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Due Process Institute's Brief Guide To
What Really Matters at the Supreme Court a.k.a.
Sifting Through the Minutiae for Busy Criminal Defense Lawyers
(& Those Who Otherwise Care About Improving Our Criminal Law)
To Highlight the Most Significant SCOTUS Criminal Law Stuff

By Shana-Tara O'Toole (2019-2020 Edition)

Last year, our choice for **BEST CURRENTLY PENDING CERTIORARI PETITION** went to *Asaro v. United States*, No. 19-107, which sought review on the question of whether the 6th Amendment right to a jury trial prohibits judges from basing sentencing on charges for which juries have acquitted criminal defendants. We were hopelessly biased having filed an *amicus* case in *Asaro* (as well as other cases that sought to end the practice of acquitted conduct sentencing). Unfortunately, the Supreme Court ultimately denied review of that case. Good thing, however, that we weren't relying on them to get the job done. We worked hard to support the bipartisan introduction of the "Prohibiting Punishment of Acquitted Conduct Act" in the Senate and initiated a #JuriesDecide education and advocacy campaign to abolish the practice throughout our nation. *We wouldn't mind if the Court tried to beat us to it, but one way or the other, this is ending*. (And then, on to abolishing *relevant* conduct sentencing.)

Unlike last year, it's hard to pick just one favorite pending cert. petition because we love all our Constitutional procedural protections. Here are our top choices:

DIGITAL BORDER SEARCH: *Williams v. United States*, No. 19-1221 is a case arising out of the 10th Circuit asking whether, to conduct a warrantless forensic search of a digital device at the border, government agents need some iteration of reasonable suspicion. There is a division across the circuit whether government agents need reasonable suspicion that the device contains digital contraband (9th Circuit), reasonable suspicion that the device contains evidence of a particular crime with a nexus to the purposes of the border search exception to the warrant requirement (4th Circuit), reasonable suspicion of any kind of criminal activity (10th Circuit), or no suspicion whatsoever (11th Circuit).[1] *Place your bets folks! Where will the spinning ball land?*

The petition, authored by a federal defender in Colorado and lawyers from the DC office of Jones Day, is a gripping piece of writing that grabs interest quickly. Just take the first paragraph, which appeared *before* the question presented (*I love it when that happens*): "When Petitioner Derrick Williams arrived from Europe at Denver International Airport, government agents seized his laptop, used forensic software to break the password and copy its data bit-for-bit, and then searched the files. The agents had neither a warrant nor suspicion that Mr.

[1] *United States v. Williams*, 942 F.3d 1187 (10th Cir. 2019); *United States v. Vergara*, 884 F.3d 1309, 1311 (11th Cir. 2018); *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013).

Williams was inadmissible, smuggling contraband, or evading customs duties. [*Is there any kind of reasonable limitation on warrantless border searches? Please?*]" (*Emphasis on my paraphrased Question Presented.*)

PUBLIC CORRUPTION / HARMLESS ERROR: ***Silver v. United States***, No. 20-60 is a case from the 2d Circuit that asks: 1.) whether a public official can be convicted of bribery absent proof of an agreed exchange with the alleged bribe payor, based solely on his unexpressed, unilateral state of mind when receiving a benefit; (2) whether a conviction for Hobbs Act extortion can be based on a theory of simple bribery; and (3) whether, if the government elects not to argue harmless error, a court of appeals may raise harmless error *sua sponte*, without providing the defendant an opportunity to be heard on the issue.

I can't decide which is more exciting—the thought that maybe SCOTUS would take the case and continue their attempts to clear up the muddy waters of public corruption law, or the thought that SCOTUS might explore whether it is time to limit one of my least favorite criminal law doctrines—harmless error. *Seriously*. Is there anything worse than something that sounds like it's just a common-sense limitation on minor administrative type failings but is, in fact, a gargantuan black hole where fairness and justice go to die?

DISCOVERY: ***Dailey v. Florida***, No. 19-1094 is an appeal from Florida presenting multiple questions regarding the withholding of evidence by the government in a criminal case.

Until Due Process Institute can work with Congress and our partners to pass meaningful discovery reforms as well as measures that increase prosecutorial accountability, we're stuck waiting for the judiciary to pay attention to the epidemic of discovery abuse in America's criminal legal system. What exculpatory evidence did the government fail to disclose prior to trial in this case? A statement by a former prosecutor that the petitioner's codefendant had confessed to committing the crime. And—in a prosecution where essentially the only evidence at trial was the testimony of multiple jailhouse informants—a statement revealing that police offered favorable treatment in exchange for testimony against the petitioner. The Florida Supreme Court refused to allow the evidence to be considered, holding that it was the defense's job to affirmatively find this evidence on their own. Are you grimacing yet? What if I told you this was a capital case? Say it with us, folks: "*No State shall deprive any person of life…without due process of law.*" If we all say it loud enough, perhaps the Justices might hear us.

GUNS + DRUGS: ***Jordan v. United States***, No. 20-256 is a case from the 4th Circuit asking whether each separate conviction under 18 U.S.C. § 924(c)(1) requires only a separate predicate crime of violence or drug trafficking offense (3rd, 4th, and 8th Circuits) or also requires a separate act of using, carrying or possessing a firearm (2nd, 5th, 6th, 7th, 10th, and D.C. Circuits).[2] *Hmm, is it just us?* Or does it seem like there is a significant Circuit split on this issue and the question of whether a person is incarcerated is controlled by their jurisdiction, not their conduct and . . . *that's not fair*?

[2] *United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017); *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012); *United States v. Sandstrom*, 594 F.3d 634 (8th Cir. 2010); *But see United States v. Vichitvongsa*, 819 F.3d 260 (6th Cir. 2016); *United States v. Rentz*, 777 F.3d 1105 (10th Cir. 2015); *United States v. Cureton*, 739 F.3d 1032 (7th Cir. 2014); *United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003); *United States v. Finley*, 245 F.3d 199 (2d Cir. 2001); *United States v. Wilson*, 160 F.3d 732 (D.C. Cir. 1998).

4TH AMENDMENT EXIGENT EXCEPTION: *Lange v United States*, No. 20-18 is an appeal from California involving how much more of the 4th Amendment the exigent circumstances exception can swallow. Courts across the nation are split on the appropriate test to apply when an officer enters a home without a warrant under the "exigent circumstances" exception to the 4th Amendment and there is probable cause to believe a *misdemeanor* has been committed. Again, I'm deeply troubled by how frequently justice in America depends on your geographic location and of course, misdemeanors are by far the most common basis for arrest, so we're talking about a lot of people. Let's hope the Court gets this is a big deal and takes the case to help protect what remains of the 4th Amendment.

PERJURED TESTIMONY: *Farrar v. Williams*, No. 19-953 arises from the 10th Circuit and asks whether due process is violated when the prosecution relies on material, perjured testimony to secure a conviction but did not know the testimony was perjured until after the trial, as six courts have held, or whether the prosecution's contemporaneous knowledge of the perjured testimony is required, as eight courts have held.

If you aren't convinced you should care about this case, just know this: Mr. Farrah is serving a life sentence on the testimony of the victim (his stepdaughter) who credibly recanted a year after the trial explaining that as a teenager in a blended family, she was resentful and angry and looking for ways to escape her parents ' jurisdiction and live with her grandparents instead. (Her grandmother alleges she raised this concern and questioned the credibility of her granddaughter's accusations with the prosecutorial team prior to the trial.) Farrah sought federal habeas relief on the ground that a conviction that rests on perjured testimony violates due process. The Tenth Circuit said not unless the government knew at the time of trial the testimony was false. However, in many other places,[3] what happened here *would* be deemed an unconstitutional conviction and Farrah would be acquitted because, *you know*:

- "recantations of material testimony that would most likely affect the verdict rise to the level of a due-process violation, if a state, alerted to the recantation, leaves the conviction in place;"[4]
- "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness;"[5]
- "the truth seeking function of the trial is corrupted by perjury whether encouraged by the prosecutor or occurring without his knowledge;"[6] and
- other due process-y stuff like that.

But . . . [*insert John Williams' genius Star Wars "Imperial March"*], enter the Antiterrorism and Effective Death Penalty Act (AEDPA), which denies relief in federal habeas cases if there is no "clearly established law, as determined *by the Supreme Court of the United States*."[7] So due to the existence of a Circuit split, Mr. Farrah spends the rest of his life in jail? The only thing that makes me feel better about this case is that I realize it gives Due Process Institute a great

[3] *E.g.*, the Second and Ninth Circuits, as well as the Supreme Courts of Texas, Kentucky, Nevada, and New Mexico.
[4] *Sanders v. Sullivan,* 863 F.2d 218, 225 (2d Cir. 1988).
[5] *Killian v. People*, 282 F.3d 1204, 1209 (9th Cir. 2002).
[6] *Riley v. State*, 567 P.2d 475, 476 (Nev. 1977).
[7] 28 U.S.C. § 2254(d)(1) (emphasis added).

example to take to Congress as one of the many reasons we need federal habeas reform.[8] *We're coming for you, AEDPA*.

So, admit it. You're glad we didn't stick to just one favorite pending cert. petition because these are *all* good. And guess what? None of these great petitions had any *amicus* support. Due Process Institute would love more volunteer lawyers who are willing to write for us. We also need funding to hire a permanent staff *amicus* attorney to watch the docket like a hawk and weigh in when it matters. Wouldn't that be awesome? C'mon, people. **We can do better than this.** Let's start winning more of these! *The People need us*.

Our utterly biased designation for **MOST DISAPPOINTING DENIAL OF *CERTIORARI*** (so far) this year results in a tie between a case involving judicial fact-finding that increases punishment and a collection of cases challenging the doctrine of qualified immunity.

ALLEYNE / APPRENDI: First, there is Fogleman v. Mississippi, No. 19-7794, in which the Court failed to consider the question of whether the Constitution requires the invalidation of state statutes that allow a judge (rather than a jury) to make factual findings that postpone or eliminate a defendant's eligibility for parole. In a terrific amicus brief authored by Kendall Turner in O'Melveny's DC office for Due Process Institute and the National Association for Public Defense, we learn: "At least fifteen states have laws [like the Mississippi law at issue] that allow judicial fact-finding to raise the minimum amount of time a defendant must serve in prison before he is eligible for parole, or render him wholly ineligible for any form of early release. These state laws function just like the statute [the Court invalidated] in *Alleyne*: They increase the minimum sentence a prisoner must serve."[9] The Court's failure to take this on means a significant number of injustices will continue in these states unabated. We wish to thank Ms. Turner for taking on this effort *pro bono*, under a very tight deadline, and during the disruptive uncertain early days of mandatory quarantine. *It's lawyers like her who give us all a good name*.

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[8] **If habeas work is your jam, be sure to look at the cert. denial in March of this year in *Avery v. United States*, No. 19-633 (*no, not Steven Avery*).** CLE worthy info: Federal law provides incarcerated individuals seeking post-conviction relief (frequently referred to as habeas petitions) into two categories: those in state custody who are seeking federal review apply under 28 U.S.C. § 2254 and those in federal custody who are seeking federal review apply under 28 U.S.C. § 2255. One AEDPA provision, 28 U.S.C. § 2244(b)(1), states that a "claim presented in a second or successive application *under section 2254* that was presented in a prior application shall be dismissed." (*Emphasis added for the textualists*). Despite the clear language of the statute, until recently, DOJ had successfully argued to six Courts of Appeal that the second or successive ban in § 2254 equally applies to § 2255. In 2019, the Sixth Circuit had the good sense to read the statute and realize the other Circuits (and DOJ) have just been making this up and that there is no textual basis for these holdings (my words, not theirs). Even DOJ is *currently* conceding that § 2244(b)(1) does not apply to § 2255 motions and that arguing otherwise is "inconsistent with the text of Section 2244." As Justice Kavanaugh put it in a statement accompanying the denial of Avery's cert. petition, "the Government now disagrees with the rulings of the six Courts of Appeals that had previously decided the issue in the Government's favor. In a future case, I would grant certiorari to resolve the circuit split…." ***Lawyers in those 6 Circuits: go forth and bring the case to put this issue to bed (before DOJ changes its mind).*** Now, if only there was something to be done for the thousands of cases dismissed as a result of those previous rulings…. ***Jailhouse lawyers: get busy writing.***

[9] *Alleyne v. United States*, 570 U.S. 99 (2013).

