *Id.* at 1338. As to the second element, the Court declined to say whether a plaintiff must establish malice or some other *mens rea* to

succeed on a malicious prosecution claim. *Id.* at 1338 n.3. The Court also noted that, because the claim was housed in the Fourth Amendment, the plaintiff would also have to establish that the malicious prosecution resulted in a seizure of the plaintiff. *Id.* at 1337 n.2.

67. *Id.* at 1338–40.

68. *Id.* at 1337, 1340.

69. *Id.* at 1347 (Alito, J., dissenting).

**“Ruan v. United States emphasized the importance of importing mens rea requirements into criminal statutes.”**

## CONFRONTATION CLAUSE

In *Hemphill v. New York*,<sup>70</sup> the Supreme Court rejected an attempt to limit the scope of individuals’ Confrontation Clause rights and held that an accused person does not open the door to inadmissible testimonial hearsay evidence that was never subject to cross-examination merely by asserting a defense theory that makes that testimonial hearsay relevant. The case involved

a fight in the Bronx that ended with a stray bullet from a 9-millimeter handgun killing a two-year-old child.<sup>71</sup> The police searched the apartment of a suspect, Nicholas Morris, and found a 9-millimeter cartridge and three .357-caliber bullets on his nightstand. Another person involved in the fight told police that Morris was the shooter. (He later recanted, telling police that Darrell Hemphill had fired the gun.) Police charged Morris with murder but ultimately let Morris plead guilty to possession of a .357-magnum revolver. Three years later, after DNA linked Hemphill to a sweater the police believed was connected to the crime, Hemphill was charged with murder.

At trial, Hemphill blamed Morris for the shooting, arguing that police had recovered ammunition from Morris’s nightstand that matched the bullets used in the murder. In response, the State introduced the transcript of Morris’s plea allocution to suggest that he possessed only a .357 revolver. Hemphill objected, noting that, because Morris was unavailable and had not been subject to cross-examination, the transcript was testimonial hearsay that violated his Confrontation Clause rights. The trial court admitted the transcript excerpts, relying on a New York Court of Appeals decision, which held that an accused person could open the door to otherwise inadmissible evidence if the evidence was “reasonably necessary to correct [a] misleading impression” made by the accused person’s evidence or argument.<sup>72</sup> Hemphill was convicted. He appealed, alleging that the state court’s decision violated his Confrontation Clause rights. The state courts affirmed, but the Supreme Court, in an 8-1 decision written by Justice Sotomayor, reversed.

The majority recognized that states may adopt reasonable procedural rules governing individuals’ abilities to exercise their Confrontation Clause rights, but did not believe that the New York rule was a mere procedural rule. Instead, the New York rule required trial judges to make substantive judgment calls about whether evidence created a “misleading impression that the testimonial hearsay was reasonably necessary to correct.”<sup>73</sup> According to Justice Sotomayor, those are precisely the kind of reliability and credibility assessments that the Supreme Court’s *Crawford* line of Confrontation Clause cases rejected. *Crawford*,<sup>74</sup> the majority explained, issued an “emphatic rejection of the reliabil-

ity-based approach of *Ohio v. Roberts*,” commanding instead, “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>75</sup> Because Morris was never available for cross-examination, the admission of his testimonial plea statements violated Hemphill’s Confrontation Clause rights.

The majority was careful to state that it was not opining on the validity of the common-law rule of completeness—under which a party may introduce the remainder of a statement that an opposing party partially introduced—as applied to testimonial hearsay. Justice Alito’s brief concurrence, joined by Justice Kavanaugh, weighed in on that issue. He argued that when an accused person introduces part of an unavailable declarant’s statement, that person has implicitly waived any Confrontation Clause objection to the declarant’s remaining statements or other statements on the same subject matter.<sup>76</sup> It remains to be seen whether a majority of the Court will agree with Justices Alito and Kavanaugh on that point.

Justice Thomas was the lone dissenter. He believed that Hemphill had not properly raised his Sixth Amendment claim to the highest state court, and therefore the Court lacked jurisdiction to consider the claim.<sup>77</sup>

## STATUTORY INTERPRETATION

The Court interpreted the scope of a number of federal statutes this Term. *Ruan v. United States* emphasized the importance of importing *mens rea* requirements into criminal statutes. In *Wooden v. United States* and *United States v. Taylor*, the Court focused on statutory language to limit the scope of criminal liability with an interesting discussion in *Wooden* about the scope of the rule of lenity in criminal cases. In *Concepcion v. United States*, the Court emphasized the discretion traditionally given to sentencing judges when interpreting the First Step Act. And in *Kemp v. United States*, the Court interpreted a Federal Rule of Civil Procedure to limit individuals’ abilities to reopen federal habeas judgments.

## THE CONTROLLED SUBSTANCES ACT

*Ruan v. United States*<sup>78</sup> involved two consolidated cases that featured doctors convicted of violating the Controlled Substances Act (CSA), which makes it unlawful, “[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance.”<sup>79</sup> The issue in both cases turned on the requisite *mens rea* in the statute for the “except as authorized” clause. Both trial courts instructed jurors that the doctors did not have to know that they were acting in an unauthorized manner or intended to act in an unauthorized manner. Instead, the lower courts had instructed jurors to consider the doctors’ authorization or lack thereof using more objective standards that focused on whether the doctors acted in good faith and in objectively reasonable ways. The Supreme Court disagreed.

70. 142 S. Ct. 681 (2022).

71. *Id.* at 686.

72. *People v. Reid*, 971 N.E.2d 353, 388 (2012).

73. *Hemphill*, 142 S. Ct. at 692.

74. *Crawford v. Washington*, 541 U.S. 36 (2004).

75. *Hemphill*, 142 S. Ct. at 691 (quoting *Crawford*, 541 U.S. at 61).

76. *Id.* at 695 (Alito, J., concurring).

77. *Id.* at 696 (Thomas, J., dissenting). The majority rejected this argument, finding that the Confrontation Clause had been properly presented below. *See id.* at 689.

78. 142 S. Ct. 2370 (2022).

79. 84 STAT. 1260, 21 U.S.C. § 841(a).

Justice Breyer wrote the majority opinion, joined by the Chief Justice and Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh. The majority held that the “knowingly or intentionally” *mens rea* in the statute applied to the “except as authorized” clause. Justice Breyer began with the “longstanding presumption” that criminal laws require culpable mental states.<sup>80</sup> Under this “*mens rea* canon,” the Court typically interprets criminal statutes to require a *mens rea* for each element even if the most grammatical reading of the statute would not support that interpretation.

With respect to the CSA, the majority emphasized four different things that supported application of the *mens rea* canon to the authorization clause: (1) the language in the statute, which includes a “knowingly or intentionally” provision; (2) the important role that authorization (or lack thereof) plays in distinguishing morally blameworthy conduct from socially necessary conduct; (3) the serious nature of the crime and its high potential penalties; and (4) the vague and general regulatory language defining the bounds of prescribing authority. Without a knowing or intentional scienter requirement for the authorization clause, the Court worried that doctors might refrain from prescribing socially beneficial prescriptions out of fear that a court might find the prescription to deviate from the usual course of professional practices.

The majority also relied on precedent from prior cases—including *Liparota v. United States*,<sup>81</sup> *United States v. X-Citement Video, Inc.*,<sup>82</sup> and *Rehaif v. United States*<sup>83</sup>—to demonstrate that the Court has often imported “knowingly” scienter requirements in other, similar criminal statutes. The government (and the concurring Justices) attempted to distinguish those cases by noting that they all imposed a scienter requirement on an “element” of the offense, and the authorization clause is not an element of the CSA because it need not be alleged in the indictment and because a person accused of violating the statute has the burden of presenting evidence of authorization. Justice Breyer quickly rejected these attempts to distinguish the CSA, noting that they “have little or nothing to do with scienter requirements.”<sup>84</sup> There were practical reasons why the government was not required to allege the inapplicability of every statutory exception in the indictment of each CSA prosecution. And the majority noted that, although the person accused has the burden of producing evidence to show they fit within the authorization exception, the burden of persuasion then shifts back to the government to show a lack of authorization beyond a reasonable doubt.

Justice Alito wrote a separate concurrence, joined by Justices Thomas and Barrett, pointing out that the CSA has an exception for prescriptions issued “in the course of professional practice” and noting that the Supreme Court had interpreted that excep-

tion in the CSA’s predecessor statute as requiring doctors to act subjectively in “good faith.”<sup>85</sup> Such good faith exists, according to Justice Alito, if the doctor believes that the prescription is a valid means of pursuing a medical purpose. He would apply that standard and not import some other higher *mens rea* requirement. More broadly, the concurring justices objected to the majority’s decision to apply the *mens rea* canon to affirmative defenses that are not elements of the offense, describing it as a “radical new course.”<sup>86</sup>

Justice Alito, this time joined only by Justice Thomas, also objected to the Court’s decision to hold that the government must prove beyond a reasonable doubt that the accused person knowingly or intentionally acted in an unauthorized manner.<sup>87</sup> He argued that the burden of proof issue was not properly before them; that, if it were, the typical presumption that the accused person carries the burden of proving affirmative defenses should apply; and that, even if the burden of persuasion did shift to the government, it should only be a preponderance of the evidence burden.

#### THE ARMED CAREER CRIMINAL ACT (ACCA)

In *Wooden v. United States*,<sup>88</sup> the Supreme Court interpreted the “occasions clause” in the ACCA—a provision that enhanced the penalties for those with three previous convictions for violent felonies that were “committed on occasions different from one another.”<sup>89</sup> The Court held that the occasions clause was designed to ensure that the ACCA applied to “revolving door” felons and not those who commit a number of offenses during one criminal event at the same place on the same night.<sup>90</sup> William Dale Wooden had been convicted of being a felon in possession of a firearm, and his sentence had been enhanced under the ACCA, because he had ten prior burglary convictions. As a result of the ACCA enhancement, he faced a 15-year mandatory minimum sentence instead of a maximum 10-year sentence because of his prior convictions, but those convictions all stemmed from an incident on one night when he burglarized ten different units in a one-building storage facility.

In an opinion written by Justice Kagan, the Court unanimously held that Wooden’s offenses occurred on a single occasion. The majority focused on the ordinary meaning of the word “occasion,” noting that it typically refers to a single “event, occurrence, happening, or episode” that may include “multiple, tem-

**“The Court held that the occasions clause was designed to ensure that the ACCA applied to ‘revolving door’ felons...”**

80. *Ruan*, 142 S. Ct. at 2377.

81. 471 U.S. 419 (1985) (interpreting a statute penalizing anyone who “knowingly uses [food stamps] in any manner not authorized by” statute and holding that “knowingly” modified both the “use” of the food stamps element and the element that their use not be authorized).

82. 513 U.S. 64 (1994) (interpreting a statute penalizing anyone who “knowingly transports” or “knowingly receives” videos “involv[ing] the use of a minor engaging in sexually explicit conduct” and holding that “knowingly” applied to the fact that the videos involved the use of a minor in addition to the transporting or receiving elements).

83. 139 S. Ct. 2191 (2019) (interpreting a statute that made it unlawful for felons to knowingly possess a gun and holding that the government had to prove that the government knew he was a felon in addition to proving that he knew he possessed a gun).

84. *Ruan*, 142 S. Ct. at 2379.

85. *Id.* at 2383 (Alito, J., concurring).

86. *Id.*

87. *Id.* at 2387–88 (Alito, J., concurring).

88. 142 S. Ct. 1063 (2022).

89. 18 U.S.C. § 924(e)(1).

90. *Wooden*, 142 S. Ct. at 1074.

**“[T]he Court decided that an attempted Hobbs Act robbery did not constitute a ‘crime of violence’...”**

porally distinct activities.”<sup>91</sup> For this reason, the majority rejected the government’s “temporal-distinctness test,” which would have found a separate occasion every time the elements needed to satisfy each offense occurred.<sup>92</sup>

The Court instructed lower courts to consider the proximity in time and location of the prior convictions, as well as the character and relationship

of the offenses, to determine whether multiple prior convictions were part of one “occasion.” Justice Kagan emphasized that “[o]ffenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion,” while those committed a day apart or at a “significant distance” will typically not.<sup>93</sup> “The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.”<sup>94</sup>

Justice Kagan also argued that the ACCA’s history and purpose supported this interpretation, although she was joined only by Chief Justice Roberts and Justices Breyer, Sotomayor, and Kavanaugh for this part of her opinion. She noted that Congress added the “occasions clause” to the ACCA after the Solicitor General confessed error in a case where the penalty enhancement had been applied to a man convicted of six counts of robbery stemming from a single incident.<sup>95</sup> This revision showed that the ACCA was supposed to target repeat offenders who repeatedly commit violent crimes, not one-time offenders like Wooden.

Justice Barrett refused to join the section of the opinion that considered the ACCA’s history and purpose. Her concurrence, joined by Justice Thomas, argued that the connection between Congress’s revision of the ACCA and the Solicitor General’s position in the prior robbery case was too tenuous to produce any conclusive evidence of congressional intent.<sup>96</sup> She argued that legislative history could be used to infer congressional intent only in rare circumstances, such as when Congress explicitly says a statute was enacted in response to a Supreme Court decision, or when Congress enacts a statute against a well-established legal backdrop.

Justice Gorsuch concurred in the judgment but wrote separately to criticize the majority’s multi-factor balancing test as unworkable. Instead, Justice Gorsuch relied on the rule of lenity to support reversal. Justice Sotomayor joined his opinion in part, agreeing that the rule of lenity provided an independent basis for the Court’s decision. Justice Gorsuch traced the rule’s history back to founding-era sources and reasoned that it was important to provide fair notice to people of what conduct is criminal and to uphold the separation of powers and ensure that the legislative

branch properly defines the scope of criminal laws. According to Justice Gorsuch, “[w]here the traditional tools of statutory interpretation yield no clear answer, the judge’s next step isn’t to legislative history or the law’s unexpressed purposes. The next step is to lenity.”<sup>97</sup>

Justice Kavanaugh concurred to disagree with Justice Gorsuch about the degree of ambiguity required to trigger the rule of lenity. Justice Kavanaugh would rely upon lenity only as a last resort when a statute is “grievously ambiguous.”<sup>98</sup> To address concerns about fair notice, he pointed to the presumption that the government must prove an accused person’s *mens rea* with respect to each element of a federal offense, which would require the accused person to know that their conduct was unlawful before they could be subject to criminal punishment.

## CRIMES OF VIOLENCE

In *United States v. Taylor*,<sup>99</sup> the Court decided that an attempted Hobbs Act robbery did not constitute a “crime of violence” under 18 U.S.C. § 924(c)(3)(A). Justin Taylor pled guilty to one count of violating the Hobbs Act<sup>100</sup> and one count of violating 18 U.S.C. § 924(c)(3)(A), which authorizes further punishment for those who used a firearm in connection with a “crime of violence.” Section 924(c)(3)(A)—also known as the elements clause—defines as crimes of violence offenses that “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another.”<sup>101</sup> Taylor later filed a habeas petition arguing that his conviction for attempted Hobbs Act robbery did not qualify as a crime of violence under this definition. The Fourth Circuit Court of Appeals agreed and so did the Supreme Court.

Justice Gorsuch, joined by Chief Justice Roberts and Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett, began by noting that settled Supreme Court precedent applies a “categorical approach” to interpretations of the elements clause. Under the categorical approach, “[t]he only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.”<sup>102</sup> A conviction for an attempted Hobbs Act robbery requires the government to prove that the accused person intended to unlawfully take or obtain personal property by means of actual or threatened force and that he completed a “substantial step” toward that end.<sup>103</sup> The Court did not define what qualifies as a “substantial step,” but noted that it did not require proving that the accused person used, attempted to use, or even threatened to use force against another person or his property. An attempted Hobbs Act robbery therefore does not satisfy the requirements of the elements clause.

Justices Thomas and Alito both dissented separately to deride the categorical approach. Justice Thomas would have invited further briefing on whether a conduct-based approach would better

91. *Id.* at 1069.

92. *Id.*

93. *Id.* at 1071.

94. *Id.*

95. See *Petty v. United States*, 481 U.S. 1034 (1987).

96. *Wooden*, 142 S. Ct. at 1077–78 (Barrett, J., concurring in part).

97. *Id.* at 1085–86 (Gorsuch, J., concurring).

98. *Id.* at 1075 (Kavanaugh, J., concurring).

99. 142 S. Ct. 2015 (2022).

100. 18 U.S.C. § 1951(a).

101. 18 U.S.C. § 924(c)(3)(A).

102. *Taylor*, 142 S. Ct. at 2020.

103. *Id.*

track the statutory text and purpose of the element clause.<sup>104</sup> Justice Alito would find that an attempted Hobbs Act robbery was a crime of violence under the elements clause, because one of its elements is the attempted use of force.<sup>105</sup>

### THE FIRST STEP ACT

In *Concepcion v. United States*,<sup>106</sup> the Court held that district court judges may consider intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) when resentencing individuals under the First Step Act of 2018.<sup>107</sup> Carlos Concepcion pled guilty in 2007 to distributing 13.8 grams of crack cocaine. He was sentenced to 228 months in prison under Congress's then-existing drug law regime, which had a 100-to-1 disparity between sentences given to possessors of crack and powder cocaine. In 2010, Congress passed the Fair Sentencing Act,<sup>108</sup> which reduced the crack-to-powder-cocaine sentencing disparity. But those changes were not made retroactive to people like Concepcion until the First Step Act of 2018. Once eligible, Concepcion filed a motion arguing that his sentence should be reduced, because (1) he no longer classified as a "career offender" in light of other post-sentencing legal developments<sup>109</sup> and (2) there was evidence of his post-sentencing rehabilitation, including successful completion of drug and vocational programs, spiritual growth, and a stable reentry plan.

The district court refused to consider either of Concepcion's arguments for a reduced sentence, believing that it could consider only the changes in the law that the Fair Sentencing Act enacted and not other legal or factual changes since the time of the original sentencing. Because Concepcion's 228-month sentence was still within the recommended range under the Fair Sentencing Act (albeit at the high end of the range), the district court found that he was not eligible for a reduced sentence, and the First Circuit Court of Appeals affirmed.

In a 5-4 decision, the Supreme Court reversed. Justice Sotomayor, joined by Justices Thomas, Breyer, Kagan, and Gorsuch, emphasized the traditional discretion given to sentencing judges to decide what information to consider at initial sentencing proceedings and at sentencing modification hearings. Although the majority recognized that Congress may limit this discretion, it found nothing in the text or structure of the First Step Act indicating that Congress intended to do so. As a result, the majority held that district judges have discretion when resentencing under the First Step Act to consider intervening legal and factual changes since the original sentencing.

Justice Kavanaugh dissented, joined by Chief Justice Roberts

and Justices Alito and Barrett. He argued that, for sentence-modification proceedings, Congress allows courts to reduce a sentence only as "expressly permitted by statute."<sup>110</sup> Because the text of the First Step Act does not expressly permit reducing a sentence based on intervening legal or factual changes, the dissenters would hold that those factors should not be considered. In the dissenters' view, the First Step Act provided "a targeted retroactive reduction in crack-cocaine sentencing ranges [and should not be interpreted to] unleash a sentencing free-for-all in the lower courts."<sup>111</sup>

**"[T]he text, structure, and history of the federal rule indicated that a 'mistake' under 60(b)(1) includes judges' legal errors."**

### FEDERAL RULE OF CIVIL PROCEDURE 60(B)

In *Kemp v. United States*,<sup>112</sup> the Court held that a person who wants to file a motion to reopen a final judgment under Federal Rule of Civil Procedure 60(b) based on a judge's errors of law must do so under Rule 60(b)(1), which has a one-year statute of limitations, rather than under Rule 60(b)(6), which has no one-year limit. Rule 60(b)(1) authorizes a court to reopen a final judgment for "mistake, inadvertence, surprise, or excusable neglect,"<sup>113</sup> while 60(b)(6) allows reopening for "any [other] reason that justifies relief."<sup>114</sup> After being convicted of various drug and gun crimes, Dexter Kemp filed a postconviction motion under 28 U.S.C. § 2255, but his motion was dismissed as untimely. He later moved under Rule 60(b) to reopen his post-conviction proceedings, arguing that his § 2255 petition had been timely and the district court had made a legal error in calculating the statute of limitations under § 2255. Because his motion to reopen under Rule 60(b) was filed more than a year after the original judgment, Kemp argued that it was a Rule 60(b)(6) motion, but the federal district court disagreed. It held that the motion was properly considered under Rule 60(b)(1) and dismissed it as untimely. Both the Eleventh Circuit Court of Appeals and the United States Supreme Court agreed.

In an 8-1 decision, Justice Thomas wrote for the majority and explained that the text, structure, and history of the federal rule indicated that a "mistake" under 60(b)(1) includes judges' legal errors. The ordinary meaning of the term "mistake," according to the Court, encompasses all errors, including judicial ones.<sup>115</sup> And the drafting history of 60(b)(1) reflects this understanding. Rule 60(b)(1), as initially drafted, referred only to mistakes made by a

104. *Id.* at 2031 (Thomas, J., dissenting). Justice Thomas also again advocated for reviving § 924(c)(3)(B)'s residual clause, which defined a crime of violence as also including offenses that "by [their] nature, involv[e] a substantial risk that physical force . . . may be used." The Supreme Court declared that clause unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319 (2019), over a dissent that Justice Thomas joined.

105. *Id.* at 2036 (Alito, J., dissenting).

106. 142 S. Ct. 2389 (2022).

107. First Step Act of 2018, Pub. L. No. 115-391, 132 STAT. 5194 (2018).

108. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 STAT. 2372

(2010).

109. One of his prior convictions had been vacated, and the others no longer counted as crimes of violence under the statute since *Johnson v. United States* invalidated the Armed Career Criminal Act's residual clause on constitutional vagueness grounds. *Johnson v. United States*, 576 U.S. 591 (2015).

110. *Concepcion*, 142 S. Ct. at 2406 (Kavanaugh, J., dissenting).

111. *Id.* at 2407 (Kavanaugh, J., dissenting).

112. 142 S. Ct. 1856 (2022).

113. FED. R. CIV. P. 60(b)(1).

114. FED. R. CIV. P. 60(b)(6).

115. *Kemp*, 142 S. Ct. at 1862.

**“In his final Term on the Court, Justice Breyer repeatedly expressed his concerns about the constitutionality of the death penalty.”**

party, but that limiting language was removed from the text in 1946, suggesting that the rule was intended to cover judicial mistakes too.

The majority was careful to note that it was not deciding whether judicial errors predicated on legal or factual changes that occurred after the original decision would fall under Rule 60(b)(1). Justice Sotomayor concurred separately to emphasize that, in her view, Rule 60(b)(6) would apply in such cases.

Justice Gorsuch dissented. He would have dismissed the case as improvidently granted, because this “policy question” could have been resolved better by the committee created by the Rules Enabling Act to clarify the scope of the Federal Rules of Civil Procedure.<sup>116</sup>

### CAPITAL PUNISHMENT

In his final Term on the Court, Justice Breyer repeatedly expressed his concerns about the constitutionality of the death penalty.<sup>117</sup> Even though the other members of the Court did not question the constitutionality of capital punishment, debate continues to rage over the constitutionality of different methods of execution. In 2015, the Supreme Court decided *Glossip v. Gross*,<sup>118</sup> which held that individuals on death row who want to challenge their state’s method of execution must show that it presents a “substantial risk of serious harm” over and above the death itself, and they must “identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved.”<sup>119</sup> Four years later, *Bucklew v. Precythe*<sup>120</sup> held that, when identifying an alternative method, the person facing execution is not limited to choosing a method authorized by a particular state’s law.

This Term, in *Nance v. Ward*,<sup>121</sup> the Supreme Court held that a § 1983 suit—rather than a habeas petition—is the appropriate procedural vehicle for bringing a method-of-execution claim. Michael Nance was convicted of murder and sentenced to death in Georgia, which authorizes only lethal injection as a method of execution. Nance filed a § 1983 claim alleging that the use of lethal injection would violate the Eighth Amendment’s prohibition against cruel and unusual punishments in his case because his veins were “severely compromised” and could “blow,” and also because his longtime use of prescription drugs for back pain could inhibit sedation and leave him conscious during his execution.<sup>122</sup> Instead of lethal injection, Nance wanted to be executed

via firing squad, which is permitted in four other states.

The district court dismissed his § 1983 suit as untimely. On appeal, the Eleventh Circuit Court of Appeals reconstrued his suit as a federal habeas petition, holding that, because Georgia’s statutes were “fixed” and authorized death by only lethal injection, if Nance won, he could not be executed. The Eleventh Circuit thought this meant that he was effectively seeking to invalidate his death sentence, making his claim sound in habeas rather than § 1983. The Eleventh Circuit then dismissed his petition as “second or successive” under AEDPA’s restrictive rules.<sup>123</sup>

The Supreme Court reversed in a 5-4 decision written by Justice Kagan and joined by the Chief Justice and Justices Breyer, Sotomayor, and Kavanaugh. The majority noted that, while both § 1983 and habeas enable individuals in prison to complain of unconstitutional treatment at the hands of state officials, habeas corpus is a procedural vehicle limited to claims that necessarily challenge the validity of a conviction or sentence. In the majority’s view, Nance was not seeking to invalidate his conviction or sentence. By providing the state with a feasible alternative method, Nance actually provided “a veritable blueprint” for carrying his sentence out.<sup>124</sup> And because “[o]ne of the ‘main aims’ of § 1983 is to ‘override’—and thus compel change of—state laws when necessary to vindicate federal constitutional rights,” the majority was not bothered by the fact that Nance’s claim, if successful, would require Georgia to change its statute.<sup>125</sup>

Justice Barrett dissented, joined by Justices Thomas, Alito, and Gorsuch. She believed it appropriate to consider “state law as it currently exists.”<sup>126</sup> Because Nance’s challenge would prevent him from being executed under Georgia law as it existed at the time he brought his claim, it sounded in habeas rather than § 1983.

In *Hamm v. Reeves*,<sup>127</sup> the Supreme Court vacated the lower courts’ determination that Matthew Reeves—an intellectually disabled person on death row—was entitled to assistance under the Americans with Disabilities Act in understanding and completing a form that permitted him to choose the method of his pending execution. Reeves alleged that he would have opted for execution by nitrogen hypoxia rather than lethal injection if given the choice, but he did not understand the form. Both the federal district court and the Eleventh Circuit Court of Appeals held that he should have been given assistance to make that choice, and they enjoined the state from executing him using lethal injection. Justice Thomas, joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh, vacated the injunction without an opinion and over the dissent of Justice Kagan, joined by Justices Breyer and Sotomayor. (Justice Barrett would have denied the application.)

Finally, in *United States v. Tsarnaev*,<sup>128</sup> the Court addressed a

116. *Id.* at 1865–66 (Gorsuch, J., dissenting).

117. See *Buntion v. Lumpkin*, 142 S. Ct. 3 (2021) (mem.) (respecting denial of certiorari); *United States v. Tsarnaev*, 142 S. Ct. 1024, 1042 (2022) (Breyer, J., dissenting).

118. 576 U.S. 863 (2015).

119. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (describing the Court’s holding in *Glossip*).

120. 139 S. Ct. 1112 (2019).

121. *Nance*, 142 S. Ct. at 2214 (2022).

122. *Id.* at 2220.

123. See 28 U.S.C. § 2244(b).

124. *Nance*, 142 S. Ct. at 2223.

125. *Id.* at 2223–24 (quoting *Monroe v. Pape*, 365 U.S. 167, 173 (1961)).

126. *Id.* at 2226 (Barrett, J., dissenting) (emphasis in original).

127. 142 S. Ct. 743 (2022) (mem.).

128. 142 S. Ct. 1024 (2022).

claim about jury selection as well as a capital sentencing issue in the trial of Dzhokhar Tsarnaev, one of the two brothers responsible for the Boston Marathon bombing. Given the high-profile nature of the case, the parties jointly prepared a 100-question survey to screen prospective jurors. The district court accepted most of the questions, but rejected one that asked each prospective juror to list the facts they had learned about the case from the media. The court was concerned that this question was “unfocused” and could “cause trouble” by producing massive amounts of marginal data.<sup>129</sup> The defense objected. Ultimately, the original pool of 1,373 prospective jurors was narrowed to 12 and the case went to trial. Tsarnaev admitted to committing the bombing, stealing a car, and killing another person a few days later, so the jury returned a guilty verdict on all counts.

The prosecution sought the death penalty at the sentencing phase. Tsarnaev’s attorney wanted to introduce mitigating evidence suggesting that Tsarnaev’s brother masterminded the bombing and pressured Tsarnaev to participate. Specifically, Tsarnaev’s attorney wanted to present evidence suggesting that Tsarnaev’s brother had murdered three people on the tenth anniversary of 9/11 and that Tsarnaev knew about that. The district court precluded the evidence, finding that it was too speculative and “would be confusing to the jury and a waste of time.”<sup>130</sup>

The First Circuit Court of Appeals reversed. With respect to the jury questionnaire, the court held that the district court failed to adhere to circuit precedent that required district courts in high-profile cases to inquire into prospective jurors’ media exposure to the case and the parties. The First Circuit also held that the district court abused its discretion in excluding the evidence about Tsarnaev’s brother’s possible connection with three murders at the sentencing phase. The panel found this evidence to be probative of the brother’s ability to influence Tsarnaev.

In a 6-3 decision, the Supreme Court reversed on both issues. Justice Thomas, joined by the Chief Justice and Justices Alito, Gorsuch, Kavanaugh, and Barrett, wrote for the majority and held that the district court did not abuse its discretion by declining to ask about each juror’s media exposure to the case. The Court emphasized that trial courts have “broad discretion” in performing jury selection, because they are best positioned to assess prospective jurors’ sincerity, candor, and sense of duty.<sup>131</sup> The majority noted that the district court asked extensively about media consumption generally and asked whether media information had caused any jurors to form an opinion about the case. The district court had also allowed the defense attorney to ask follow-up questions about jurors’ media consumption as needed, thereby adequately balancing efficiency and fairness.

Justice Thomas, writing for the same majority, also held that

the district court appropriately excluded evidence that Tsarnaev’s brother may have previously murdered three people. The Federal Death Penalty Act<sup>132</sup> permits district courts to exclude information “if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.”<sup>133</sup> The Court rejected Tsarnaev’s constitutional challenge to this statutory provision, concluding that the Eighth Amendment does not preclude the government from setting reasonable limits on the evidence that a person facing a possible death sentence can submit and noting that it is reasonable for judges to consider the dangers of unfair prejudice and confusion of the issues when considering the admissibility of mitigation evidence. The Court also found that the district court did not abuse its discretion in this instance, because the evidence “risked producing a confusing mini-trial where the only witnesses who knew the truth were dead.”<sup>134</sup>

Justice Breyer dissented, joined by Justices Sotomayor and Kagan. He argued that the evidence concerning Tsarnaev’s brother should have been admitted because the Federal Death Penalty Act “tips the balance in favor of admitting mitigating evidence,” despite including some language that resembles Federal Rule of Evidence 403.<sup>135</sup> Here, Justice Breyer thought that the evidence was probative and reliable, because the FBI previously used it to secure a search warrant to search Tsarnaev’s brother’s car. The dissenters also noted this evidence was no more likely to cause jury confusion than evidence of the convicted person’s prior criminal behavior, which prosecutors routinely offer in sentencing.<sup>136</sup>

## STATE CRIMINAL JURISDICTION IN INDIAN COUNTRY

In *Oklahoma v. Castro-Huerta*,<sup>137</sup> the Court held that the federal government and the states have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. Victor Manuel Castro-Huerta was convicted of child neglect in Oklahoma state court and sentenced to 35 years in prison, but the state appellate court vacated his conviction because it believed the federal government had exclusive jurisdiction to prosecute. The Supreme Court disagreed in a 5-4 decision.

Justice Kavanaugh, joined by the Chief Justice and Justices Thomas, Alito, and Barrett, began the majority opinion with an overarching jurisdictional principle that they claimed dates back

**“The Court emphasized that trial courts have ‘broad discretion’ in performing jury selection...”**

129. *Id.* at 1032.

130. *Id.* at 1033.

131. *Id.* at 1034.

132. 18 U.S.C. §§ 3591.

133. 18 U.S.C. § 3593(c).

134. *Tsarnaev*, 142 S. Ct. at 1039.

135. *Id.* at 1048 (Breyer, J., dissenting).

136. *Id.* at 1049–50 (Breyer, J., dissenting). Justice Barrett wrote a concurring opinion, joined by Justice Gorsuch, to question the propriety of the First Circuit Court of Appeals’s assertion of a “super-

visory power” over the district courts. The First Circuit had created a rule obligating district courts to ask prospective jurors about their media exposure to high-profile cases, but Justice Barrett questioned whether circuit courts of appeal possess supervisory authority over lower courts. *See id.* at 1041–42 (Barrett, J., concurring). The dissenters argued that Supreme Court precedent “clearly recognize[d] the existence of such a power.” *Id.* at 1051 (Breyer, J., dissenting).

137. 142 S. Ct. 2486 (2022).

**“In *Denezpi v. United States*, the Court addressed a situation in which the United States brought two prosecutions against one individual for the same conduct...”**

to the 1800s: that states have jurisdiction to prosecute crimes committed in Indian country unless preempted by federal law. And the majority did not think any federal law preempted Oklahoma’s authority. The General Crimes Act, which grants the federal government jurisdiction to prosecute crimes in Indian country, “simply ‘extend[s]’ federal law to Indian country, leaving untouched the background principle.”<sup>138</sup> And Public Law 280, which grants states jurisdiction over some crimes committed in Indian country, was not meant to divest states of pre-existing jurisdiction.<sup>139</sup> Nor did the

majority believe that it should imply preemption, because—in its view—the exercise of state jurisdiction would help Tribes and not unlawfully infringe upon their self-governance.

Justice Gorsuch, joined by Justices Breyer, Sotomayor, and Kagan, dissented. Justice Gorsuch read the history differently—as instantiating an opposite background principle that “Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.”<sup>140</sup> Because “Tribes are sovereigns,” the appropriate search is “for federal legislation *conferring* state authority,”<sup>141</sup> and no federal law gave Oklahoma such authority. The dissenters accused the majority of making a “mockery of all of Congress’s work from 1834 to 1968” and acting in “paternalist” ways that were devastating to Tribal sovereignty.<sup>142</sup>

## DOUBLE JEOPARDY

In *Denezpi v. United States*,<sup>143</sup> the Court addressed a situation in which the United States brought two prosecutions against one individual for the same conduct—one under tribal law and the other under federal law. In a 6-3 decision, the Court held that both prosecutions could proceed under its dual sovereignty doctrine without violating the Double Jeopardy Clause.

Although most tribes now have their own established judicial systems, some continue to rely on the Courts of Indian Offenses that the Department of Interior established in the 1880s. The Ute Mountain Ute Tribe has not created its own court system and relies on one of these courts, which are now called C.F.R. courts because they are based in the Code of Federal Regulations, to enforce its Tribal penal code. Although the penal code was created by the Tribe, it must be approved by the federal government; the C.F.R. court judges are appointed by the federal government; and a federal official files and prosecutes the charges.

Merle Denezpi was convicted in a C.F.R. court of assault and

battery under the Ute Mountain Ute Code for sexually assaulting another member of the Navajo Nation. When he was later prosecuted in federal court for aggravated sexual abuse for the same conduct, he argued that his federal prosecution violated the Double Jeopardy Clause, because his original conviction had been obtained by a federal prosecutor in a Court of Indian Offenses created by the Department of the Interior. The district court, Tenth Circuit Court of Appeals, and ultimately the Supreme Court all disagreed.

Justice Barrett, joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito, and Kavanaugh, began by explaining the dual sovereignty principle—that “an offense defined by one sovereign is necessarily a different offense from that of another sovereign”—and pointed out that this principle applies to Indian Tribes as well as states.<sup>144</sup> The Double Jeopardy Clause, the majority explained, prohibits successive prosecutions for the same “offense,” but does not prohibit successive prosecutions by the same sovereign for different offenses. Because Denezpi was originally convicted of an offense defined by tribal law, his later prosecution for a federal crime was for a different “offense.”

Justice Gorsuch, joined by Justices Sotomayor and Kagan, dissented, arguing that, under the Court’s precedent, it must determine whether two entities “draw their authority to punish the offender from distinct sources of power” to determine if two entities are separate sovereigns.<sup>145</sup> Because they viewed the C.F.R. court as drawing its power from the federal government, the dissenters did not view it as a separate sovereign and would have prohibited the second prosecution.

In a separate part of the dissent not joined by others, Justice Gorsuch questioned the validity of both the C.F.R. courts (which were never authorized by statute) and the dual sovereignty doctrine itself. Then, taking the majority’s dual sovereignty views at face value, he argued that Denezpi’s original conviction was not for a different “offense,” because it was not a “tribal offense” but a violation of federal regulations that assimilated tribal law into federal law with federal approval. (The majority responded by noting that Denezpi conceded that his first conviction was for a “tribal” offense rather than a “federal” offense, so this issue was not raised in the case.)

## SECOND AMENDMENT

In *New York State Rifle & Pistol Association v. Bruen*,<sup>146</sup> the Court extended its prior holdings in *District of Columbia v. Heller*<sup>147</sup> and *McDonald v. Chicago*<sup>148</sup> and held that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home. It further declared unconstitutional a New York licensing regime that required individuals to show “proper cause” before they could obtain licenses to carry weapons in public. Although no state

138. *Id.* at 2495.

139. *Id.* at 2499–500.

140. *Id.* at 2505 (Gorsuch, J., dissenting).

141. *Id.* at 2512 (Gorsuch, J., dissenting).

142. *Id.* at 2517, 2520 (Gorsuch, J., dissenting).

143. 142 S. Ct. 1838 (2022).

144. *Id.* at 1844–45.

145. *Id.* at 1854 (Gorsuch, J., dissenting) (quoting *Puerto Rico v.*

*Sánchez Valle*, 579 U.S. 59, 67–68 (2016)).

146. 142 S. Ct. 2111 (2022).

147. 554 U.S. 570 (2008) (holding that the Second Amendment protects the rights of ordinary, law-abiding citizens to have handguns in their homes for self-defense).

148. 561 U.S. 742 (2010) (incorporating the Second Amendment against the States).

statute defined “proper cause,” New York courts required evidence “of particular threats, attacks or other extraordinary danger to personal safety,” and noted that living or working in high-crime areas was not enough to get a license.<sup>149</sup> In a 6-3 decision, the Court held that this scheme violated the Second Amendment.

Justice Thomas authored the majority opinion, joined by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett. The majority emphasized that individual self-defense is the central component of the Second Amendment and noted that the need for self-defense applies both inside and outside the home. The Court criticized the lower federal courts for employing mean-ends tests such as strict or intermediate scrutiny to determine the validity of Second Amendment claims. According to the majority, the only relevant question is whether the regulation at issue is consistent with this Nation’s historical tradition of firearms regulation. But “not all history is created equal.”<sup>150</sup> Justice Thomas explained that historical evidence that long predates the time when the relevant provision was enacted may not be relevant if things changed in the intervening years. Justice Thomas also said a word of caution about giving too much weight to post-enactment history, noting that the text always controls. (Justice Barrett concurred to note that the Court was *not* resolving (1) the extent to which post-ratification practice bears on the original meaning of the Constitution, or (2) whether the prevailing understanding of a right should be analyzed at the time the Bill of Rights was ratified or when the Fourteenth Amendment was ratified.<sup>151</sup>)

Going through the relevant history, the majority concluded that New York did not meet its burden “to identify an American tradition justifying the State’s proper-cause requirement.”<sup>152</sup> Historically, Justice Thomas explained, reasonable restrictions limited “the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials.”<sup>153</sup> States did not prohibit the public carry of commonly used firearms for personal defense. As such, New York’s law violated the Second Amendment.

Justice Kavanaugh, joined by Chief Justice Roberts, wrote separately to emphasize that the Second Amendment permits a variety of gun regulations, and nothing in the majority opinion prohibits states from having licensing regimes like those that exist in 43 states, which require fingerprinting, background checks, mental health records checks, and training programs. The problem with the New York regime was that it vested discretion in licensing officials to deny permits unless the applicant showed some “special need” apart from a general need for self-defense.<sup>154</sup>

Justice Breyer dissented, joined by Justices Sotomayor and Kagan. The dissenters criticized the Court’s exclusive reliance on history, arguing that the Constitution does not require such a limit, it is inconsistent with precedent, it fails to produce clear answers, and it will pose practical problems for judges who are

not historians. Justice Breyer also felt that a history-only analysis improperly fails to consider how compelling the government’s regulatory interests are. Justice Breyer would have let states work out different solutions to the problems of gun violence through the democratic process. The dissenters also criticized the Court’s historical analysis, arguing that the majority ignored a lot of historical evidence restricting public carriage of firearms.<sup>155</sup>

## LOOK AHEAD

The 2022-23 Term will continue to address technical questions about the availability of criminal procedure remedies. In *Jones v. Hendrix*,<sup>156</sup> the Court will consider whether a person who is legally innocent of the federal crime for which he was convicted, because the Supreme Court later reinterpreted the federal statute under which he was convicted to render his conviction invalid, can challenge that conviction through a federal habeas corpus petition filed under 28 U.S.C. § 2241. In *Cruz v. Arizona*,<sup>157</sup> the Court will address questions about the adequacy and independence of an Arizona state procedural rule being used to stop a person on death row from challenging his capital sentence. And in *Reed v. Goertz*,<sup>158</sup> the Court will decide when the statute of limitations begins to run for a 42 U.S.C. § 1983 claim seeking DNA testing of crime-scene evidence. We will see if the Court continues its trend toward limiting the availability of remedies in criminal law and procedure cases. The addition of Justice Ketanji Brown Jackson is unlikely to stop the Court’s trajectory, but her perspective as the first former public defender on the Court will certainly change the nature of the conversation.



*Eve Brensike Primus is the Yale Kamisar Collegiate Professor of Law at the University of Michigan Law School where she teaches criminal law/procedure, evidence, and habeas corpus.*



*Justin Hill graduated from the University of Michigan Law School in May of 2022. He is currently clerking in the U.S. District Court for the District of Columbia, and will clerk in the Seventh Circuit Court of Appeals during the 2023-24 term.*

149. *Bruen*, 142 S. Ct. at 2123.

150. *Id.* at 2136.

151. *Id.* at 2162–63 (Barrett, J., concurring).

152. *Id.* at 2156.

153. *Id.*

154. *Id.* at 2123.

155. This prompted a separate concurrence from Justice Alito who accused the majority of rearguing *Heller*.

156. *Jones v. Hendrix*, No. 21-857.

157. *Cruz v. Arizona*, No. 21-846.

158. *Reed v. Goertz*, No. 21-442.