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U.S. Supreme Court Criminal Case Update

Cases covered include reported decisions from the U.S. Supreme Court decided between April 2, 2019 through June 27, 2019. The summaries were prepared School of Government staff and faculty.

Contents

Search and Seizure

(1) Court vacates judgment of Wisconsin Supreme Court affirming petitioner's impaired driving conviction and remands for application of new exigency test; (2) Plurality concludes that when the State has probable cause to believe that an unconscious driver has committed the offense of driving while impaired, exigent circumstances "almost always" permit the State to carry out a blood test without a warrant; (2) Opinion concurring in the judgment only would hold that the dissipation of alcohol creates an exigency justifying a warrantless search any time the State has probable cause for impaired driving

Mitchell v. Wisconsin, 588 U.S. ___, 139 S. Ct. 2525 (June 27, 2019)
The petitioner appealed from his impaired driving conviction on the basis that the State violated the Fourth Amendment by withdrawing his blood while he was unconscious without a warrant following his arrest for impaired driving. A Wisconsin state statute permits such blood draws. The Wisconsin Supreme Court affirmed the petitioner's convictions, though no single opinion from that court commanded a majority, and the Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

Justice Alito, joined by Chief Justice Roberts, Justice Breyer and Justice Kavanaugh announced the judgment of the court and wrote the plurality opinion. The plurality noted at the outset that the Court's opinions approving the general concept of implied consent laws did not rest on the idea that such laws create actual consent to the searches they authorize, but instead approved defining elements of such statutory schemes after evaluating constitutional claims in light of laws developed over the years to combat drunk driving. The plurality noted that the Court had previously determined that an officer may withdraw blood from an impaired driving suspect without a warrant if the facts of a particular case establish exigent circumstances. *Missouri* v. *McNeely*, 569 U.S. 141 (2013); *Schmerber* v. *California*, 384 U.S. 757, 765 (1966). While the natural dissipation of alcohol is insufficient by itself to create per se exigency in impaired driving cases, exigent circumstances may exist when that natural metabolic process is combined with other pressing police duties (such as the need to address issues resulting from a car

accident) such that the further delay necessitated by a warrant application risks the destruction of evidence. The plurality reasoned that in impaired driving cases involving unconscious drivers, the need for a blood test is compelling and the officer's duty to attend to more pressing needs involving health or safety (such as the need to transport an unconscious suspect to a hospital for treatment) may leave the officer no time to obtain a warrant. Thus, the plurality determined that when an officer has probable cause to believe a person has committed an impaired driving offense and the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may almost always order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment. The plurality did not rule out that in an unusual case, a defendant could show that his or her blood would not have been withdrawn had the State not sought blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties. The plurality remanded the case because the petitioner had no opportunity to make such a showing.

Justice Thomas concurred in the judgment only, writing separately to advocate for overruling *Missouri* v. *McNeely*, 569 U.S. 141 (2013), in favor of a rule that the dissipation of alcohol creates an exigency in every impaired driving case that excuses the need for a warrant.
Justice Sotomayer, joined by Justices Ginsburg and Kagan, dissented, reasoning that the Court already had established that there is no categorical exigency exception for blood draws in impaired driving cases, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. The dissent noted that in light of that precedent, Wisconsin's primary argument was always that the petitioner consented to the blood draw through the State's implied-consent law. Certiorari review was granted on the issue of whether this law provided an exception to the warrant requirement. The dissent criticized the plurality for resting its analysis on the issue of exigency, an issue it said Wisconsin had affirmatively waived.

Justice Gorsuch dissented by separate opinion, arguing that the Court had declined to answer the question presented, instead upholding Wisconsin's implied consent law on an entirely different ground, namely the exigent circumstances doctrine.

Because officers had probable cause, First Amendment retaliatory arrest claim fails

Nieves v. Bartlett, 587 U.S. ___, 139 S. Ct. 1715 (May. 28, 2019)
The Court reversed and remanded a decision by the Ninth Circuit, holding that because police officers had probable cause to arrest Respondent Bartlett, his First Amendment retaliatory arrest claim fails as a matter of law. Russell Bartlett sued petitioners—two police officers—alleging that they retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest. The Court held that probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.

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Right to Trial by Jury

A plurality of the Court held that 18 U.S.C. § 3583(k) is unconstitutional, with four Justices determining that the statute's required mandatory revocation of supervised release and imposition of a minimum five-year prison sentence where a judge sitting without a jury finds by a preponderance of the evidence that a person has committed certain new criminal offenses ran afoul of the *Apprendi* line of cases

United States v. Haymond, 588 U.S. ___, 139 S. Ct. 2369 (June 26, 2019)
In a plurality opinion, a majority of the Court held that 18 U.S.C. § 3583(k) is unconstitutional. The defendant Haymond was convicted by a jury of possessing child pornography in violation of federal law and was sentenced to a prison term of 38 months, followed by 10 years of supervised release. While on supervised release, Haymond was discovered to be in possession of apparent child pornography and the government, in the plurality's words, "sought to revoke [his] supervised release and secure a new and additional prison sentence." At a hearing conducted before a district judge acting without a jury, and under a preponderance of the evidence standard, the judge found that Haymond knowingly downloaded and possessed certain images. Acting in accordance with § 3583(k), the judge revoked Haymond's supervised release and required him to serve a five-year term of imprisonment. The Tenth Circuit held that this violated Haymond's right to a trial by jury under the Fifth and Sixth Amendments and the Supreme Court granted review to evaluate this constitutional holding.