QUALIFIED IMMUNITY: The other "winner" is obviously the 2020 dismissal of a series of qualified immunity petitions.[10] Due Process Institute and many allies from both sides of the political aisle joined a *blitzkrieg* effort this year led mostly by the prolific and passionate brief writers at Cato Institute in the ~~utterly reasonable~~ apparently naive belief that the Court was finally poised to take up this invented judicial doctrine. It is time that we face the facts that this doctrine has led to the blessing of such perverse police misconduct as shooting tear gas into a house for hours even though they had consent (and a key) to enter the home, accidentally shooting a child when attempting to kill a non-threatening dog, and stealing almost $225,000 (yes, *stealing* not seizing). Turns out—the court did not find these horrific situations to be enough for it to reconsider its invention. So we were quick to pivot our resources and focus on supporting the introduction of a bipartisan bill in the House that would remove this judicially created impediment to police accountability and restore this important civil rights law to what Congress intended when it wrote it in 1871.

The civil rights of newly emancipated Black Americans were routinely violated by both private citizens and state government actors after the Civil war. For example, the Ku Klux Klan,[11] sometimes consisting of or enabled by individuals in local law enforcement,[12] used terrorism and violence to try to keep Black Americans from exercising their rights. In response to many atrocities that went unanswered by state governments and courts in the South during Reconstruction, Congress enacted a number of additional protections, including the one now codified in 42 U.S. Code § 1983.[13]

For almost 100 years, the statute meant what it said. There was agreement that the People needed a remedy and a way to bring accountability to those government actors who violated their due process rights. (It should be undisputed that we all still need this today.) But in 1967, during the height of the civil rights movement, the Supreme Court created a "qualified immunity" defense to Section 1983 liability out of thin air in *Pierson v. Ray* that essentially acted as a "good faith" defense.[14] *[I note with disdain that in the years after the Pierson*

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[10] *Cooper v. Flaig*, 779 F. App'x 269 (5th Cir. 2019) (cert. denied, June 15, 2020); *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (cert. denied sub nom. *Hunter v. Cole*, June 15, 2020); *Anderson as trustee for next-of-kin of Anderson v. City of Minneapolis*, 934 F.3d 876 (8th Cir. 2019)(cert. denied sub nom. *Anderson v. City of Minneapolis, Minnesota*, June 15, 2020); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019)(cert. denied sub nom. *West v. Winfield*, June 15, 2020) (amicus brief); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019)(cert. denied, June 15, 2020) (amicus brief); *Mason v. Faul*, 929 F.3d 762 (5th Cir. 2019)(cert. denied, June 15, 2020); *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019)(cert. denied June 15, 2020) (amicus brief); *Brennan v. Dawson*, 752 F. App'x 276 (6th Cir. 2018)(cert. denied, June 15, 2020); *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018)(cert. denied, June 15, 2020) (amicus brief); *Clarkston v. White*, 943 F.3d 988 (5th Cir. 2019)(cert. denied, May 18, 2020); *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019)(cert. denied, May 18, 2020); *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019)(cert. denied, May 18, 2020).

[11] The *Civil Rights Act of 1871* was also known as the "Ku Klux Klan Act."

[12] Michael Newton, WHITE ROBES AND BURNING CROSSES: A HISTORY OF THE KU KLUX KLAN FROM 1866 (2016); Stetson Kennedy, THE KLAN UNMASKED (2011); Frederick Allen, ATLANTA RISING: THE INVENTION OF AN INTERNATIONAL CITY 1946-1996 (1996); Ben Bruce, *The Rise and Fall of the Ku Klux Klan in Oregon During the 1920s*, 11 Voces Novae 1 (2019); Southern Poverty Law Center, *Ku Klux Klan: A History of Racism and Violence*, Southern Poverty Law Center (2011), https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf.

[13] The Supreme Court has explained that Section 1983's explicit purpose was to provide a much-needed remedy in federal court because state and local courts "by reason of prejudice, passion, neglect, intolerance or otherwise" were unwilling to enforce the due process rights of Black Americans guaranteed by the 14th Amendment. *See Monroe v. Pape*, 365 U.S. 167, 180 (1961).

[14] 386 U.S. 547 (1967).

decision, the Supreme Court went on to invent "absolute immunity" for other types of government conduct, which provides complete protection from suit even for purposeful and malicious behavior—including for a prosecutor's decision to indict a case or other prosecutorial functions. Is it just me or does anyone else believe this doctrine might serve as a significant impediment to prosecutorial accountability? Ok, back to the story.] The Supreme Court's new "good faith" version of qualified immunity existed for 15 years before the Court generated yet another new test in *Harlow v. Fitzgerald* that required the conduct at issue to be an already "clearly established" violation of someone's rights in order to assign liability.[15]

Absurd examples now abound of the level of specificity that courts have required when analyzing whether certain conduct has been "clearly established" in a particular jurisdiction as a violation of someone's rights. A great example exists in a case the Supreme Court declined this year, where the Sixth Circuit denied relief because surrendering to the police by sitting with your hands raised was not similar enough to surrendering by lying down on the ground.[16] As if this didn't stack the deck against § 1983 claims enough already, in 2009,[17] the Court changed how the methodology of how qualified immunity cases are analyzed when it ruled that courts may grant qualified immunity after assessing whether the case survives the "clearly established" test—without ever *first* determining if a constitutional violation had ever occurred. If you're not a procedural nerd, just know this: Sure, it might make sense from a "judicial efficiency" perspective to skip one part of the analysis if so many of the claims just end up failing on the second [*nearly impossible to satisfy*] prong. But this new analytical framework directly resulted in a substantial decrease in the number of judicial decisions that "clearly establish" what conduct constitutes a violation, and therefore it has *profoundly* limited the ability of civil rights plaintiffs to succeed in court since 2009. As Judge Don Willett of the U.S. Court of Appeals for the Fifth Circuit astutely explained in a recent opinion, "No precedent = no clearly established law = no liability."[18] Looking back on it now, it seems almost silly that I got so excited about the potential of SCOTUS addressing the mess it has created (*for once, I'm not blaming Congress!*) given that the Court has ignored more than 120 petitions on the topic since 2005 alone.

For now, we focus on our legislative fix: a bill that has secured significant public support—from groups as different as the Center for American Progress, Young Americans for Liberty, the National Urban League, and the National Organization for Women. There has also been support for it among many who have not previously engaged in legislative advocacy work including a group of 1,400 current and former professional athletes and coaches working with the NFL's Players Coalition and more than 400 business leaders from companies like Converse, Unilever, and Patagonia. Rest assured that, politics aside, Due Process Institute will continue to work alongside any and everyone who strives for a more just America by increasing accountability of those who violate due process rights under the cloak of government authority. *American Flag emoji.*

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[15] 457 U.S. 800 (1982).
[16] *Baxter*, 751 Fed. Appx at 872-873.
[17] *Pearson v. Callahan*, 555 U.S. 223 (2009).
[18] *Zadeh*, 928 F.3d at 479-80.

4TH AMENDMENT/PRIVATE SEARCH DOCTRINE: Just quickly, a "**Most Disappointing Denial of Cert." Honorable Mention** is deserved by ***Shaffer v. Pennsylvania***, No. 19-618, which sought review to clarify the applicability—if any—of the "private search" doctrine to modern digital devices that the Court has recognized are essentially "the digital equivalent of [our] home".[19] Fair warning: better delete whatever you might not want a police offer to access before you hand your laptop or cell phone to a repair person you've hired to help you. Apparently, SCOTUS wasn't moved to consider whether warrantless government searches initiated by private third parties of your "digital home" violate the 4th Amendment despite amicus support. Shrug. *I thought they were beginning to "get" this stuff.*

Of last year's "TOP 3 CRIMINAL CASES TO WATCH," the defense won 2 out of 3 from this category.[20] ***GO TEAM JUSTICE!***[21]

DRUGS + GUNS / MENS REA: *Borden v. United States*, No. 19-5410.

Congress designed the Armed Career Criminal Act (ACCA) to impose draconian sentencing penalties on recidivists who repeatedly commit violent crimes. Its "use of force" clause defines a "violent felony" as encompassing crimes that require, "as an element," the "use, attempted use, or threatened use of physical force against the person of another."[22] The defendant in this case was subjected to an enhanced sentence for the charge of being a felon in possession of a firearm as an "Armed Career Criminal" on the basis of state aggravated assault convictions that only required *recklessness*. (Just, FYI, application of ACCA's "enhanced" sentencing frequently doubles the defendant's sentence.) The 6th Circuit affirmed the sentence, holding that the state convictions qualified as "violent felony" predicates.

There is currently a Circuit split on whether crimes with a *mens rea* of "recklessly" qualify as "violent felonies" under ACCA.[23] *Of course there is*. Because some courts get the extraordinary difference between a "reckless" state of mind and something more culpable. Some law professors even get it, like Professor Leah Litman (joined by Professor Benjamin Levin and others) who explained in their amicus brief: "If the force clause included reckless use of force affecting rather than targeting others, it would sweep in crimes that are neither violent and aggressive nor worthy of the armed career criminal label.... Force-clause predicate offenses would include crimes that, though recklessly resulting in bodily harm, are far more naturally described as accidents than violent felonies. It would reach a police officer who drives recklessly to a crime scene and accidentally strikes another officer; or a thief who grabs a bag of money, to have it accidentally catch on a woman's ring and cause her finger minor injury. It would also reach myriad state and federal statutory offenses that punish the mere creation of some risk of

[19] *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) (quotation marks omitted).

[20] *See Ramos v. Louisiana*, 590 U.S. __ (April 20, 2020); *Kelly v. United States*, 590 U.S. __ (May 7, 2020); *but see McKinney v. Arizona,* 590 U.S. __ (February 25, 2020).

[21] **Lesson: *Keep trying. It really matters. And sometimes we win.***

[22] 18 U.S.C. § 924(e)(2)(B).

[23] The First, Fourth, and Ninth Circuits hold such offenses do not qualify; the Fifth, Sixth, Eighth, Tenth, and DC Circuits hold that it can qualify. The Third and Eleventh Circuits are in the midst of deciding.

bodily harm.... Punishing such offenses with 15-year mandatory minimum sentences defies statutory text and common sense alike."[24]

Mr. Borden's case was granted cert. a week after *Walker v. United States* was dismissed from the Court's docket due to the defendant's death. In that case, in 2007, Mr. Walker had been convicted of possessing ammunition as a felon (a handful of bullets) that he had stored in his room for short-term safekeeping after discovering them in a rooming house that he managed. As a result of this conviction, the government sought an enhanced sentence under ACCA on the bases of previous convictions that were decades old. Mr. Walker was ultimately sentenced to serve a mandatory 15 years—the shortest sentence legally available to the Court under ACCA, which noted during the sentencing the critical role Mr. Walker played in supporting his mother, wife, and disabled stepson, his advanced age, and the age of his previous convictions. On direct appeal, Mr. Walker challenged his sentence for the possession of 13 bullets as "grossly disproportionate" and thus invalid under the Eighth Amendment. The court of appeals affirmed, yet stated "[l]ike the district court," it would "[not] have imposed a mandatory 180-month sentence if left to [its] own devices."[25] Mr. Walker then sought federal habeas relief raising several claims, one of which was successful—that one of his previous convictions under a Texas law that included "reckless" acts did not qualify as a "violent felony" under ACCA and therefore his sentencing was not controlled by ACCA's 15-year mandatory minimum sentence.

In 2017, the district court resentenced Mr. Walker to essentially time served (over 7 years at that point), but his freedom was short-lived when the 6th Circuit reversed the district court's decision in July 2019 via a one-paragraph decision that sent the 65-year-old back to jail. Three justices dissented from that decision, with one pointedly raising attention to the fact that the issue of labeling reckless violent felonies "recurs frequently and typically doubles a defendant's sentence."[26] The Supreme Court granted cert. in Mr. Walker's case in November 2019, to determine whether an offense with a reckless *mens rea* can qualify as a "violent felony" under ACCA. But unfortunately, Mr. Walker died in late January 2020, before his case could be heard. One can only hope that the Court will be stepping in to curtail the extraordinary injustice occurring as a result of including convictions under recklessness statutes as qualifying for the highly punitive sentencing enhancements under ACCA. *It also serves as an important reminder that it is well past time for Congress to rethink ACCA in light of its more enlightened bipartisan approach to criminal justice issues that has evolved since its passage in 1984.*

COMPUTER FRAUD + ABUSE ACT: *Van Buren v. United States*, No. 19-783.

We're happy to see the Court weighing in on the CFAA—a federal criminal statute that has long been the subject of criticism and attempted legislative reforms to narrow its overbreadth and poor drafting. At issue in this case, a person is guilty under 18 U.S.C. § 1030(a)(2)(C) if the person "accesses a computer without authorization or exceeds authorized access, and thereby obtains—information from any protected computer." Whether a person "exceeds" their authorization is determined by whether they use their authorized access "to obtain or alter information in the computer that the accesser is not entitled so to obtain or

[24] Citations and quotations omitted.
[25] 506 Fed. Appx. 482, 489 (6th Cir. 2012).
[26] Walker v. United States, 931 F.3d 467, 469 (6th Cir. 2019), available at https://www.courthousenews.com/wp-content/uploads/2019/11/walker-ca6.pdf.

alter." The defendant in question is a police sergeant in Northern Georgia who was the subject of what ultimately became what has to be one of the lamest FBI stings ever (particularly given other examples of police officer misconduct that *should* be the subject of FBI investigation).

The sting begins with a man who would allegedly purchase the services of sex workers, but then call the police to accuse them of stealing the money he had paid them. We'll call this guy the snitch. In the past, the snitch had asked officers to run allegedly suspicious license plates because he feared retaliation from his service providers/victims. Enter a police officer who decides he needs to borrow money and approaches the snitch for a loan. The snitch snitches and, wanting to know how far the officer would go for money, the FBI sets up a sting. They have the snitch ask the officer to run a computer search for the license plate of an erotic dancer the snitch allegedly likes but is worried might be an undercover officer. The officer ran the search and the snitch gave him money. The officer offered to pay the snitch back, the snitch declined to accept, and the officer explicitly responded that he was not charging the snitch for helping him out with the requested info. Days later, the snitch followed up with another license plate request and more money, again the officer ran the search, and then the FBI swooped in.

Clearly, the officer was authorized to access the databases he used to run these searches. At trial, the officer moved for a judgment of acquittal arguing that accessing information for an improper purpose does not constitute "exceeding authorized access" under § 1030. The 11th Circuit affirmed the conviction. There is a Circuit split. The Supreme Court has taken the case to ask whether a person who is authorized to access information for certain purposes commits a federal crime under § 1030 if that person accesses the same information for an improper purpose. *Look, none of us what to see cops (or anyone else) with authorized access to certain information or databases for "legitimate" reasons use their access when they have improper motivations*. There certainly ought to be measures in place to prevent or discourage such "misuse" by those entrusted with such responsibility and there obviously ought to be policies for how to respond in such situations. It seems to me that, for example, firing someone who misuses their access for an improper motivation is a good remedy. I'm sure there are also instances wherein civil liability for a breach could be appropriate. But instead, here we are (*again*) giving prosecutors a big heavy hammer and expecting them to exercise their discretion not to use it to hit small nails. When will legislators learn that is not a sufficient approach to ensuring that the incredible consequence of a criminal conviction will only apply to specific and narrow conduct the legislators deemed worthy of criminal proscription? *Asking for a friend*.

JUVENILE LWOP: *Jones v. Mississippi*, No. 18-1259.

In the landmark 2012 *Miller v. Alabama* decision, the Court held that mandatory life without parole for those who were minors at the time their crime occurred violates the 8th Amendment prohibition on cruel and unusual punishment.[27] In its 2016 decision in *Montgomery v. Louisiana*, the Court held that *Miller* had announced a substantive rule of Constitutional law and that it must be given retroactive effect in cases where a direct review was complete when *Miller* was decided.[28] The *Montgomery* decision also clarified that the Court's holding in *Miller* means that the 8th Amendment bars life-without-parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."

[27] 567 U.S. 460 (2012).
[28] 577 U.S. __ (2016).

Post-2016, it seems that most courts have been making findings related to permanent incorrigibility when sentencing minors, but not all. This case asks whether an express finding that a minor is "permanently incorrigible" must be found prior to the imposition of a sentence of life without parole. The re-sentencing in this specific case occurred post-*Miller*, but pre-*Montgomery*, which I don't think should legally really matter, but who knows.

Of note, *Miller* was decided 5-4, with only 3 of the Court's current Justices having voted in the majority (Kagan, Sotomayor, and Breyer) and with 3 current Justices having dissented (Roberts, Thomas, and Alito). When Montgomery was decided four years later, Chief Justice Roberts joined Justices Breyer, Sotomayor, and Kagan in the majority. (Justices Thomas and Alito dissented.) I'm not an expert in this area but I don't think a large part of the legal community is explicitly worried about *Miller* being overturned as precedent, although I think it's important to think about the impact Justices Gorsuch, Kavanaugh, and possibly a third Justice, could have on this issue. I also don't know what caused Chief Justice Roberts to change his mind between *Miller* and *Montgomery*—but if it was on *stare decisis* grounds, one wonders if there is a possibility of Chief Justice Roberts returning to his earlier view in *Miller* given the Court's bitter *stare decisis* fight in the *Ramos* decision (see below)?

Will Justice Kennedy's youth justice legacy survive the changing face of the Court? If for some reason it doesn't, I'm relieved that the science and public opinion on this issue has dramatically advanced since *Miller* was decided. Since 2012, many states have banned LWOP sentences for youth offenders through legislation—states led by Republican governors and legislators as well as those led by Democrats.[29] And many more states currently have no persons serving LWOP sentences.[30] (In fact, just three states—Pennsylvania, Michigan, and Louisiana—currently account for approximately two-thirds of juvenile LWOP sentences.)[31]

THE MOST BROADLY USEFUL (OR AT LEAST *INTERESTING*) CRIMINAL(ISH) CASES DECIDED LAST TERM:

OVERCRIMINALIZATION / FRAUD STATUTES: *Kelly v. United States*, *No. 18-1059* (May 7, 2020) ***(holding unanimously that the Court is starting to understand that DOJ's public corruption prosecutors need adult supervision)***.

Does a public official defraud the government when she engages in an otherwise lawful official action but conceals the "real" motive behind such act? The "fraud" in this case involved publicly advancing a particular policy reason for an official act when it was not the subjective "real" reason. (*Yep. Bridgegate.*) Yes, it's crappy (and even dangerous) to cause gridlock in Fort Lee, New Jersey because you don't like their mayor and… well, because you *can*, but is it a federal crime? You can easily see all the ridiculous potential prosecution scenarios if the answer is yes. In a decision that had me saying, "well, it's about time," the Court unanimously reversed the mail fraud and program fraud convictions surrounding "Bridgegate" on the grounds that …

[29] Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project (February 2020), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.
[30] *Id.*
[31] *Id.*

well, they read the mail and program fraud statutes and duh, they don't apply here. And also, "not every corrupt act by state or local officials is a federal crime." Could this decision actually create a speedbump in the long-suffered overreaching of novel prosecutorial theories in fraud cases?[32] Will it deter DOJ's lawyers from doing whatever they can to take advantage of vague language in federal criminal laws? *Stay tuned*.

CAPITAL DEFENSE: *McKinney v. Arizona,* *No*. 18-1109 (February 25, 2020) **(*upholding a capital sentence by choosing to apply one procedural label so old unhelpful law would apply versus another procedural label that would allow recent beneficial law to apply*).**

In this case, McKinney received a death sentence in 1993 from an Arizona court. Two decades later, the 9th Circuit granted him habeas review because Arizona courts had failed (over 15 years) to consider certain mitigating evidence in death penalty cases in violation of Supreme Court precedents, including, in McKinney's case, his PTSD. As a result, his case returned to the Arizona Supreme Court, to which he argued he was entitled to resentencing by a jury. The state argued that the court itself could conduct the reweighing of aggravating and mitigating circumstances under the Supreme Court's 1990 decision in *Clemons v. Mississippi*.[33] The Arizona Supreme Court agreed, performed a reweighing, and ultimately upheld the sentence of death. McKinney appealed to the Supreme Court, challenging the Arizona trial court's initial 1993 finding of aggravating circumstances that made him eligible for the death penalty via the application of the 1990 law to him and arguing that he was entitled to resentencing by a jury, as per the Supreme Court's later decisions in *Ring* (2002) and *Hurst* (2016).[34]

In a 5-4 decision authored by Justice Kavanaugh, the court affirmed, viewing McKinney's case as being on collateral review, and therefore *not* subject to the Court's later jurisprudence. Justice Ginsburg dissented (joined by Breyer, Sotomayor, and Kagan) viewing McKinney's case as being on direct review and thus subject to the more recent law that would have meant McKinney was entitled to have a jury conduct the reweighing.

Look. I'm a lawyer, so I can understand a procedural analysis, but that doesn't mean it sits right. There is a growing recognition in public opinion and even on Capitol Hill of the fundamental unfairness that ensues when criminal law is improved in a dramatic way (either through legislative change or judicial interpretation) but the number of people who can benefit from that change is significantly limited by a procedural legal doctrine. And count me among these folks. It's dismaying that a court or Congress can, in essence, recognize a significant mistake or injustice in the law but frequently decide not to allow the "fix" to apply to a broad category of people who were harmed by the previous legal standards. I'd like to see an expanded, more humane approach to the important question of who is allowed to receive relief or benefit from significant positive changes or reforms in our criminal law.

I also note with disappointment the lack of meaningful discussion of *Apprendi*[35] and the Constitutional requirement that facts that increase the penalty for crimes be determined by a

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[32] See, for example, *Skilling v. United States*, 561 U.S. 358 (2010).
[33] 494 U.S. 738 (1990).
[34] *Hurst v. Florida*, 577 U.S. ___ (2016) (holding Florida's capital sentencing impermissibly allowed judge to find aggravating circumstance, independent of jury's fact-finding); *Ring v. Arizona*, 536 U.S. 584 (2002)(holding that capital defendants are entitled to jury determination of facts on which legislature conditions an increase in maximum, especially aggravating circumstances).
[35] *Apprendi v. New Jersey*, 530 U. S. 466 (2000).

jury and proven beyond a reasonable doubt. Without Justices Scalia and Stevens on the court, I worry about the diminishment of this 20-year-old powerful due process centered precedent.

GUNS + DRUGS (ACCA): *Shular v. United States*, No. 18-6662 (February 26, 2020) **(*in which we are reminded that once you label someone a "career criminal," niceties such as analytical consistency and mens rea don't matter; also, Kavanaugh recoils from the use of the rule of lenity as a meaningful principle designed to protect liberty*).**

Mr. Shular was convicted under federal law as a felon in possession of a gun, and because of multiple prior state convictions in Florida for drug offenses, he was sentenced under the federal Armed Career Criminal Act (ACCA)'s enhancement provision. However, none of the state drug offenses that caused him to be sentenced under ACCA had contained a *mens rea* element, i.e. none of them required a finding that Schular had knowledge of the illicit nature of the substance.

For many decades, the Supreme Court's jurisprudence regarding which "violent felony" state convictions can qualify as predicate offenses under ACCA's sentencing enhancement has been based on the "categorical" approach: the offense's elements must be the same or narrower than those of the generic offense. The question presented to the Court here was whether this same analysis applies in determining which state-based "serious drug offenses" may serve as a predicate for the sentencing enhancement under ACCA. (And if the answer is yes, Schular's previous convictions would not qualify since the generic federal offense in 924(e)(2)(A)(ii) included a *mens rea* element of knowledge that the controlled substance is illicit. A unanimous Supreme Court said nope. Let's analyze these two ACCA provisions differently from each other. Why? *Because they can*.

The opinion also went on to say the rule of lenity was inapplicable here because there was no statutory ambiguity. Justice Kavanaugh concurred but wanted to make sure no one ever mistook him for Justice Scalia: "[T]he rule of lenity applies when … the court *can make no more than a guess* as to what the statute means." (*Emphasis for disappointment*.)

INSANITY DEFENSE / MENS REA: *Kahler v. Kansas*, No. 18-6135 (Mar. 23, 2020) **(*in which the Court holds that the due process clause does not compel a defendant's criminal guilt to be based on a defendant's capacity to be morally blameworthy for his actions*).**

In Kansas, Alaska, Idaho, Montana, and Utah (and likely more to come), it is currently not a defense to criminal liability that mental illness prevented a person from knowing his or her actions were wrong.[36] In this capital case, the accused argued that Kansas's law violates **the fundamental and centuries-old due process principle that people cannot be punished for crimes for which they are not morally culpable**. In what is already turning out to be a highly criticized opinion, the Court disagreed with Kahler 6-3. Justices Breyer, Ginsburg, and Sotomayor dissented, noting that the majority's opinion allows states to adopt rules eliminating the "core" of the insanity defense. Breyer also leaves us with this brainteaser: the majority has now blessed a state rule that permits the use of the insanity

[36] *See* Alaska Stat. §§12.47.010(a), 12.47.020 (2018); Idaho Code Ann. §§18–207(1), (3) (2016); Kan. Stat. Ann. §21–5209 (2018); Mont. Code Ann. §46–14–102 (2019); Utah Code §76–2–305 (2017).

defense for someone who kills another believing the victim is a dog but does not permit the use of the insanity defense for someone who kills another believing a dog ordered him to kill the victim. *Chew on that for a while*.

Do yourself a favor and skip the academic writing on this case that hails it as jurisprudential "progress" and a better approach to how to analyze the value of a defendant's mental state under all criminal law generally because these academics are under the misguided belief that it is "too hard" for a prosecutor to prove that a person knew their actions were wrong (or illegal). It might be that these folks have spent too much time analyzing and reimagining "model penal codes" that aren't the law anywhere, but these scholars seem to fundamentally misunderstand a number of things, including that the mere existence or availability of a legal defense grounded in insufficient *mens rea* does not mean all (or even most) persons claiming a lack of requisite *mens rea* to any criminal offense are 1.) believed; 2.) not charged, despite the existence of credible evidence supporting inadequate *mens rea*; 3.) not convicted, even after presenting a *mens rea* defense. The mere availability of a defense does not necessitate a particular result. Neither the police, prosecutor, judge, or jury have any objective way to assess the moral truth of a *mens rea* defense. Alleged motives and mental states merely provide accused people with something to argue in their defense. The actual practice of law is not an episode of *The Good Place*, Professors, in which one ponders questions of pure philosophy and morality applied with factual certitude.

6TH AMENDMENT/NON-UNANIMOUS JURY VERDICTS*: Ramos v. Louisiana*, No. 18-5924 (April 20, 2020) ***(in which the Court ultimately held what every state other than Louisiana[37] and Oregon had figured out already—the Sixth Amendment, as incorporated against the states by the 14th Amendment, requires unanimous verdicts in criminal cases but…trouble looms ahead).***

So, if the holding was so uncontroversial, why am I bothering to mention it as being useful or interesting? Because the Court was badly fractured, and it was clear that this case became a proxy fight between the Justices regarding *stare decisis* and what this fracture might mean regarding the future overturning of other long-standing decisions. Pay attention if you want insight into the doctrinal fights ahead (coming sooner rather than later). Also, the question of retroactivity of this decision was left undecided and might be a surprisingly interesting issue in the current term. But honestly, any law nerd should also enjoy just how odd of a decision *Ramos* ended up being—with even the three dissenters refusing to defend a case they voted *not* to overrule. Ultimately, for a case allegedly asking whether the Sixth Amendment requires unanimous verdicts in criminal cases or whether that right is incorporated against the states by the 14th Amendment, the case ended up being a bitter dispute regarding if, when, and how it is appropriate to overturn a case, even in the rare instance of when *everyone* agrees it was badly decided.

The first thing you need to know is that the question of the Constitutionality of these post-Civil War non-unanimous verdict state laws had already been addressed by the Court in 1972 in a case called *Apodaca v. Oregon*, itself a badly fractured decision, in which 4 justices held that the 6th Amendment's unanimous jury requirement did *not* apply to the states and 4

[37] Actually, to be fair to Louisiana, a place I called home for 5 years, its People had the good sense to amend their state constitution to prohibit non-unanimous verdicts in criminal cases in 2018, which was before the case was decided but only applied to crimes that took place after 2018 (whereas Ramos' conviction occurred in 2017).

dissenting judges held that the 6th Amendment's unanimous jury requirement *was* fully applicable to the states via the 14th Amendment. The tie-breaking justice issued a lone concurrence in which he agreed that the 6th Amendment required unanimity but held the 14th Amendment did not render this guarantee fully applicable against the states—a so-called "dual-track incorporation" analysis that had already long been rejected by the Court even by then (and still is). So, since the Court's 1973 *Apodaca* opinion, non-unanimous verdict state laws have passed Constitutional muster via a lone concurrence opinion.

Ok, let's move on to the scorecard in *Ramos*.[38] Justice Gorsuch authored the opinion holding that the text and structure of the 6th Amendment, as incorporated via the 14th Amendment, nullify state laws that allow for non-unanimous criminal verdicts. He was joined by Ginsburg (may she forever Rest in Power), Breyer, Sotomayor, and Kavanaugh. Then, all of these Justices minus Kavanaugh (so, Gorsuch, Ginsburg, Breyer, and Sotomayor) *also* concluded that Louisiana's and Oregon's reliance on *Apodaca* was not a strong enough interest to overcome overturning precedent. These four also went on to signal whether *Teague v. Lane* might limit the retroactive application of their corrective decision.[39] Justice Thomas concurred in the judgment but got there on a different path; he went his own way via the 14th Amendment's Privileges or Immunities Clause, not the Due Process Clause.

Justice Sotomayor then departed from the group, as Justice Gorsuch, joined by only the Notorious RGB, and Justice Breyer went on to conclude that *Apodaca v. Oregon* actually lacked precedential force. They pointed out that *Apodaca*'s tie-winning concurrence [based on the "dual-track incorporation" theory] had not been joined by any other justice and was a result of an erroneous analysis (even at the time), thus it should not be afforded precedential effect.

Justice Kavanaugh filed an opinion agreeing that it was time to overrule *Apodaca* and wrote extensively of how overruling Constitutional precedent such as this (*and perhaps other landmark, yet controversial decisions*) is easier than overruling statutory precedent. Justice Kavanaugh also made it clear that he is a no vote on the question of retroactivity, which I guess is fine, but it disturbed me how he did it. Without briefing or argument, with the question not before the Court, he unthoughtfully concluded the rule was procedural, not substantive in a one-sentence paragraph and thus did not qualify for retroactivity under *Teague's* first prong. Then, in addressing *Teague's* second prong, Kavanaugh almost seemed to take *glee* in the fact that in the 31 years since the Court decided *Teague*, it has "rejected every claim that a new rule satisfied the requirements for watershed status." Why is Justice Kavanaugh proud of the fact that the Court managed to write a test that sets the bar so high that literally no criminal defendant has ever been able to ever meet it? It seems to me that is almost *per se* proof that *something* is wrong, either with the test or the way it is applied. Although I intellectually understand the arguments in favor of non-retroactivity and can understand why the Court might not want to re-open presumptively final cases every time it issues a new decision involving constitutional law, I believe that the principles of due process and fundamental

[38] Justice Gorsuch delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh joined. Justice Gorsuch also delivered an opinion with respect to Parts II–B, IV–B–2, and V, in which Justices Ginsburg, Breyer, and Sotomayor joined and an opinion with respect to Part IV–A, in which Justices Ginsburg and Breyer joined. Justice Sotomayor filed an opinion concurring as to all but Part IV–A. Justice Kavanaugh filed an opinion concurring in part. Justice Thomas filed an opinion concurring in the judgment. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts joined in full and in which Justice Kagan joined as to all but Part III–D.

[39] 489 U. S. 288 (1989) (plurality opinion).

fairness should presumptively apply whenever it becomes clear that someone's conviction or sentence is unconstitutional. In other words, allowing reconsideration of unconstitutional convictions and sentences should be more of the usual rule, not the never-applied-exception.

[I would also argue that, on the merits, Justice Kavanaugh's *Teague* analysis is incorrect. To the extent *Teague's* "watershed" rule says *Gideon v. Wainwright* is the paradigmatic and perhaps only example of such a rule, there are very powerful similarities between the *Ramos* decision and *Gideon*—with the right to a jury being very similar to the right to counsel, and the infringement on that right being similar as well.[40] (Also, as pointed out by NACDL's amicus brief in a case pending on the question of whether *Ramos* applies retroactively, to the extent the "watershed" exception requires that a new rule need be unexpected in order to qualify, *Gideon* wouldn't exactly meet that test either!)]

Justice Alito filed a dissent to the opinion, joined in full by Chief Justice Roberts, and in part by Justice Kagan. The three Justices were bothered by what they characterized as "a badly fractured majority cast[ing] aside an important and long-established decision with little regard for the enormous reliance the decision had engendered." They would have allowed *Apodaca* to stand. However, Justice Kagan did *not* join the final ~~jab~~ line of Justice Alito's dissent: "By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases." (*No one needs me to translate this, right?*) So, yeah, some fractious lines being overtly drawn in the sand regarding potential overturning of landmark precedents—but in a criminal case that your neighbors are hearing about. Makes you pretty popular at the socially distanced front porch stoop evening hangouts!

Also, there remains the question of whether this corrective decision is retroactive and what that actually means as far as relief for people stuck in the various procedural posture pipelines. It might just be tricker or more interesting than you might think. Keep an eye on *Edwards v. Vannoy, Warden*, No. 19-5807 (cert. granted May 4, 2020) (asking whether *Ramos* applies retroactively to cases on federal collateral review).

Finally, I cannot move on past this case without mentioning that a significant amount of focus was spent by most of the Justices on the racist history behind non-unanimous jury verdicts. Even more remarkably, as Jonathan Blanks pointed out in his piece for Clause 40 Foundation's blog *Ad Justitium*: "[T]o those who do not regularly follow the Supreme Court, it may be surprising that the conflict wasn't primarily a split between Democratic and Republican appointees: **two of the three opinions that cited anti-black racism as a reason for overturning *Apodaca* were written by the justices appointed by President Trump**."[41] (*Emphasis added for awesomeness*.)[42]

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[40] 372 U.S. 335 (1963).

[41] Jonathan Blanks, *In Ramos, SCOTUS Wrestles With Race*, Clause 40 Foundation, https://clause40.org/blog/f/in-ramos-scotus-wrestles-with-race.

[42] **This Guide does not include *McGirt v. Oklahoma* in its "Most Broadly Useful…Criminal Cases" category, but the Court's opinion, also authored by Justice Gorsuch, does deserve a footnote for its [long overdue] racial justice awesomeness.** It begins: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever…. The government further promised that…they shall be allowed to govern themselves…. Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word." And then it concludes: "The federal government promises the Creek a reservation in perpetuity…. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye.

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That's it for this edition of *The Due Process Institute's Brief Guide To… [SCOTUS's]…Criminal Law Stuff. If you find our perspective useful to you or are interested in more of our work, you can always access our* amicus *briefs, read about our legislative and policy work, and check out our blog (where we share our thoughts about important criminal law stuff) at www.idueprocess.org. Also, call me if you want to help us write our* amicus *briefs on fascinating and profound issues of national importance (for free of course). Seriously. Call me: 202-558-6683.*

Please also check out Clause 40 Foundation's criminal law blog Ad Justitiam (Toward Justice) at www.clause40.org!

We reject that thinking…. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *Right on, Gorsuch*. *See McGirt v. Oklahoma*, 591 U.S. __, 140 S.Ct. 2452, 2459, 2482 (July 9, 2020), available at https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf.