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The Criminal Law Docket: A Term of Modest Changes

by Alan Raphael

The Supreme Court's most significant decisions regarding criminal procedure in the current term concerned double jeopardy, the bar on racial discrimination in jury selection, the excessive fines clause of the Eighth Amendment, and the right to counsel on appeal. Most of this article discusses the first two of those decisions. The Court decided only one case regarding the Fourth Amendment prohibition on unreasonable searches and seizures, and none interpreting the Fifth and Sixth Amendment restrictions on admission of confessions against defendants.

Double Jeopardy

In *United States v. Gamble*, 588 U.S. ____ (2019), the Court reaffirmed the dual-sovereigns (or separate-sovereigns) exception to the Double Jeopardy Clause. The double jeopardy doctrine announced in the Fifth Amendment prohibits a second prosecution of a defendant for the same offense. Under the dual-sovereigns exception, double jeopardy does not bar successive prosecutions by different governments, federal or state. Neither a state nor the federal government may prosecute or punish a defendant a second time for the same offense. A prosecution in a federal court does not bar the bringing of charges in a state court; similarly, a prosecution in a state court does not bar the bringing of charges or imposition of punishment subsequently in a federal court or in another state court.

Terence Martin Gamble was convicted of felony second-degree robbery in Mobile County, Alabama, in 2008 and two domestic violence charges in 2013. Under both Alabama and federal law, it is a crime for a convicted felon to possess a firearm. While driving his vehicle in 2015, Gamble was lawfully stopped for a traffic violation, and a lawful search turned up a weapon, marijuana, and a digital scale. Charged under Alabama law with being a felon in possession of a weapon, Ala. Code 12-25-32(15), Gamble pleaded guilty, was convicted, and served one year in prison. While the state prosecution was proceeding, the United States charged Gamble with violating the federal law prohibiting a felon from possessing a weapon, 18 U.S.C. 922(g), based on the same weapon which led to the state charges. Prior to seeking the federal indictment, the federal prosecutor in Alabama obtained permission from the Department of Justice to bring the charge as being consistent with the Petite Policy, which allows federal prosecutions following state prosecutions in specified circumstances.

Gamble moved to dismiss the federal charge as violating his Fifth Amendment right against being twice placed in jeopardy for the same crime. The district court denied his motion on the basis of the separate-sovereigns exception to the Double Jeopardy Clause,

which the Supreme Court has recognized as allowing successive prosecutions by separate sovereigns, such as the federal and state governments, even though the subsequent charge would be barred if both were brought by the same government. Gamble entered a plea to the federal charge, was convicted, and received a 46-month sentence, to be served concurrently with the state sentence. The total time served by Gamble was the amount he would have served had he been convicted only in federal court.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction in an unpublished ruling. It reasoned: "The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns." The appellate court's ruling cited as authority *Abbate v. United States*, 359 U.S. 187 (1959), which first clearly announced the exception, Eleventh Circuit cases from 1979 and 2004, which applied *Abbate*, and the most recent Supreme Court case applying it, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016). In *Sanchez Valle*, two concurring justices, Justices Clarence Thomas and Ruth Bader

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Ginsburg, urged the Supreme Court to reconsider whether there should be a separate-sovereigns exception to the double jeopardy rules.

The Supreme Court granted a writ of *certiorari* in Gamble's case to decide whether to follow or overrule the separate-sovereigns exception. By a 7–2 vote, the Court reaffirmed that the separate-sovereigns rule is consistent with the text, history, and intent of the Double Jeopardy Clause and thus found no reason to reverse Gamble's conviction. Justice Samuel Alito wrote the opinion for the Court, and Justice Clarence Thomas wrote a concurring opinion. Justices Ruth Bader Ginsburg and Neil Gorsuch dissented. All the justices focused on two issues: 1) the intent of the framers of the clause and early 19th century treatises and precedents and 2) the question of when it is appropriate for the Court to reverse existing precedents.

Gamble argued that two developments since *Abbate*, when the Supreme Court last addressed the issue of the separate-sovereigns exception to the Double Jeopardy Clause in 1949, eroded the Court's basis for the ruling. First, *Abbate* was decided in 1949, years before the Double Jeopardy Clause was held to apply to the states by *Benton v. Maryland*, 395 U.S. 784 (1969). Second, in the last half century, the scope of federal criminal law has increased greatly so that instances of overlapping state and federal jurisdiction are much more common, and thus possible instances of dual prosecutions for the same offense are much greater than had formerly been true.

As to the first, the Court stated that incorporation of the Double Jeopardy Clause as applied to the states included all aspects of the jurisprudence regarding the clause, including the dual-sovereigns exception. As to the second, the Court acknowledged the increased possibility of federal and state prosecutions for the same offense but saw the development as harmful only if the dual-sovereigns doctrine is legal error. Because the Court found no error in applying the dual-sovereigns rule, the possibly greater frequency of dual prosecutions does not provide any reason to abandon the doctrine.

The Court concluded that the historical evidence asserted by Gamble was “feeble” and that the text of the Clause, historical evidence, and 170 years of precedent justified retaining the rule allowing successive prosecutions for the same offense by different sovereigns.

In her *Gamble* dissent, Justice Ginsburg rejected the view that the federal and state governments are separate sovereigns and would have overruled the Court’s decisions regarding the dual-sovereigns exception. In her view, incorporation of the Double Jeopardy Clause as a protection against state governments meant that, like the federal government, states could not prosecute a person twice for the same offense. She saw no reason “why each of two governments within the United States should be permitted to try a person once for the same offense when neither could try him or her twice.”

Further, Justice Ginsburg viewed the expansion of federal criminal law as increasing the likelihood of dual prosecutions for the same offense, which would have been rare when federal criminal law’s scope was more limited. She pointed out that Gamble’s case was not an unusual or extraordinary one but, instead, a run-of-the-mill felon-in-possession charge.

What is probably more important than the fate of Gamble’s conviction or the retention of the dual-sovereigns rule are the justices’ differing views on the question of when the Court should follow existing precedent and when the Court should be willing to overturn well-established Court rulings. In the current term, the Court reversed long-established decisions in two cases, *Franchise Tax Board of Cal. v. Hyatt*, 587 U.S. ____ (2019), and *Knick v. Township of Scott*, 588 U.S. ____ (2019). The Supreme Court has been closely divided on numerous constitutional issues in recent years, and recent appointments to the Court have altered that balance so the majority may now favor positions on numerous issues previously articulated by dissenting opinions. The willingness of justices to overturn precedents may be crucial in determining constitutional law in numerous areas, such as abortion, affirmative action, deference to administrative agencies, death penalty jurisprudence, racial and political gerrymandering, rights of gay people, determinations of what unenumerated rights are protected by the federal constitution, and the scope of the Commerce Clause.

In *Hyatt*, dissenting Justice Stephen Breyer wrote of the dangers of reversing legal course “only because five Members of a later Court” decide that an earlier ruling was incorrect. He then concluded: “Today’s decision can only cause one to wonder which cases the

Court will overrule next.” In *Knick*, dissenting Justice Elena Kagan quoted Breyer’s words in *Hyatt* a month earlier and observed: “Well, that did not take long. Now one may wonder yet again.”

The Alito majority opinion in *Gamble* concluded that Gamble had failed to show that the exception was inconsistent with the original understanding of the Double Jeopardy Clause or that there was a good reason to reject the principle of *stare decisis*, the application of existing precedent. The Court recognized that *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process” (quoting from *Payne v. Tennessee*, 501 U.S. 808 (1991)). Although recognizing that *stare decisis* is less binding in constitutional adjudication when compared to statutory interpretation because in the former Congress cannot overturn decisions by ordinary legislation, the Court held that “even in constitutional cases, a departure from precedent ‘demands special justification.’”

In his concurring opinion, Justice Clarence Thomas concluded that his initial skepticism about the dual-sovereigns doctrine was not supported by the historical record. His concurrence expressed a very different view of the role of *stare decisis* in constitutional adjudication than that expressed by the Court in this case. He asserts that the Court should decide constitutional issues “through adherence to the correct, original meaning of the laws we are charged with applying.” For any decision that was “demonstrably erroneous—one that is not a

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permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.” Thus, the majority’s consideration of stability of the law, preservation of reliance interests, or judicial humility, in Justice Thomas’s view, improperly interfere with the duty to decide based on the original understanding of the constitutional provision. According to Justice Thomas, precedent may be relevant when it is not demonstrably erroneous, “when there is room for honest disagreement.” Applying those tests in this case led Justice Thomas to concur with the Court’s decision, concluding that “I am not persuaded that our precedent is incorrect as an original matter, much less demonstrably erroneous.”

Dissenting in *Gamble*, Justice Gorsuch asserted that “the [constitutional] text, principles of federalism, and history” demonstrate that the dual-sovereigns doctrine should be abandoned. Justice Gorsuch noted that the Court has always taken care in applying *stare decisis* in constitutional decisions because judges swear to protect and defend the Constitution. He pointed out that “blind obedience to *stare decisis* should leave this Court still abiding grotesque errors like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*.” Unlike Justice Thomas, Justice Gorsuch asserted that whether to apply *stare decisis* requires consideration of various factors—“the quality of the decision’s reasoning, its consistency with related decisions, legal developments since the

decision, and reliance on the decision.” He then applied each of these factors and concluded they supported an overruling of the separate-sovereigns exception.

Racial Discrimination in Jury Selection

In another case that received a great deal of popular attention because of a much-publicized podcast, the Court in *Flowers v. Mississippi*, 588 U.S. ____ (2019), reversed the convictions and death sentence of Curtis Giovanni Flowers for four murders in 1996 at a furniture company in Winona, Mississippi. The Court concluded that the prosecutor had engaged in racial discrimination by the use of peremptory challenges during jury selection in the trial. The prosecutor in the case was white, the African-American defendant had faced six trials for murder. The Supreme Court’s reversal of the conviction does not prevent the state from trying him again. Although the opinion strongly reiterated that courts must vigorously prevent racial discrimination in jury selection, the *Flowers* Court made clear that it was making no new law and that the facts of the case were so unusual that the decision has little precedential value.

The Sixth Amendment guarantees criminal defendants the right to a jury trial in criminal cases, applicable to state trials through the Fourteenth Amendment Due Process Clause, *Duncan v. Louisiana*, 391 U.S. 145 (1968). To select a jury, a random venire of prospective jurors is summoned. The potential jurors fill out questionnaires, and both parties and/or the court ask further questions to determine their fitness to serve on the jury. Then either party may challenge venire members for bias or other cause, and attorneys may strike a set number of them by peremptory challenges. A party usually does not have to disclose its reasons for exercising peremptory challenges. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court ruled that equal protection is violated by the exercise of peremptory challenges used intentionally for racially discriminatory purposes. Although *Batson* involved the actions of a prosecutor, subsequent decisions have extended its reach to all trials, civil or criminal, and all parties, and have also barred use of peremptory challenges for intentional gender discrimination.

To determine whether *Batson* has been violated, courts apply a three-part test. A party arguing that peremptory challenges were employed discriminatorily has the burden to prove a *prima facie* case of discrimination. If that standard is met, the court orders the party who used the challenges to provide nondiscriminatory reasons for each peremptory. The burden then shifts back to the objecting party to convince the court that purposeful discrimination has been shown. If the trial court determines that even one prospective juror was removed with discriminatory intent, then the defendant has met his burden of persuasion under *Batson*. In reviewing a *Batson* challenge, the appellate court must show deference to the trial court’s reasoning and will reverse only if it finds that the decision was clearly erroneous.

Initially, the prosecution tried Flowers for two of the murders in separate trials. During jury selection in the second trial, the judge found that the prosecutor had committed a *Batson* violation

in removing one person from the jury and reinstated the juror to the panel. Both those trials resulted in convictions, but both convictions were reversed because of numerous instances of prosecutorial misconduct. Flowers’s subsequent trials were for all four killings. At the third trial, the judge rejected a *Batson* claim of racial discrimination. On appeal, the Mississippi Supreme Court reversed the conviction after finding *Batson* violations regarding the challenges to two potential jurors. The Mississippi Supreme Court indicated that the prosecutor’s actions demonstrated the most egregious instance of a *prima facie* case of discrimination that it had seen. The next two trials resulted in mistrials because the juries could not reach unanimous verdicts.

The case before the Supreme Court involved the sixth trial. The same prosecutor acted for Mississippi in all six trials. The venire consisted of 26 people. There were 6 African-American venire persons; the prosecutor challenged 5 and allowed 1 to serve on the jury. Flowers challenged each of the strikes; the trial court found a *prima facie* showing of racial discrimination and ordered the

prosecutor to present race-neutral justifications for the peremptory challenges. The prosecutor did so, and the trial court found that Flowers had failed to meet his burden of showing that the challenges were intentionally

racially discriminatory. Flowers was convicted and sentenced to death. The Mississippi Supreme Court affirmed the convictions, rejecting the *Batson* claim. After remand from the United States Supreme Court for reconsideration, the state supreme court again affirmed by a narrow margin.

In ruling for Flowers on this appeal, the Supreme Court, in an opinion by Justice Brett Kavanaugh, found that the totality of the circumstances demonstrated that the trial court erred in denying the *Batson* claim. The Court concluded that four facts led to this conclusion. First, the state in the repeated trials used its peremptory challenges to remove 41 of the 42 black prospective jurors it could have struck. (Data is lacking regarding the fifth trial, so these statistics include only the first four trials and the present, sixth, trial.) Second, the prosecutor removed 5 of the 6 potential jurors in the sixth trial. Third, in questioning potential jurors, the prosecutor asked far more questions of the black jurors before striking them compared to the white jurors who were not struck; the Court saw this disparity in questioning as an apparent attempt to find pretextual reasons to strike black prospective jurors. Fourth, the state’s expressed reasons for striking one juror, Carolyn Wright, were equally relevant to a white juror who was not challenged. She was the only juror whose strike was found to be intentionally discriminatory. The Supreme Court opinion stated clearly that it was not deciding that any one of these four facts alone would require reversal of the conviction. Rather, it concluded that “all the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not ‘motivated in substantial part by discriminatory intent.’” The Court clearly stated that “we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.”

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Obviously, this decision is important to Flowers, whose four murder convictions and death sentence have been struck down. The state is free to retry Flowers again. The Court did not bar the same prosecutor from bringing the prosecution of Flowers or requiring the trial to be held in another county, although either would, if the next trial resulted in a conviction and a *Batson* claim were made, weaken the argument that there is a pattern of discrimination by the prosecutor in the numerous trials.

When the Supreme Court decided *Batson*, Justice Thurgood Marshall concurred. He applauded the Court for announcing that racially discriminatory use of peremptory challenges violates the Equal Protection Clause and for reversing contrary precedent. Nevertheless, Justice Marshall also indicated a belief that *Batson* would not eliminate impermissible racial discrimination and argued that the only remedy to do so was ending the practice of peremptory challenges entirely. Some critics of *Batson* believe that Justice Marshall was correct in his doubts about the effectiveness of the remedy the Court provided. Because the second step in *Batson*, requiring the challenged party to offer a nondiscriminatory reason for the challenge, is easily met, and because of the deference given by appellate courts to the determinations made by trial courts as to the third step in *Batson*, the procedures in fact often allow the continued use of peremptory challenges for racial or gender discrimination despite the decision's strong condemnation of the biased use of peremptory challenges.

Ineffective Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to counsel and includes the right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court held that ineffective assistance of counsel was determined by applying a two-part test: first, a defendant must demonstrate that counsel's performance was deficient; and second, a defendant must show that the deficient performance was prejudicial to his case. The *Strickland* requirement applies to trials as well as appeals.

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court held that prejudice would be presumed, and thus need not be demonstrated, when an attorney's deficient performance denied the defendant an appeal he otherwise would have pursued. This year, in *Garza v. Idaho*, 586 U.S. ____ (2019), the Supreme Court held that the presumption of prejudice recognized in *Flores-Ortega* applies when a defendant signs a waiver of appeal in the course of pleading guilty but then insists on filing an appeal, which his attorney fails to do.

In 2015, Gilberto Garza Jr. entered into two plea agreements arising from criminal charges brought by the state of Idaho. The agreements each contained a clause stating that Garza waived his right to appeal. Shortly after he was sentenced, Garza informed his trial counsel that he wished to appeal. According to Garza, he repeatedly attempted to notify counsel of his request, and the attorney later stated that he was aware of Garza's wish to appeal. Nevertheless, counsel did not file a notice of appeal and informed Garza, after the time for filing an appeal had passed, that his appeals would be "problematic" because of the waiver clause contained in the plea agreements.

Four months after being sentenced, Garza sought post-conviction relief in Idaho state court, alleging his attorney's ineffective assistance of counsel for failing to file a notice of appeal despite Garza's repeated requests. The Idaho trial court denied relief, and the Idaho Court of Appeals and the Idaho Supreme Court affirmed the decision. The Idaho Supreme Court held that Garza could not show deficient performance by counsel and the resulting prejudice, as required by *Strickland*. The Idaho court concluded that the presumption of prejudice recognized in *Flores-Ortega* does not apply when the defendant has agreed to an appeal waiver. In a 6–3 decision, the Supreme Court reversed, holding that *Flores-Ortega*'s presumption of prejudice for failing to file an appeal as sought by the client applies regardless of whether the defendant has signed an appeal waiver.

The *Garza* Court explained that "no appeal waiver serves as an absolute bar to appellate claims." Some waiver clauses may leave certain claims unwaived, and some claims cannot be waived. Thus, an attorney's refusal to follow the client's direction to file an appeal is always prejudicial. According to the Court in *Flores-Ortega*, filing a notice of appeal is a "purely ministerial task." Ultimately, the decision to take an appeal is the defendant's choice to make alone.

Ultimately, as *Garza* shows, the decision to take an appeal is the defendant's choice to make alone.

Excessive Fines Clause

In *Timbs v. Indiana*, 586 U.S. ____ (2019), the Court held that the Eighth Amendment's Excessive Fines Clause is applicable to the states under the

Fourteenth Amendment's Due Process Clause. Under the Eighth Amendment, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause, the Court reasoned, is a safeguard for defendants against abuses of the government's power to punish.

After pleading guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft, Tyson Timbs was sentenced to one year of home detention and five years of probation, including a requirement for Timbs to participate in a substance abuse treatment program. Additionally, Timbs was required to pay fees and costs totaling \$1,203. The state then brought a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle was used to transport heroin. The vehicle, which Timbs had recently purchased for \$42,000 using money from insurance proceeds and not from drug sales, was seized at the time of Timbs's arrest.

Although the trial court found that the vehicle had been used to transport heroin, it denied the forfeiture because the purchase price of the vehicle was more than four times the maximum \$10,000 monetary fine that could have been assessed against Timbs in his criminal case. Because of this disproportionality, the trial court determined that the forfeiture was unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed the trial court's determination, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause is applicable only to federal action, but not to state action. The Indiana Supreme Court did not decide the question of whether the forfeiture in this case was excessive.

The Supreme Court granted a writ of *certiorari* to decide whether the Eighth Amendment’s Excessive Fines Clause is applicable to the states under the Due Process Clause of the Fourteenth Amendment. In a 9–0 vote, the Court reversed the Indiana Supreme Court’s decision and held that the Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment. Justice Ruth Bader Ginsburg wrote for the Court, and Justices Clarence Thomas and Neil Gorsuch wrote concurring opinions. The concurring justices agreed as to the result, but would find the incorporation under the Fourteenth Amendment Privileges or Immunities Clause rather than under the Due Process Clause.

The Court’s opinion focused on the history of incorporating Bill of Rights protections to the states, as well as the application of the Excessive Fines Clause to state civil *in rem* forfeitures (the forfeiture of property used in the commission of an offense). Justice Ginsburg noted that the history of the Clause dated back to the Magna Carta and that, at the time of the ratification of the Fourteenth Amendment, 35 of the 37 states expressly prohibited excessive fines. The protections found in the Bill of Rights are enforceable against state action under the Fourteenth Amendment, Justice Ginsburg explained, if the protection is “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition.” *McDonald v. Chicago*, 561 U.S. 742 (2010). The Court found those tests met and thus concluded that the Indiana Supreme Court erred in holding that the Clause did not apply to the state court’s forfeiture of Timbs’s vehicle.

Indiana argued that the Excessive Fines Clause “does not apply to its use of civil *in rem* forfeitures because...the Clause’s specific application to such forfeitures is neither fundamental nor deeply rooted.” In responding to this argument, the Court reiterated its opinion in *Austin v. United States*, 509 U.S. 602 (1993), which held that civil *in rem* forfeitures are fines that fall within the protection of the Excessive Fines Clause when they are at least partially punitive. To succeed in its argument, the Court contended, the state would have to convince the Court to overrule *Austin*, or to hold that the Excessive Fines Clause is not incorporated because its application to civil *in rem* forfeitures is neither “fundamental nor deeply rooted.”

The Supreme Court refused to consider the question of whether the Court should overrule *Austin* because the state did not make that argument in the Indiana Supreme Court. In the Indiana Supreme Court, the state had argued that the forfeiture of Timbs’s SUV was not excessive; that court in no way addressed the Clause’s application to civil *in rem* forfeitures. Thus, the Court declined to reconsider *Austin* or to decide whether civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are partially punitive.

Indiana’s final argument posited that application of the Excessive Fines Clause to the states cannot be incorporated even if it does apply to civil *in rem* forfeitures. The Court reasoned that, once a Bill of Rights protection is incorporated, there is no difference between

application of that right to conduct by the federal government and conduct by the states. It acknowledged one exception to this rule, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held that jury unanimity is required in federal, but not state, criminal proceedings, but indicated that the exception reflected an unusual judicial disagreement and it is unclear if the Court would continue or overrule that exception if it were challenged.

Accordingly, the Supreme Court vacated the Indiana decision and remanded the case for further proceedings.

Searches and Seizures

For the third time in recent years, the Court addressed warrantless searches for blood alcohol concentration (BAC) in the bodies of allegedly impaired drivers, in *Mitchell v. Wisconsin*, 588 U.S. ____ (2019). The Fourth Amendment has two clauses, one setting the requirements for issuance of warrants by judges and one prohibiting unreasonable searches and seizures. Warrants are not always required, but there is a preference for having judicial authorization before a police officer carries out a search or seizure. In numerous circumstances, court decisions have approved exceptions to the warrant procedure, finding good reason for dispensing with a warrant and declaring the searches to be reasonable.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court recognized that forcing people to have blood taken from their body is a search, but upheld the warrantless blood draw of an

apparently intoxicated driver involved in an automobile accident as reasonable under the exigent, or emergency, circumstances exception to the warrant requirement. The presence of alcohol in blood diminishes once the person stops drinking, so the Court concluded it is important to have the test done quickly in order to obtain a proper reading to be used in evidence.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Supreme Court clarified that *Schmerber* did not hold that all nonconsensual blood tests were allowed in evidence without warrants but rather that the further delays caused by police dealing with an automobile accident, combined with the natural decrease over time in BAC, created an exigent circumstance allowing the warrantless search.

Birchfield v. North Dakota, 579 U.S. ____ (2016), applied the search incident to arrest exception to the warrant requirement to justify warrantless breath tests of persons arrested for drunk driving but not warrantless blood tests, because the breath tests are less intrusive, equally trustworthy, and readily able to be performed. This term, the Court addressed whether a warrantless blood test should be allowed to be admitted in evidence when the person in custody was unconscious or otherwise physically unable to participate in the breath test.

Like all states, Wisconsin law provides that a driver, by obtaining a license, has given implied consent to submit to a BAC test when there is probable cause to believe that the person was driving while impaired by alcohol. Although drivers can withdraw the consent

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and refuse the test, their license may then be revoked and their refusal used against them in court to show that they were driving over the legal alcohol limit. Gerald Mitchell was stopped lawfully while driving and arrested for driving while intoxicated. Police took him to the station for the breath test, but he was too lethargic to perform the test and then became unconscious. He was taken to the hospital, whose personnel performed a blood test on him while he was unconscious. His BAC was substantially over the legal limit. His conviction on the drunk driving charges was affirmed by the state courts on two grounds: first, that the implied consent laws mean that Mitchell consented to the blood test, thus satisfying the Fourth Amendment, and second, that it is reasonable to perform a warrantless blood test on an unconscious person because the less intrusive breath test is not available.

Most of the briefing and argument before the Supreme Court concerned whether implied consent laws indicated consent to taking the BAC test, but the Court did not decide that question. Instead, it concluded that Mitchell's inability to undergo the breath test due to his lethargy and unconsciousness, combined with the natural diminution of alcohol in his blood over time, almost certainly created an exigent circumstance that justified performing the BAC test without a judge first issuing a warrant for it. The exigency was established because the officer could reasonably believe that the delay necessary to obtain a warrant threatened the destruction of the blood content evidence of driving while intoxicated. The Court recognized that in unusual cases the defendant could rebut the finding of exigent circumstances and remanded the case to the Wisconsin courts.

Charges of driving while intoxicated are numerous, so any decision regarding BAC testing is important. Such searches comply with the Fourth Amendment if a warrant is issued before the test is performed, or if the arrestee voluntarily consents to the test. A BAC

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test is not allowed simply because the person has been lawfully arrested, but a breath test may be carried out without a warrant allowing it. The tests are allowed without a warrant if there is an exigent circumstance, an emergency, or a similar necessary situation, including situations in which a police officer is dealing with a vehicle accident and, almost always, a situation in which the condition of the suspect precludes carrying out the less intrusive breath test. The Court has not decided whether the existence of an implied consent law makes any BAC test reasonable or whether an unconscious person has given a voluntary consent if, at the time of the test, the person was unable to revoke the implied consent to the blood draw.

This term, the Court's opinions regarding criminal procedure were more modest in scope than in recent terms, which applied the Fourth Amendment to new technologies and limited the scope of the exclusionary rule. *Gamble* and *Flowers* received the most media attention, but neither made any change in existing legal doctrine. *Timbs* did change the law by holding that the Excessive Fines Clause applied to the states, but the decision is not surprising in light of the reasoning of *McDonald v. Chicago*, 561 U.S.742 (2010), applying the second amendment to the states. Similarly, *Garza* and *Mitchell* do not represent surprising changes from recently decided cases.



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