Generally under 18 U.S.C. § 3583(e), a judge who finds a violation of a condition of supervised release by a preponderance of the evidence has discretion as to whether to revoke the term of supervised release. Upon deciding to revoke the term of release, a judge also has discretion as to the amount of time a person must serve in prison as a consequence of the revocation. 18 U.S.C. § 3583(k) modifies this general rule in situations such as Haymond's where a defendant required to register under SORNA has his or her supervised release revoked because of a judge's determination that he or she has committed one of several criminal offenses enumerated in the statute. In such a case, § 3583(k) requires the judge to revoke the term of supervised release and further requires the imposition of a term of imprisonment of at least five years.

Writing for himself and Justices Ginsburg, Kagan, and Sotomayor, Justice Gorsuch determined that § 3583(k) ran afoul of principles laid down in *Blakely v. Washington*, *Apprendi v. New Jersey*, and *Alleyne v. United States*, saying that under the statute "judicial factfinding triggered a new punishment in the form of a prison term of at least five years and up to life." Likening this situation to that of *Alleyne* Gorsuch said that "the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." Gorsuch continued, saying that "what was true in [*Alleyne*] can be no less true here: A mandatory minimum 5-year sentence that comes into play *only* as a result of additional judicial factual findings by a preponderance of the evidence cannot stand." Contrasting § 3583(k) against other provisions in § 3583 regarding revoking supervised release and requiring a defendant to serve a term of imprisonment, Gorsuch explained that "§ 3583(k) alone requires a substantial increase in the minimum sentence to which a defendant may be exposed based solely on judge-found facts."

Justice Breyer concurred in the judgment and said that § 3583(k) is unconstitutional because "it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would

typically attach." However, Breyer said that he would "not transplant the *Apprendi* line of cases to the supervised-release context" and that he agreed with much of the dissent.

Justice Alito dissented, joined by Chief justice Roberts, Justice Thomas, and Justice Kavanaugh. Justice Alito said that the plurality opinion "is not grounded on any plausible interpretation of the original meaning of the Sixth Amendment," and generally criticized the plurality for extending the Sixth Amendment right to a jury trial to the supervised release context. Jamie Markham blogged about the case here.

In the context of a *Batson* challenge, the trial court committed clear error in concluding that the State's peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent

Flowers v. Mississippi, 588 U.S. ___, 139 S. Ct. 2228 (June 21, 2019)
In this murder case resulting in a death sentence, the Court held that the trial court committed clear error in concluding that the State's peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent. The defendant Flowers, who is black, allegedly murdered four people at a furniture store in Winona, Mississippi, three of whom were white. Flowers was tried six separate times for the murders; the same lead prosecutor conducted each of the trials. A conviction in the first trial was reversed by the Mississippi Supreme Court on grounds of prosecutorial misconduct, with the court not reaching a *Batson* challenge raised in that proceeding. A conviction in the second trial was reversed by the Mississippi Supreme Court on grounds of prosecutorial misconduct. A conviction in the third trial was reversed by the Mississippi Supreme Court on grounds that the State violated *Batson*. The fourth and fifth trials ended in hung jury mistrials. A *Batson* challenge arising in the sixth trial is the basis of the instant case.

Under principles of equal protection, *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibits the use of peremptory strikes in a racially discriminatory manner. A *Batson* challenge is a three-step process. First, the party asserting the challenge must make a prima facie case of discrimination in the use of a peremptory strike. If a prima facie case is established, the burden shifts to the party subject to the challenge to provide a race-neutral reason for the strike. In the third step, the trial judge assesses whether purposeful discrimination has been proved, examining as part of this assessment whether the proffered race-neutral reasons for the strike in fact are pretext for discrimination.

In assessing the *Batson* issue in the instant case, the Court said that four categories of evidence loomed large:

> (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial.

The Court addressed each of these categories in turn. With regard to the history from Flowers' trials, the court first noted that under *Batson* a challenger need not demonstrate a history of discriminatory strikes in past cases – purposeful discrimination may be proved solely on evidence concerning the exercise of peremptory challenges at the particular trial at issue. However, *Batson* does not preclude use of such historical evidence, and the "history of the prosecutor's peremptory strikes in Flowers' first

four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. Over the course of the first four trials, the State "used its available peremptory strikes to attempt to strike every single black prospective juror that it could have struck." The Court further noted that a *Batson* challenge in the second trial was sustained by the trial court and that the Mississippi Supreme Court reversed the conviction obtained in the third trial because of a *Batson* violation.

Turning to the events of the sixth trial, the Court noted that the State struck five of six black prospective jurors and that this, in light of the history of the case, suggested that the State was motivated in substantial part by discriminatory intent. The Court also noted the State's "dramatically disparate questioning of black and white prospective jurors." The five black prospective jurors who were struck were asked a total of 145 questions by the State. In contrast, the State asked the 11 seated white jurors a total of 12 questions. With regard to this disparate questioning, the Court found that the record refuted the State's argument that differences in questioning was explained by differences in the jurors' characteristics. Finally, with regard to a particular black prospective juror, Carolyn Wright, the Court found that the State's peremptory strike was motivated in substantial part by discriminatory intent. The State said that it struck Wright in part because she knew several defense witnesses and worked at a Wal-Mart where Flowers' father also worked. The Court noted that Winona is a small town and that several prospective jurors knew many individuals involved in the case. It further noted that the State did not engage in a meaningful voir dire examination on this purported basis for striking Wright with similarly situated white potential jurors. The State also misstated the record while attempting to provide a race-neutral explanation of its strike of Wright to the trial court. The Court explained that "[w]hen a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent." The court concluded its analysis of the State's strike of Wright by explaining that its precedents require that the strike be examined "in the context of all the facts and circumstances," and that in this light "we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent."

Justice Thomas, joined in part by Justice Gorsuch, dissented. In Thomas's view, "[e]ach of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the *Batson* hearing."

Double Jeopardy

Refusing to overturn the dual-sovereignty doctrine, the Court held that the defendant's federal prosecution for felon in possession did not violate double jeopardy despite the fact that he had been previously convicted for the same instance of possession under state law

Gamble v. United States, 587 U.S. ___, ___ S. Ct. ___ (June 17, 2019)
Citing the text of the Double Jeopardy Clause of the Fifth Amendment, historical evidence, and "170 years of precedent," the Court refused to overturn the "dual-sovereignty" doctrine and held that the defendant's federal prosecution for unlawful possession of a handgun was not barred by principles of double jeopardy despite the fact that the defendant had been previously convicted for the same instance of possession under state law.

The defendant pleaded guilty in Alabama state court to possession of a firearm by a person convicted of a crime of violence and thereafter was indicted by the United States for the analogous federal offense based on the same instance of possession. He moved to dismiss on the ground that the federal indictment was for "the same offence" as the one at issue in his state conviction and thus exposed him to double jeopardy. The district court denied the motion and the Eleventh Circuit affirmed, each citing the dual-sovereignty doctrine – the long-standing principle that two offenses are not the "same offence" for double jeopardy purposes if prosecuted by different sovereigns. Reviewing the text of the Double Jeopardy Clause, historical evidence, and its precedent, the Court affirmed the lower courts and declined to depart from the doctrine.

Dissenting from the majority opinion, Justice Ginsburg characterized the dual-sovereignty doctrine as "misguided" and, for reasons explained in her dissenting opinion, would have overruled it. Dissenting separately, Justice Gorsuch also would have overruled the doctrine, saying that it "was wrong when it was invented, and remains wrong today."

Cases of Interest in 2019 Term

Kahler v. Kansas, No. 18-6135

QUESTION PRESENTED: Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

Ramos v. Louisiana, 18-5924

QUESTION PRESENTED: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

Mathena v. Malvo, 18-217

QUESTION PRESENTED: In Miller v. Alabama, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Id. at 465. Four years later, in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the Court held that "Miller announced a substantive rule of constitutional law" that, under Teague v. Lane, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when Miller was decided. Montgomery, 136 S. Ct. at 736. The question presented is: Did the Fourth Circuit err in concluding-in direct conflict with Virginia's highest court and other courts-that a decision of this Court (Montgomery) addressing whether a new constitutional rule announced in an earlier decision (Miller) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

Kansas v. Garcia, 17-834

QUESTION PRESENTED: In 1986, Congress enacted the Immigration Reform and Control Act CIRCA (IRCA). IRCA made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the

law. 8 U.S.C. § 1324a. Regulations implementing IRCA created a "Form I-9" that employers are required to have all prospective employees complete-citizens and aliens alike. IRCA contains an "express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens," Arizona v. United States, 567 U.S. 387, 406 (2012), but IRCA "is silent about whether additional penalties may be imposed against the employees themselves." Id. IRCA also provides that "[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5). Here, Respondents used other peoples' social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease. Kansas prosecuted Respondents for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions. This petition presents two questions, depending on the answer to the first question: 1. Whether IRCA expressly preempts the States from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications. 2. If IRCA bars the States from using all such information for any purpose, whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes.

Kansas v. Glover, 18-556

QUESTION PRESENTED: A Kansas officer ran a registration check on a pickup truck and learned that the registered owner's license had been revoked. Suspecting that the owner was unlawfully driving, the officer stopped the truck, confirmed that the owner was driving, and issued the owner a citation for being a habitual violator of Kansas traffic laws. The Kansas Supreme Court, breaking with 12 state supreme courts and 4 federal circuits, held the stop violated the Fourth Amendment. The question presented is whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

Kelly v. United States, 18-1059

QUESTION PRESENTED: Does a public official "defraud" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision?