

CRIMINAL YEAR SEMINAR

**April 17, 2020
Webinar**



US Supreme Court Law Update

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Distributed By:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY
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**OCTOBER TERM 2019
(2019 and early 2020 cases)
SUPREME COURT OF THE
UNITED STATES**



**LAW OFFICES OF
Robert J. McWhirter**

Courts and Process





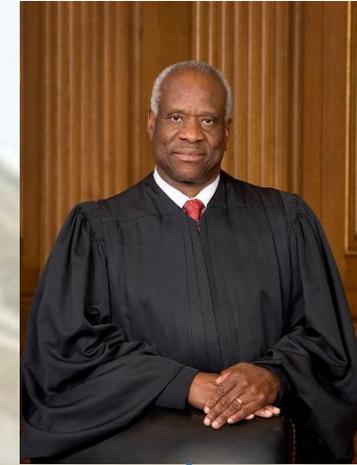
SUPREME COURT
OF THE UNITED STATES

Oral arguments scheduled for the March and April sessions have been postponed.

- In “keeping with public health precautions ...”
- Justices’ private conferences to consider new cases continue but some of the justices (6 over age of 60) “may participate remotely by telephone.”



“I hate waiting.”



Clarence Thomas =
Next oldest.
The current
longest-serving
justice
28 years, 177 days
as of April 17, 2020

SUPREME COURT OF THE UNITED STATES
Intel Corporation Investment Policy Committee v. Sulyma,
Slip Op. No. 18-1116 (U.S. S. Ct., Feb. 26, 2020),

Intel loses and English wins!

Question: What does “actual knowledge” mean.

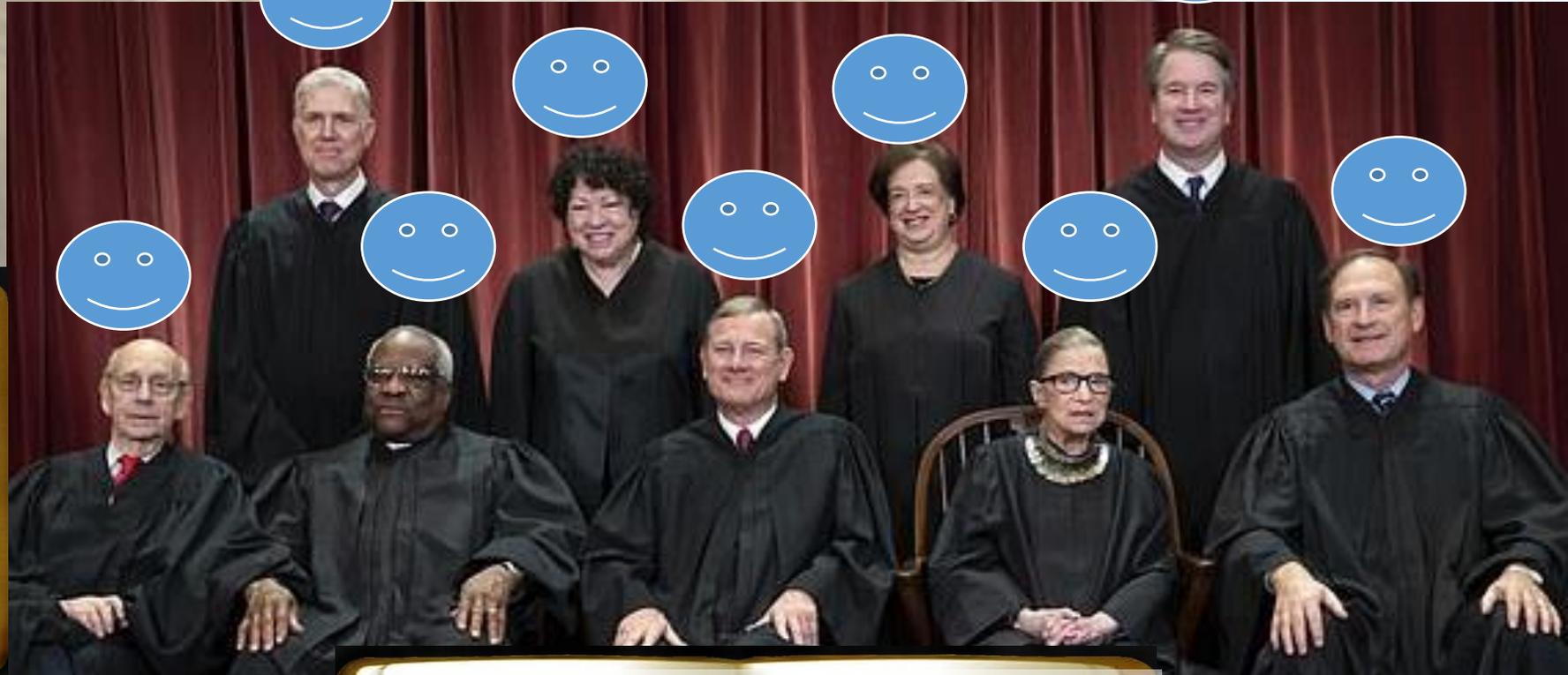
- ❖ Claim under the Employee Retirement Income Security Act of 1974 (ERISA) must be within 6 years of “actual knowledge” of violation.
- ❖ Intel claimed that financial disclosures on a website = “actual knowledge.”



Intel Corporation Investment Policy Committee v. Sulyma,



“Dictionaries are hardly necessary to confirm the point but they do.”



In law, “acutal knowledge” means actual knowledge, ie, you really gatta know it.

Non-Criminal Cases to Watch

Chiafalo v. Washington, 19-465

Issue: Is a state law threatening a fine for presidential electors who vote contrary to the law unconstitutional under the 1st Amendment?



Colorado Depart. of State v. Baca, 19-518

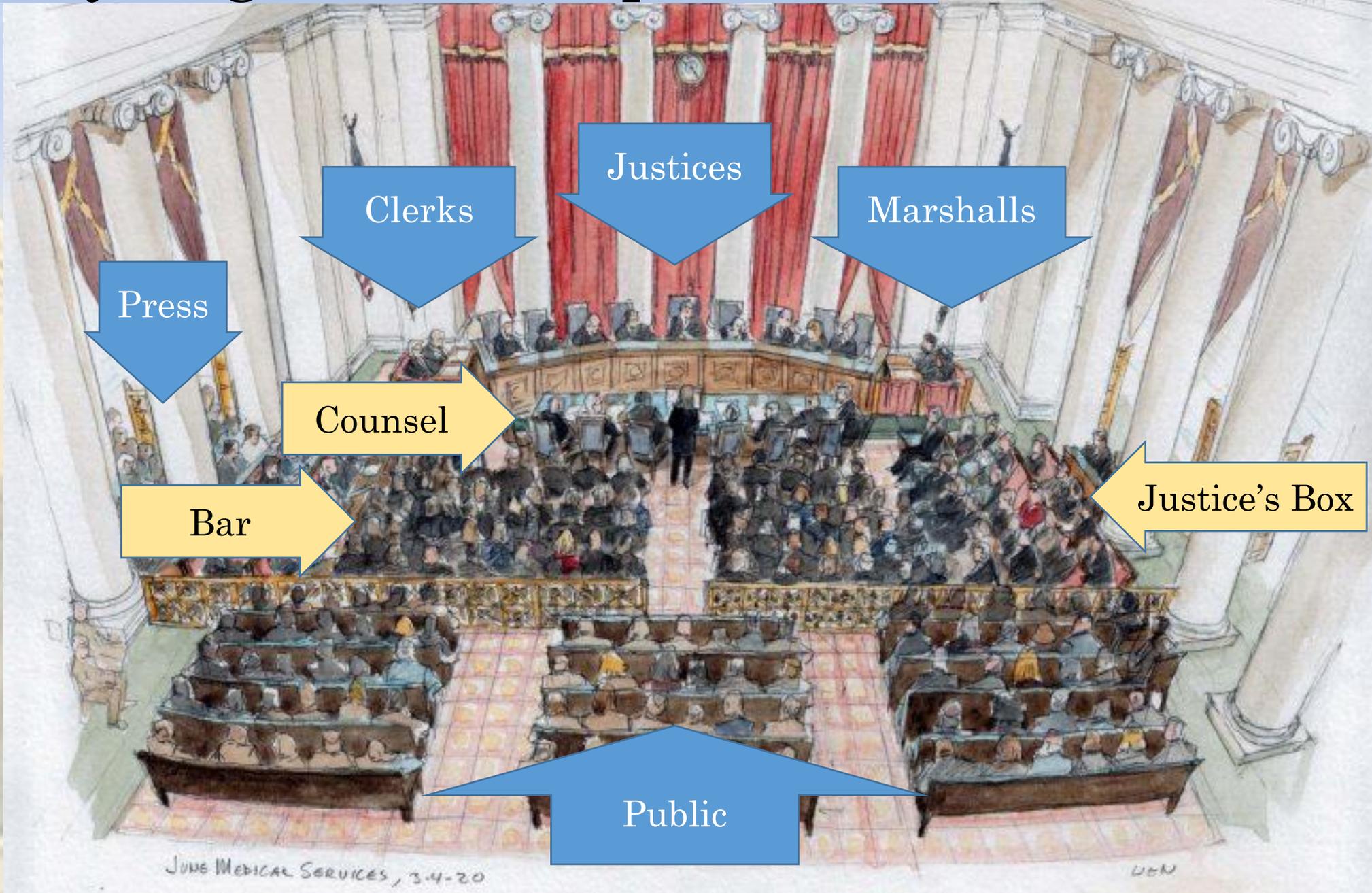
Issues:

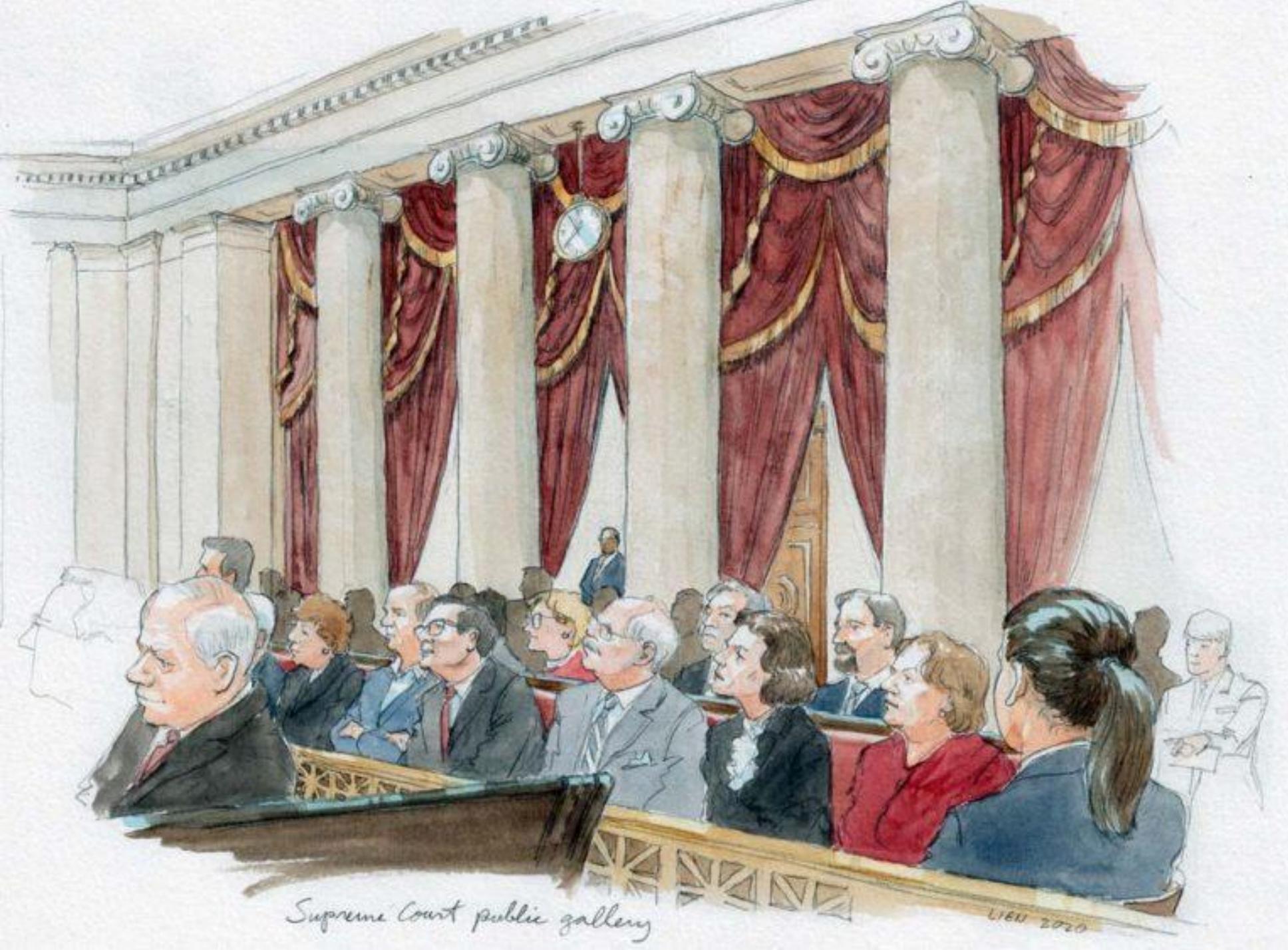
(1) Does a presidential elector have standing to sue their appointing state

(2) Does Article II or the 12th Amendment forbid a state from requiring its presidential electors to follow the state's popular vote when casting their ballots.



When you go to the Supremes!





- 439 seats
- Only 50 (11%) for general public.





The “public line”

- ❖ Right-hand sidewalk across First Street.
- ❖ 7:30 am officers hand out at least 50 tickets.
- ❖ The rest of the line waits outside for more tickets between 9:30 and 10 a.m.
- ❖ **The “three-minute line”** - 25 seats set for the public in the “three-minute line” allowing people to cycle through the courtroom for three to five minutes.



O, the Brave New World of the 4th Amendment

The 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTH

The Fourth Amendment

"THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED."

4

When Great Britain ruled the Colonies, officials could search someone even when they had no real reason to suspect that person of crime. The FOURTH AMENDMENT forbids this. It says officials need special permission from a judge to search people or their belongings. This special permission is called a "search warrant." To get a search warrant, police must show they have good reason to believe a law has been broken. And the warrant must describe the place and people to be searched and any belongings to be seized.

AMENDMENT

FORBIDDING UNREASONABLE SEARCHES AND SEIZURES.



SUPREME COURT OF THE UNITED STATES
KANSAS v. GLOVER
No. 18–556

From last year



SUPREME COURT OF THE UNITED STATES
KANSAS v. GLOVER
No. 18–556

Issue: During an investigatory stop, can an officer reasonably suspect the vehicle's registered owner is driving absent contrary information.

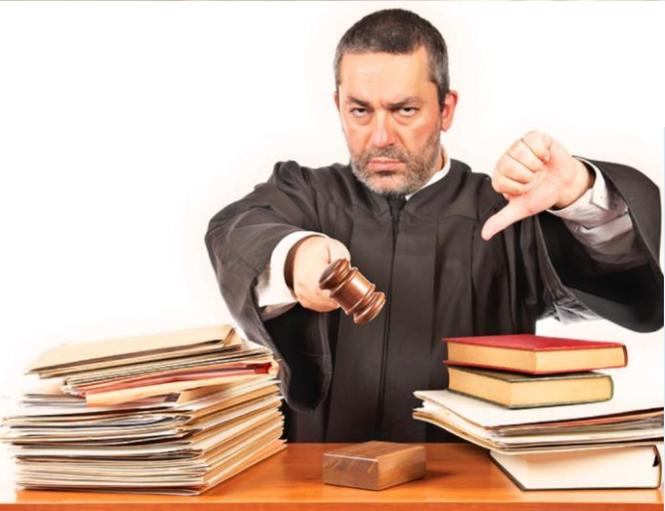
- Sheriff's deputy checked pick-up registration.
- Registered to Glover – who had revoked driver's license.
- Glover charged with driving without a license.



KANSAS *v.* GLOVER, No. 18–556

Glover argues deputy lacked reasonable suspicion to stop.

Kansas argues reasonable suspicion because deputy knew car's owner lacked valid driver's license and could infer owner was driver.



- Trial judge against Glover
- Kansas Supreme Court for Glover.
- Kansas petitioned U.S. Supreme Court.



At oral argument ...

Kagan: What about *Florida v. Harris*?

Kagan: “[Y]ou’re asking for a very different approach than we unanimously decided was proper in that case. I don’t think [it] makes all that much difference. The idea was that if you have a trained dog and it gives an alert, there’s a reason to think that there’s drugs in the car.”



Kansas Solicitor General Toby Crouse

Kansas Solicitor General Toby Crouse, KANSAS v. GLOVER, 11-9-19

SUPREME COURT OF THE UNITED STATES

FLORIDA *v.* HARRIS

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 11–817. Argued October 31, 2012—Decided February 19, 2013

- First case to challenge the dog's reliability
- Data = average of up to 80% of dog's alerts are wrong.

• **Background:** “Aldo” did a “free air” sniff

• **Held:** Court can presume (subject to conflicting evidence) a certified dog's alert provides probable cause to search, under "totality-of-the-circumstances."

Aldo



At oral argument ...

Kagan: We know something about the dog's history. We know something about the dog's training. We know something about the other circumstances. And I think what you're asking us to do is essentially to say that all of those similar things in this context become irrelevant because we just have, as Justice [Ruth Bader] Ginsburg said, this single circumstance, which is that a non-registered owner is driving the car.



Kansas Solicitor General Toby Crouse

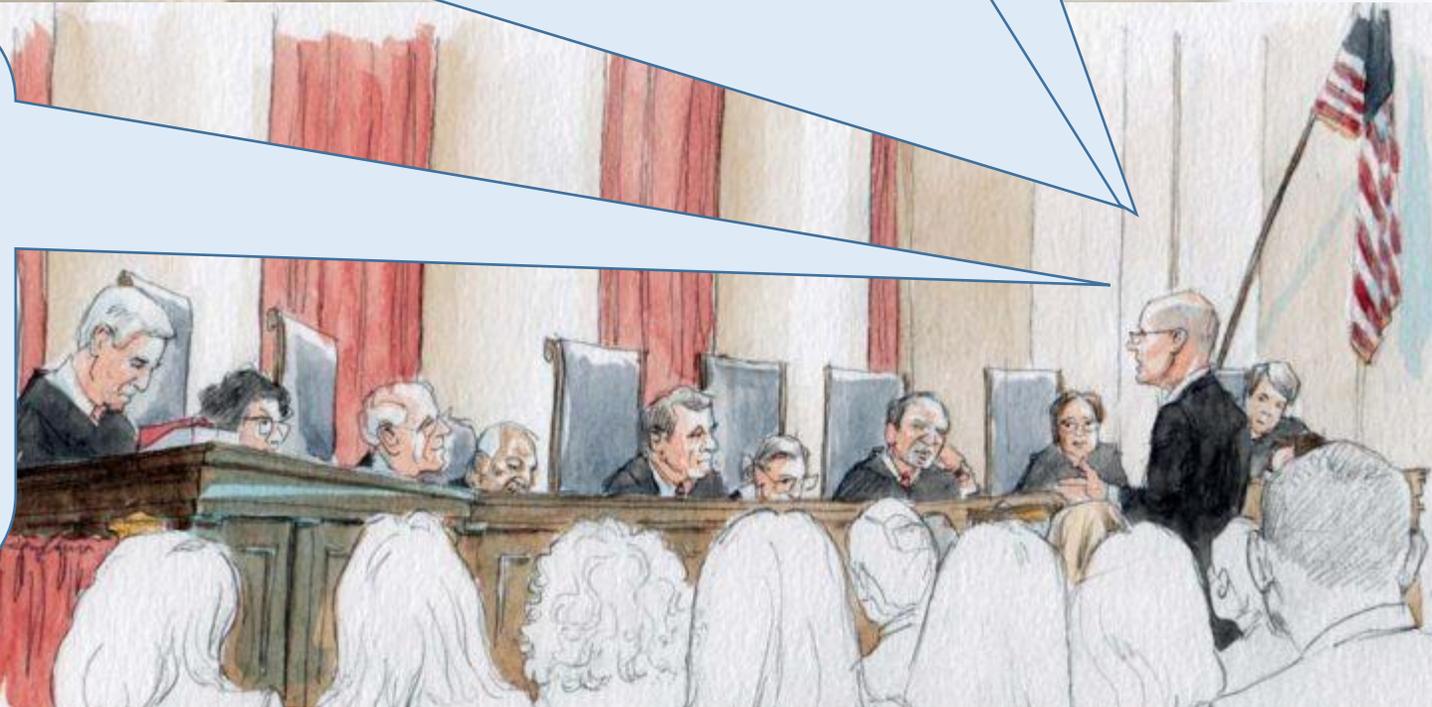
Kansas Solicitor General Toby Crouse, KANSAS v. GLOVER, 11-9-19

At oral argument ...

Crouse: “Yeah, I actually think that’s helpful because it depends upon what the nature of the inquiry is.”

Crouse: “Here’s it’s driving while suspended and the registered owner and the connection to the driver is common.”

Crouse: “With regard to a trained dog to sniff out particular drugs, I think there the dog actually alerted to a drug that it was not trained to identify.”



Kansas Solicitor General Toby Crouse

Kansas Solicitor General Toby Crouse, KANSAS v. GLOVER, 11-9-19

Roberts: “Do you think it’s totally random who the driver is? In other words, it’s registered to Fred Jones, but it could be anybody in the world?”

Roberts: “Okay. Do you think the odds that it’s Fred Jones are 5 percent? ... And where are you going to stop? Surely one out of ten, it’s Fred Jones’s car. And when the officer goes up, he sees that ... it’s a middle-aged man and not a teenage girl. Is it still like — is it maybe one out of ten chances?”

“I think it is probably one out of ten that an owner with a valid license is driving his car.”
conceded.



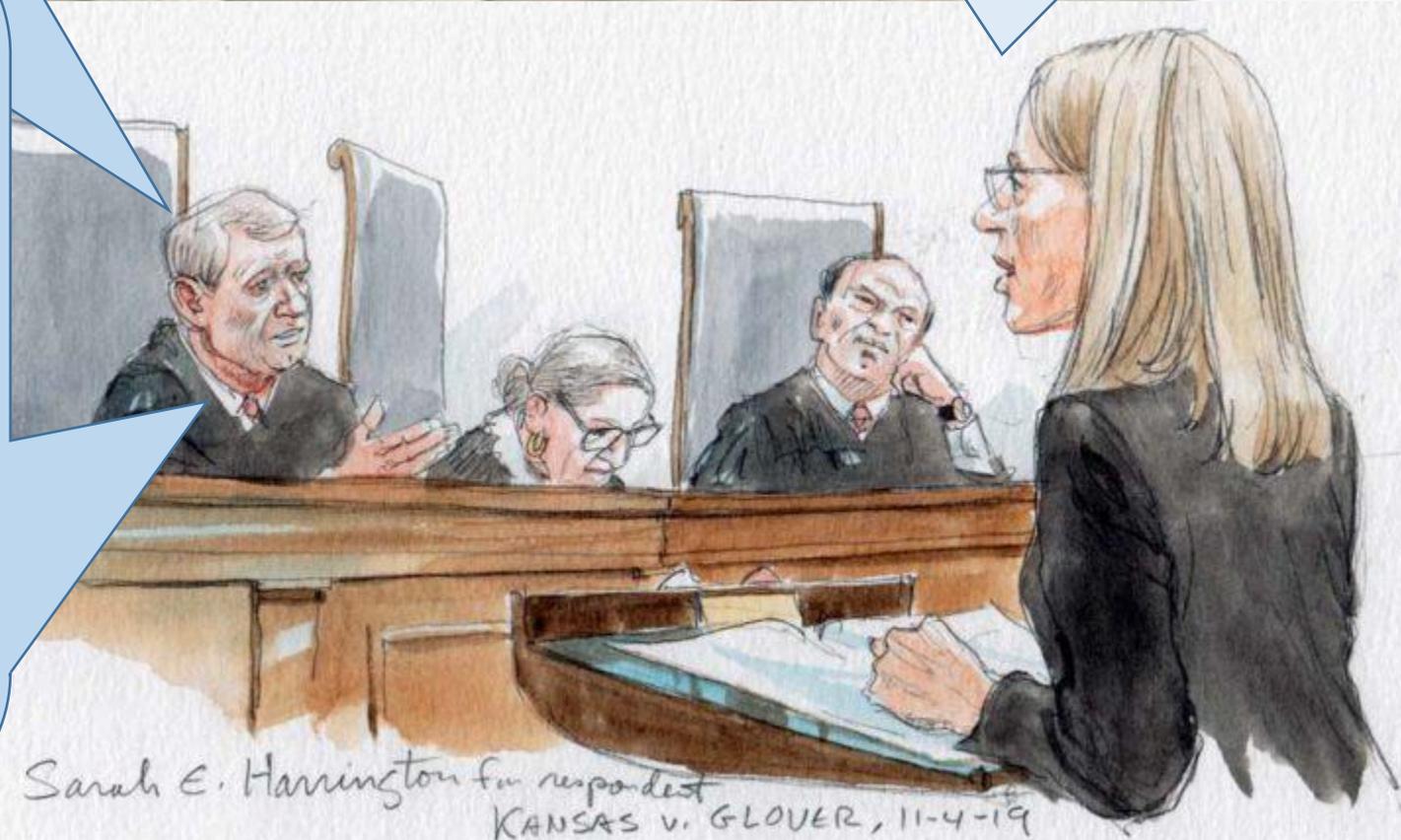
Harrington for Glover

At oral argument...

Roberts: “What reasonable suspicion cutoff do you think? Do you think it’s one out of five?”

“I can’t say because this Court has said repeatedly that none of us can say, right?”

Roberts: “No, the point is most of us can say. And the reason is because reasonable suspicion does not have to be based on statistics, it does not have to be based on specialized experience. As we’ve said often, it can be based on common sense.”



At oral argument ...

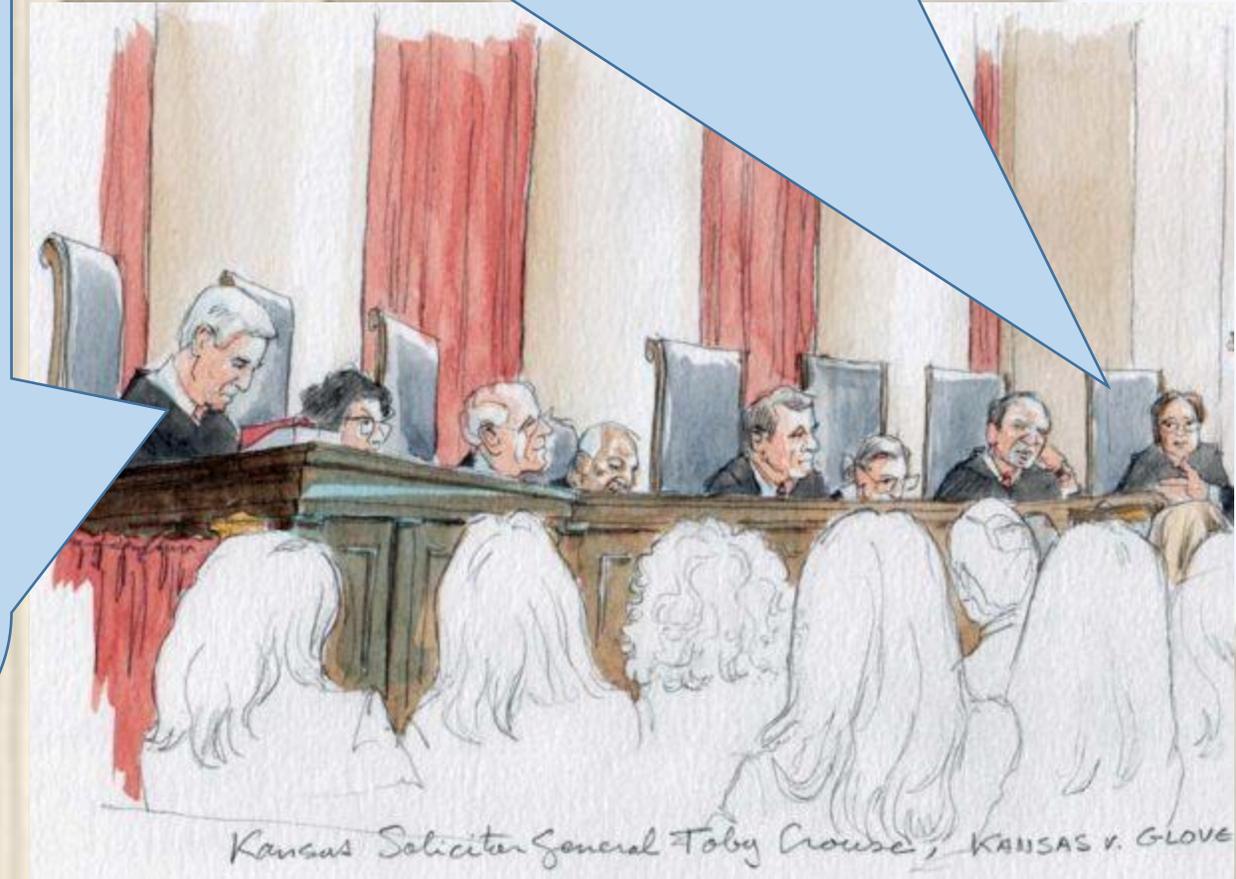
“How do we know if it is common sense?”

Roberts: “I already got you to 10 percent!”



Kagan: “I mean, it’s just like the dog, right? Somebody certifies me, somebody trains me, I’ve seen this done by my partner, I’ve heard about it being done by other people in my department.”

Gorsuch: “If that’s all that is at issue here, is that Kansas ... neglected to put an officer on the stand to say in my experience the driver is usually the owner of the car or often is, what are we fighting about here? It seems to me that it’s almost a formalism you’re asking for this Court to endorse.”



Gorsuch: “The officer will now come in and say — and recite — I mean, we’re just asking for a magic incantation of words.”

“The question isn’t whether an owner usually drives his car but whether an owner who doesn’t have a valid license usually drives his car.”

“But there would be an opportunity for cross-examination.”



Alito: “What are all of the considerations that you think the officer has to take into account before initiating a stop? Trying to check with headquarters as to the basis for the license suspension? Whether it’s an urban area or a rural area or someplace in between? Whether it’s a highway or a city street? Whether it’s raining? Whether it’s dark? Maybe whether it’s a law-abiding community where people who have suspended licenses never drive?”



Alito: “After having done that and when there is a motion to suppress, the judge has to take into account all of those factors?”

“Just like in any Fourth Amendment case, Justice Alito, you’d have to look at the full factual context. And here we did not hear from the local law enforcement officer at the suppression hearing. We did hear from the local trial judge, and she said, in her experience, based on her life in the community of Lawrence, Kansas, this was not a reasonable assumption.”

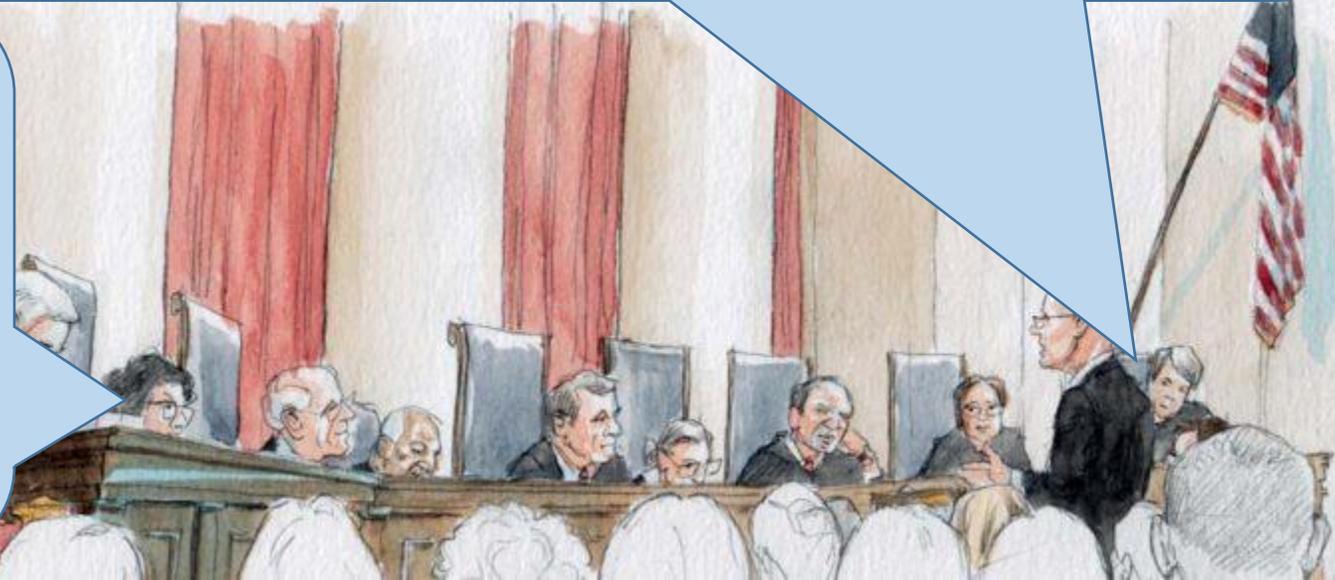


Other approaches...

Regarding having officers continue to observe the vehicle until a traffic violation.

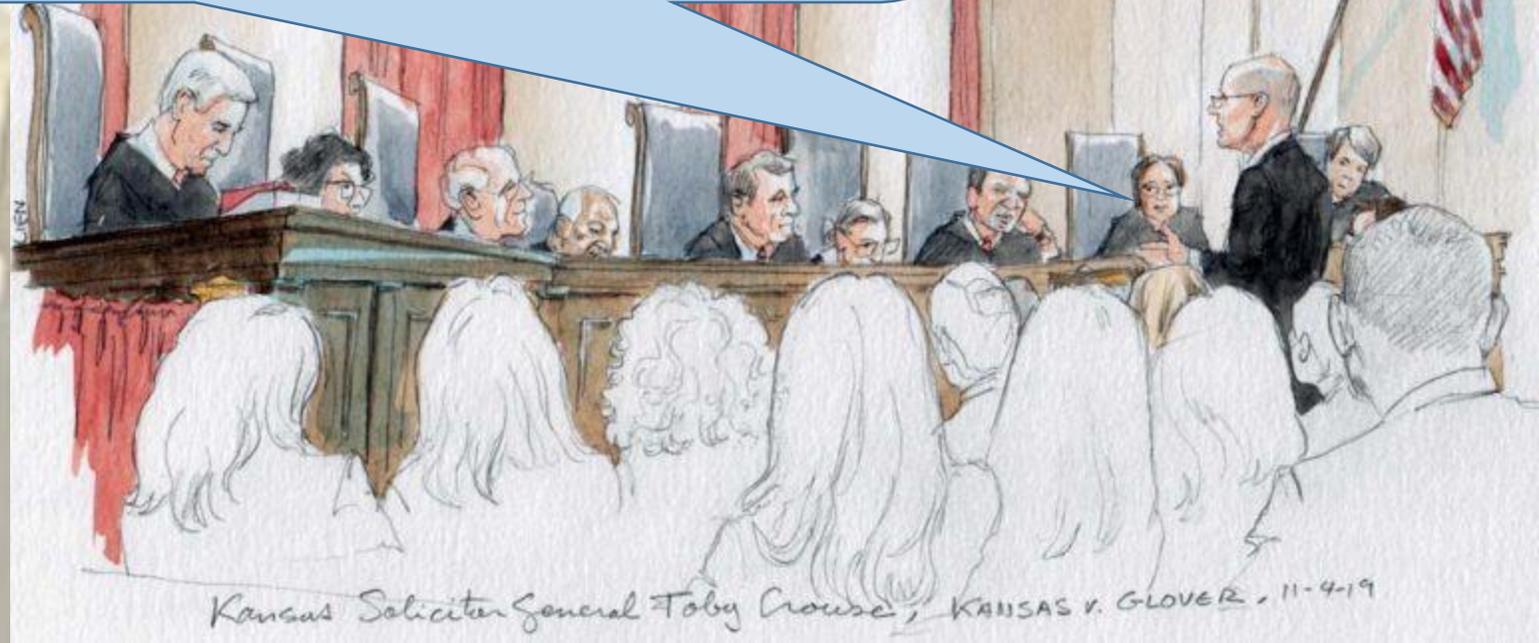
Kavanaugh: “I’m trying to figure out what purpose that would serve. Just, okay, instead of stopping right away, I’m going to follow you until you go 31 in the 30, and then I’m going to immediately pull you over.”

Sotomayor: Could the officer try to get a look at the driver to see if the age and sex seem to match up with those of the registered owner, provided that the maneuver is safe under the circumstances?



Other approaches...

Kagan: “[Y]ou don’t really require that anybody be followed until they do something wrong, and you don’t really require that a police officer goes and checks out who’s sitting in the front seat. As long as the police officer shows up to the suppression hearing and says, ‘I based this on my training and my experience’ and subjects himself to some form of cross-examination.”



Reminder from 2017-18

BYRD v. UNITED STATES, 584 U.S. ____ (2018)

Held: Driver in lawful possession of a rental car though not listed on the rental agreement still has a reasonable expectation of privacy.

Prediction:

If we assume the rental case driver has a 4th Amendment expectation of privacy, then an officer can reasonably assume the driver is an owner?



Sample Car Rental Agreement

Between and by Exchange House Holdings, LLC, and "Named Driver" _____

Named Driver: dob _____ License # _____ Issuing Country _____

Dates of coverage _____ to _____

Please read carefully the Terms and Conditions of Use (see over).

The Named Driver is eligible to drive any of the vehicles listed below:

Make/Model/Year	VIN #	Odometer at beginning of Dates of Coverage	License Tag #
Ford Escort Wagon 1997	3FALP15P3VR117041	184,970	BFV 1772
Mazda 626 1999	1YVGF22C7X5867368	134,718	BFT 9651
Nissan Frontier 2001	1N6DD26S41C390222	173,970	BEH 7878

*In the Terms and Conditions of Use (see over),
"the Vehicle" refers to any one of the vehicles listed above.*

Replacement value of each vehicle listed above: \$3,500.00

SUPREME COURT OF THE UNITED STATES

Torres v. Madrid 19-292

COMING
ATTRACTIONS

COMING
ATTRACTIONS

➤ **Issue:** Is an unsuccessful attempt to forcefully detain a suspect a 4th Amendment “seizure”?

Circuit split:

Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold an unsuccessful attempt is still a seizure.

vs.

Tenth Circuit and the D.C. Court of Appeals hold there must be actual physical detention to be a “seizure”.

SUPREME COURT OF THE UNITED STATES

Torres v. Madrid 19-292

COMING
ATTRACTIONS

COMING
ATTRACTIONS

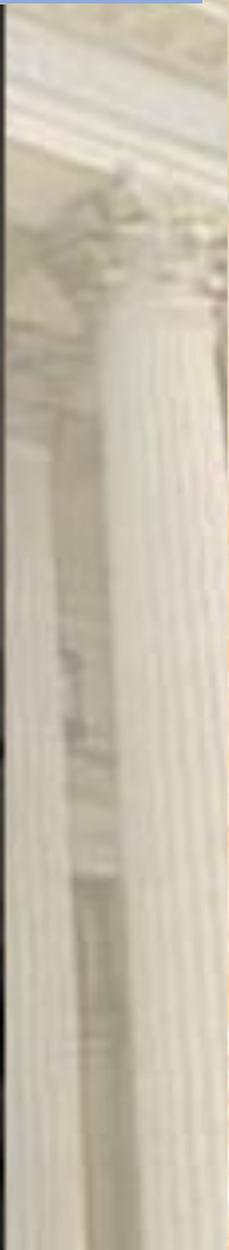
➤ **Issue:** Is an unsuccessful attempt to forcefully detain a suspect a 4th Amendment “seizure”?

What happened?

- ❖ Excessive force suit.
- ❖ Police shot Petitioner, but she drove away and eluded capture.
- ❖ District court (and 10th Circuit) granted summary judgment for the officers because no “seizure” occurred.



The 5th Amendment



FIFTH

The Fifth Amendment

"NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHER-WISE HEAVY CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB, NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION."

5

AMENDMENT

CERTAIN RIGHTS OF PERSONS ACCUSED OF CRIMES AND PERSONS WHOSE PROPERTY IS TO BE TAKEN.

The first part of this amendment says a person can only be put on trial for a serious crime after a grand jury first agrees that this should happen. A grand jury is a group of citizens who decide whether there is enough evidence to try someone for a crime. The FIFTH AMENDMENT also says a person normally cannot be tried more than once for the same crime. And it says persons accused of crimes cannot be forced to make any statements that might be used against them in a trial. That's why police must now tell people under arrest that they "have the right to remain silent." The FIFTH AMENDMENT says a person accused of a crime must be given "due process of law" — that is, all laws and rules must be followed in that person's trial. Finally, the amendment says the government cannot take away anyone's property without paying for it fairly.

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Reminder from 2017 Talk

Bravo-Fernandez v. United State,

Held: The Double Jeopardy Clause does not bar government from retrying defendants after a "jury has returned irreconcilably inconsistent verdicts."

Commonwealth of Puerto Rico v. Sanchez Valle

Held: The Double Jeopardy Clause bars the governments of Puerto Rico and the United States from prosecuting the same person for the same crime.

SUPREME COURT OF THE UNITED STATES
GAMBLE v. UNITED STATES
No. 17–646 - Argued December 6, 2018

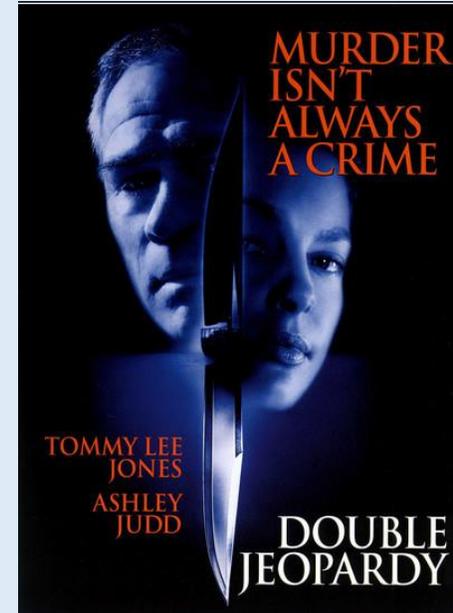
From last year

➤ **Issue:** Should the Supreme Court end the “separate sovereigns” exception to the double jeopardy clause?



GAMBLE *v.* UNITED STATES, No. 17–646 - Argued December 6, 2018

- Alabama police pull over Gamble for faulty headlight.
- Two bags of marijuana, a digital scale, and a handgun.
- Both state and federal felon in possession of a firearm charges.
- Gamble argued prosecuting him for federal and state firearm charges violates the 5th Amendment's double jeopardy clause,
 - No one shall “be twice put in jeopardy” “for the same offence.”



GAMBLE *v.* UNITED STATES, No. 17–646 - Argued December 6, 2018

- The lower courts rejected claim because of “separate sovereigns” doctrine –
- State and federal governments are different sovereigns and therefore can both prosecute someone for the same conduct.

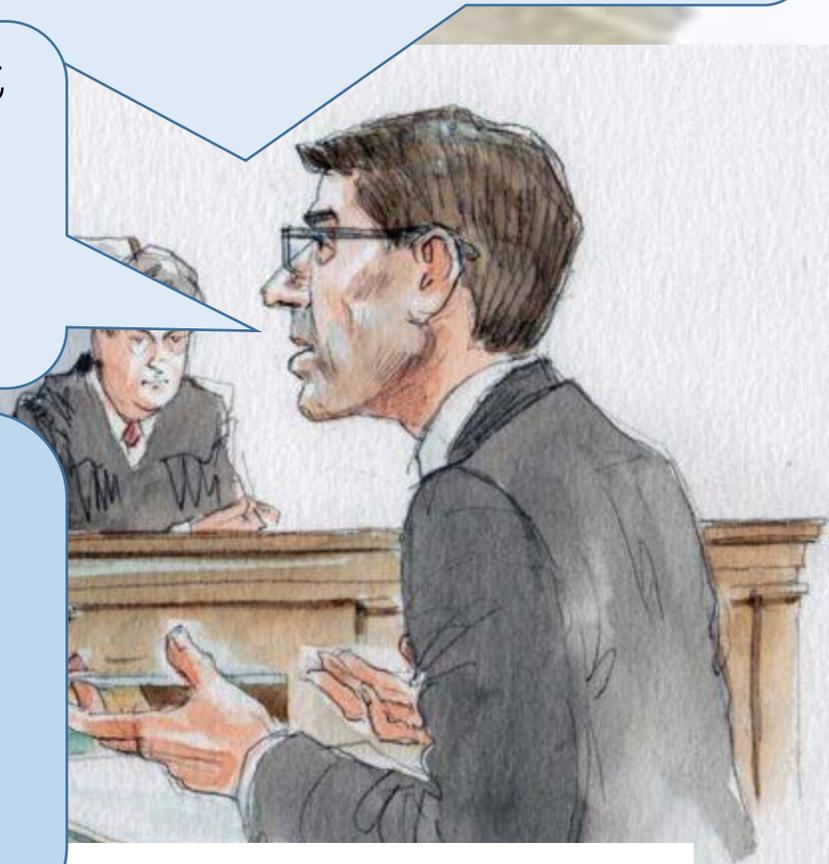


GAMBLE *v.* UNITED STATES, No. 17–646 - Argued December 6, 2018

The separate sovereigns' doctrine is inconsistent with the text and original meaning of the double jeopardy clause.

A “mountain of affirmative evidence” shows that in the years before the U.S. Constitution, courts in England did not allow successive prosecutions.

Roberts: It would be “surprising” for the new republic to adopt a rule that would intrude on American sovereignty.



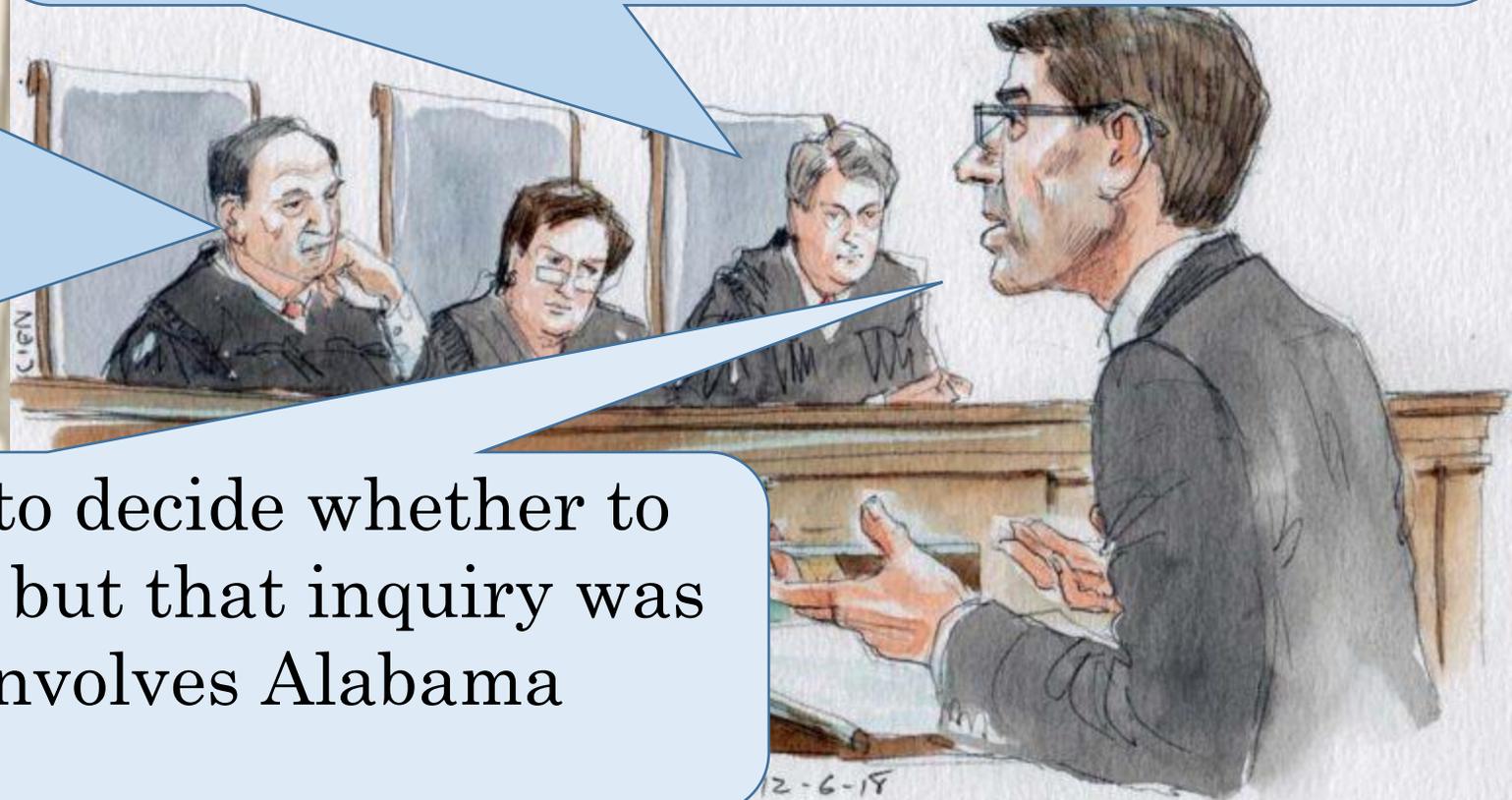
maintain for Gamble

GAMBLE v. UNITED STATES, No. 17–646 - Argued
December 6, 2018

Alito – Hypo: What about if a foreign country acquits terrorists for murdering Americans, does that mean the United States can't prosecute the terrorists?

Kavanaugh – But we need to consider the question because your position extends to foreign prosecutions and could hamper national-security.

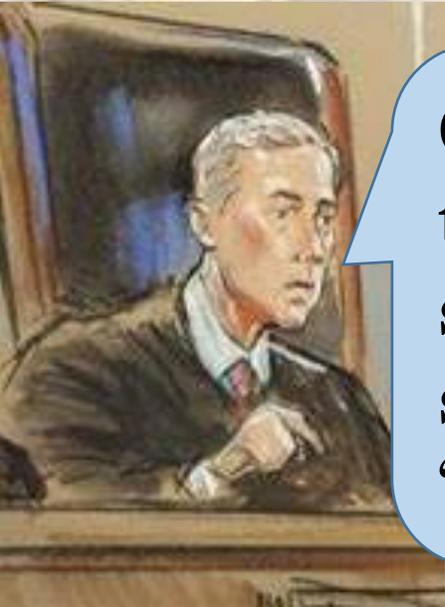
The U.S. court would have to decide whether to recognize the foreign court, but that inquiry was not necessary here, which involves Alabama courts.



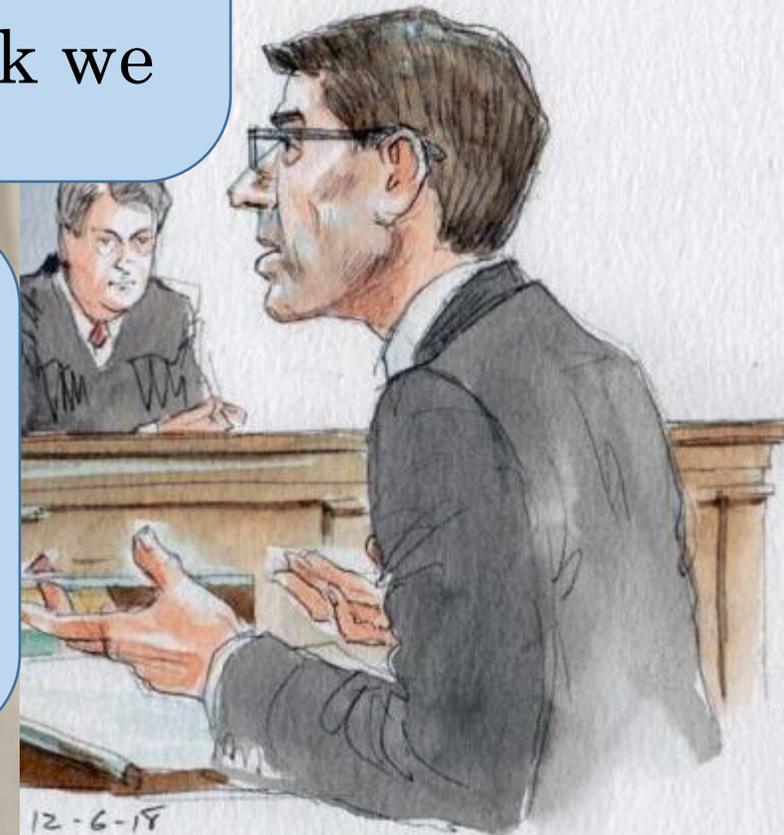
GAMBLE v. UNITED STATES, No. 17–646 - Argued
December 6, 2018



Kagan - Separate sovereigns' doctrine is a “170-year-old rule” for which 30 justices have voted. *Stare decisis* is a doctrine of “humility”; we don’t want to overrule an earlier decision just because we think we can do it better.

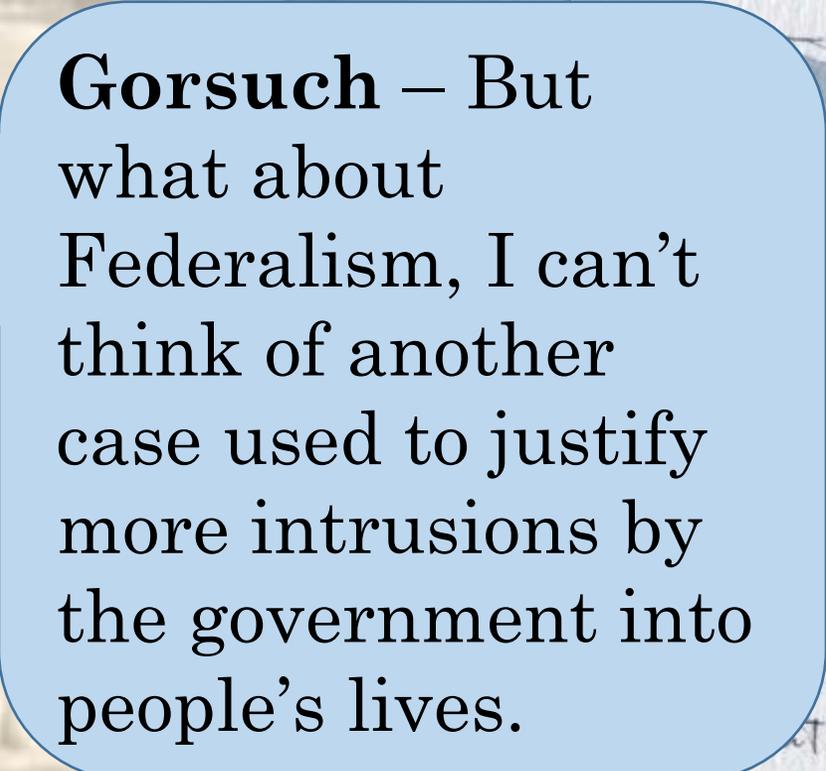


Gorsuch - Why, “of all the errors this Court has made over the years,” should we overrule the separate sovereigns’ doctrine.
“Why should we care about this one?”



GAMBLE *v.* UNITED STATES, No. 17–646

Gorsuch later seemed to side with Ginsburg and Thomas who had previously suggested the Court should reconsider the separate sovereigns doctrine.



Gorsuch – But what about Federalism, I can't think of another case used to justify more intrusions by the government into people's lives.



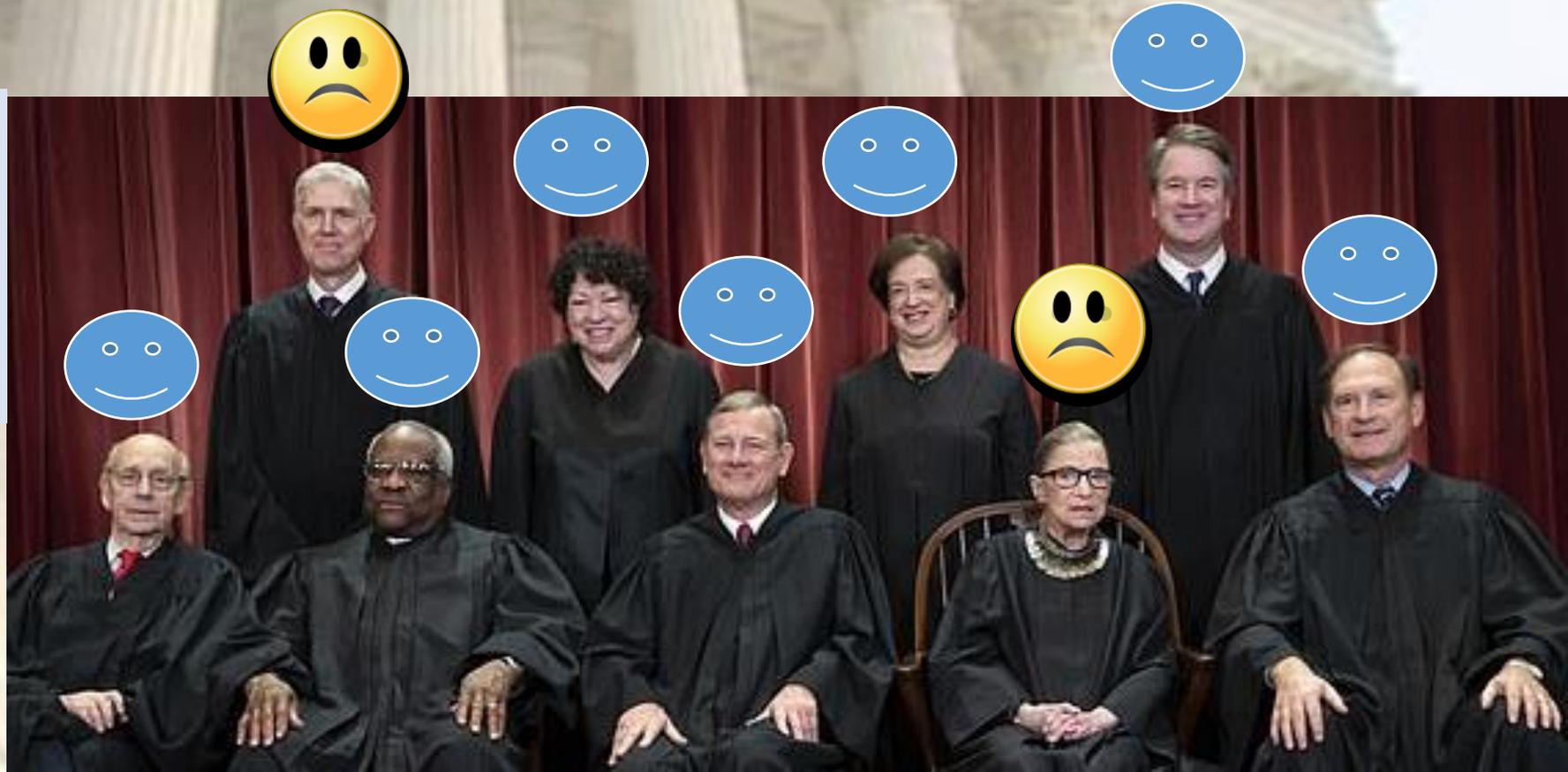
Eric Feigin, Assit. solicitor gen.

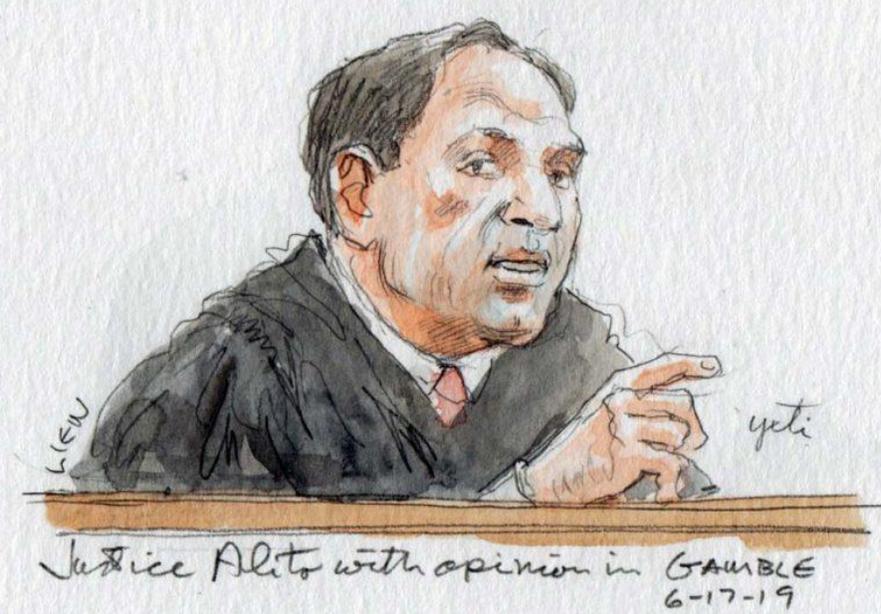
GAMBLE v. UNITED STATES, No. 17-646 (June 17, 2019).

Held: Dual-sovereignty doctrine upheld.

Judgment: Affirmed, 7-2.

Alito Opinion
Thomas Concurrence
Ginsburg and
Gorsuch dissents.

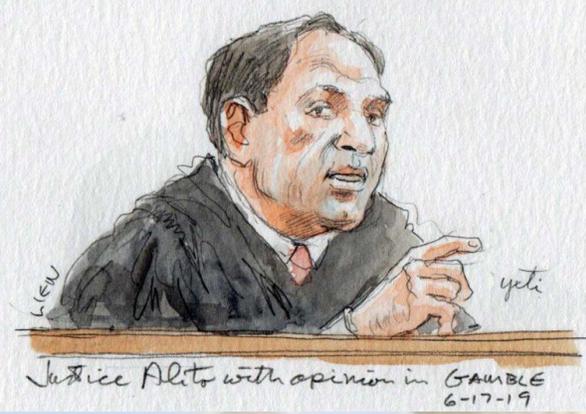




the “separate sovereigns” doctrine is not an exception to the double jeopardy clause at all, but instead is part and parcel of the clause itself because the clause bars successive prosecutions for the same offense – not for the same conduct.

“So where there are two sovereigns, there are two laws,” and therefore two offenses.

“[I]f only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court.”



Gamble argues the “separate sovereigns” cases conflict with the Founding Fathers. But stare decisis “means” Gamble must offer “something more than ambiguous historical evidence.”

Gamble cannot “do so with enough force to break of chain of precedent linking dozens of cases over 170 years.”

Thomas Concurrency ...

The “proper role of stare decisis” is that “if the Court encounters a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.”

“[P]roponents of stare decisis tend to invoke it most fervently when the precedent at issue is least defensible” and stare decisis “has had a ‘ratchet-like effect,’ cementing certain grievous departures from the law into the Court’s jurisprudence.”



Thomas Concurrence ...

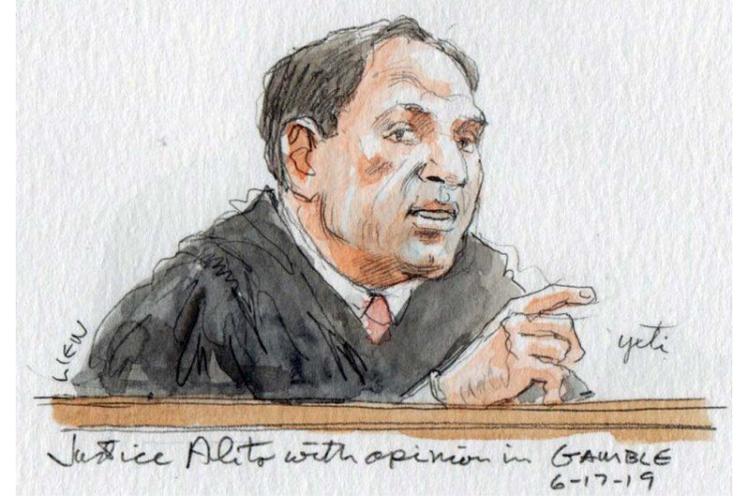
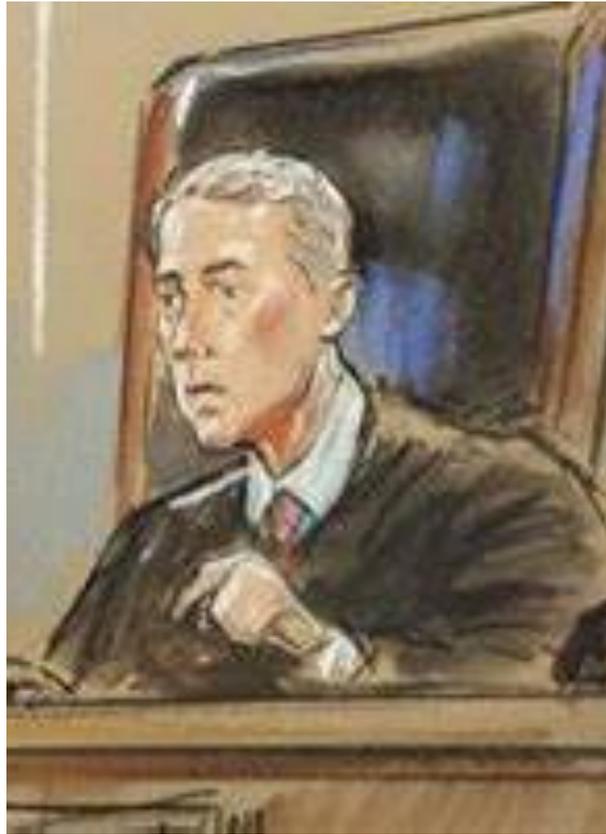
Stare decisis “elevates demonstrably erroneous decisions ... over the text of the Constitution and other duly enacted federal law.”



Gorsuch Dissent ...

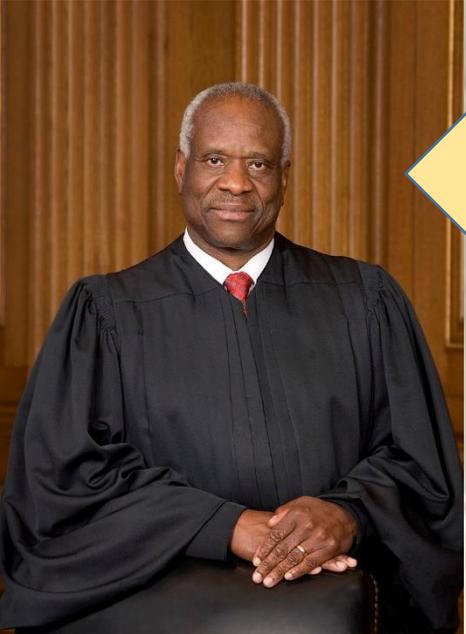
“[B]lind obedience to stare decisis would leave this Court still abiding grotesque errors like” the Supreme Court’s 1857 decision holding that blacks were not citizens and could not bring a lawsuit in U.S. courts or its 1944 decision upholding the internment of Japanese-Americans during World War II.”





So what's the deal with stare decisis?

Supreme Court precedent on Reproductive rights



Thomas aims at *Casey v. Planned Parenthood* (1992) case upholding abortion rights under *Roe v. Wade*.

There may now be 5 members of the court who agree

Chief Justice Roberts has worked hard to avoid this issue including using *stare decisis* arguments.



GAMBLE v. UNITED STATES, No. 17–646 (June 17, 2019).

Implications of a win for Gamble?

Sate court prosecutions from Special Counsel Robert Mueller's investigation into possible Russian interference in the 2016 election.





The 6th Amendment



SIXTH

The Sixth Amendment

"IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

This amendment says a person accused of a crime has a right to be brought to trial quickly. That trial must be public — in other words, it must not be held in secret. Accused persons must be told what crimes they have supposedly committed. They must be allowed to see and hear all witnesses used to prove them guilty. And they have a right to make witnesses come to court who can help them. Really, the **SIXTH AMENDMENT** says any accused person has a right to the help of a lawyer during his or her trial.

AMENDMENT

OTHER TRIAL RIGHTS OF PERSONS ACCUSED OF CRIMES.



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SUPREME COURT OF THE UNITED STATES
KAHLER v. KANSAS
March 23, 2020

➤ **Issue:** Whether the 8th and 14th Amendments permit a state to abolish the insanity defense.

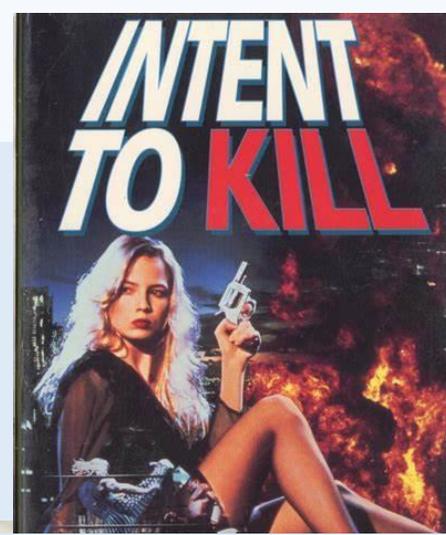
Until 1979, every jurisdiction in the United States allowed mentally ill defendants to assert the insanity defense.

➤ In 1996 Kansas eliminated the insanity defense—unless the defendant shows he was unable to form the “mental state” necessary to violate the law.

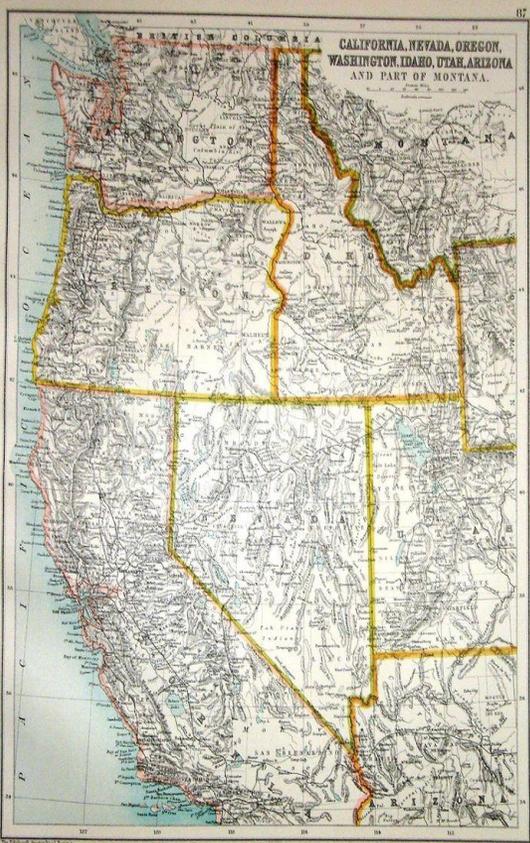


KAHLER *v.* KANSAS

➤ A defendant unable to form the “intention” to kill could not be convicted, but one who could “intend” to shoot or kill could be, regardless of how distorted the subjective reasons for doing so.



- 3 other states—Idaho, Montana, and Utah—abolished the insanity defense,
- Alaska truncated the defense allowing conviction even if a defendant didn't understand right from wrong at the time of the crime.
- 7 others—California, Colorado, Louisiana, Minnesota, Mississippi, Nevada, Washington—courts suggest the Constitution requires the insanity defense.



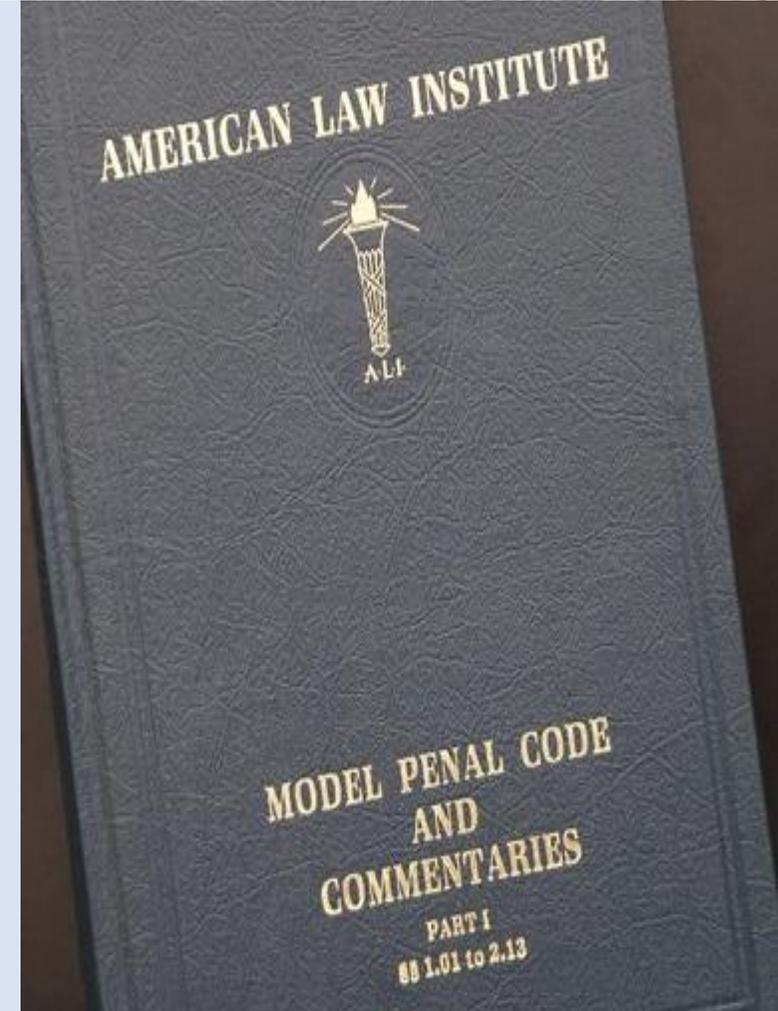
45 states split between

➤ Model Penal Code – lacks capacity to appreciate the criminality of the act or to conform to the law.

➤ And

➤ M’Naghten – Lacks ability to distinguish between right and wrong

➤ New Hampshire – Durham Rule – “A person who is insane at the time he acts is not criminally responsible for his conduct.”



- 1843 - The M'Naghten Rules – a panel of judges answered Parliament's hypothetical questions defining the rules.
- Daniel M'Naghten had been acquitted for killing Edward Drummond, whom he mistook for British Prime Minister Robert Peel.



DANIEL M'NAUGHTEN.

B. MARKETS.

"at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong."

Sir Robert Peel
First police - 1860s
"Bobbies" or "Peelers."

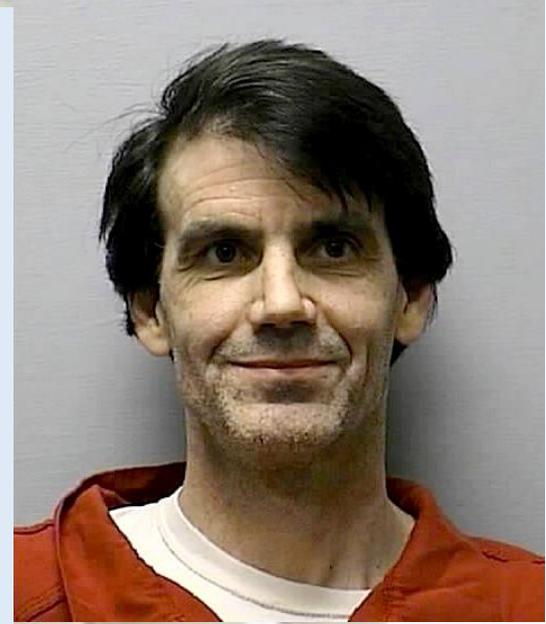


Supreme Court

- *Ford v. Wainwright* 477 U.S. 399 (1986) - upheld the common law rule that the insane cannot be executed.
- Also, a person under the death penalty is entitled to a competency evaluation and to an evidentiary hearing in court regarding his competency to be executed.
- *Wainwright v. Greenfield*, held it is fundamentally unfair for the prosecutor to argue the respondent's silence after receiving Miranda warnings was evidence of sanity.

KAHLER *v.* KANSAS, 18-6135

- James K. Kahler in 2009 went to his ex-wife's grandmother's house on Thanksgiving 2009 and killed the grandmother, his ex-wife, and the couple's two daughters.
- Lawyers offered evidence he was suffering from major depressive and obsessive-compulsive disorders.
- A defense expert testified that Kahler "felt compelled" to kill and was, for that period, "completely out of control."

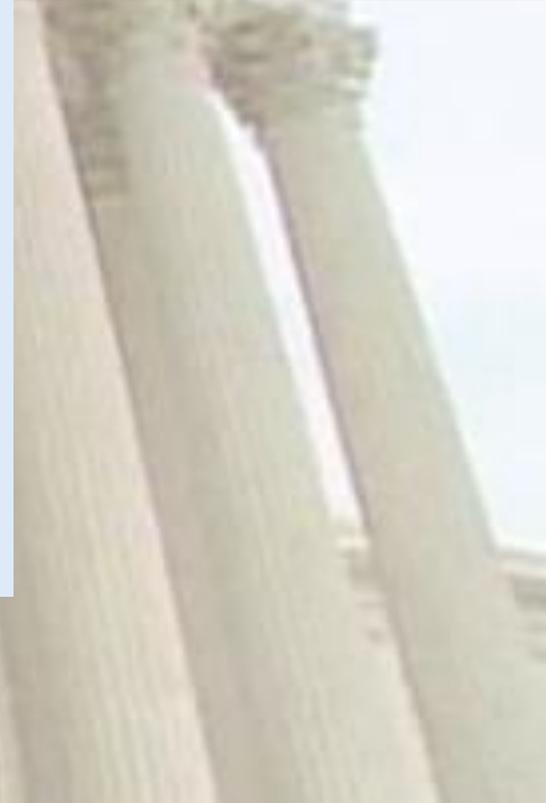


KAHLER *v.* KANSAS, 18-6135

- Jury could decide only whether Kahler had the intent to kill;
- Jury concluded he did and sentenced him to death.
- Kansas supreme court rejected his constitutional challenge to the insanity law.

- Argument before Supreme Court:

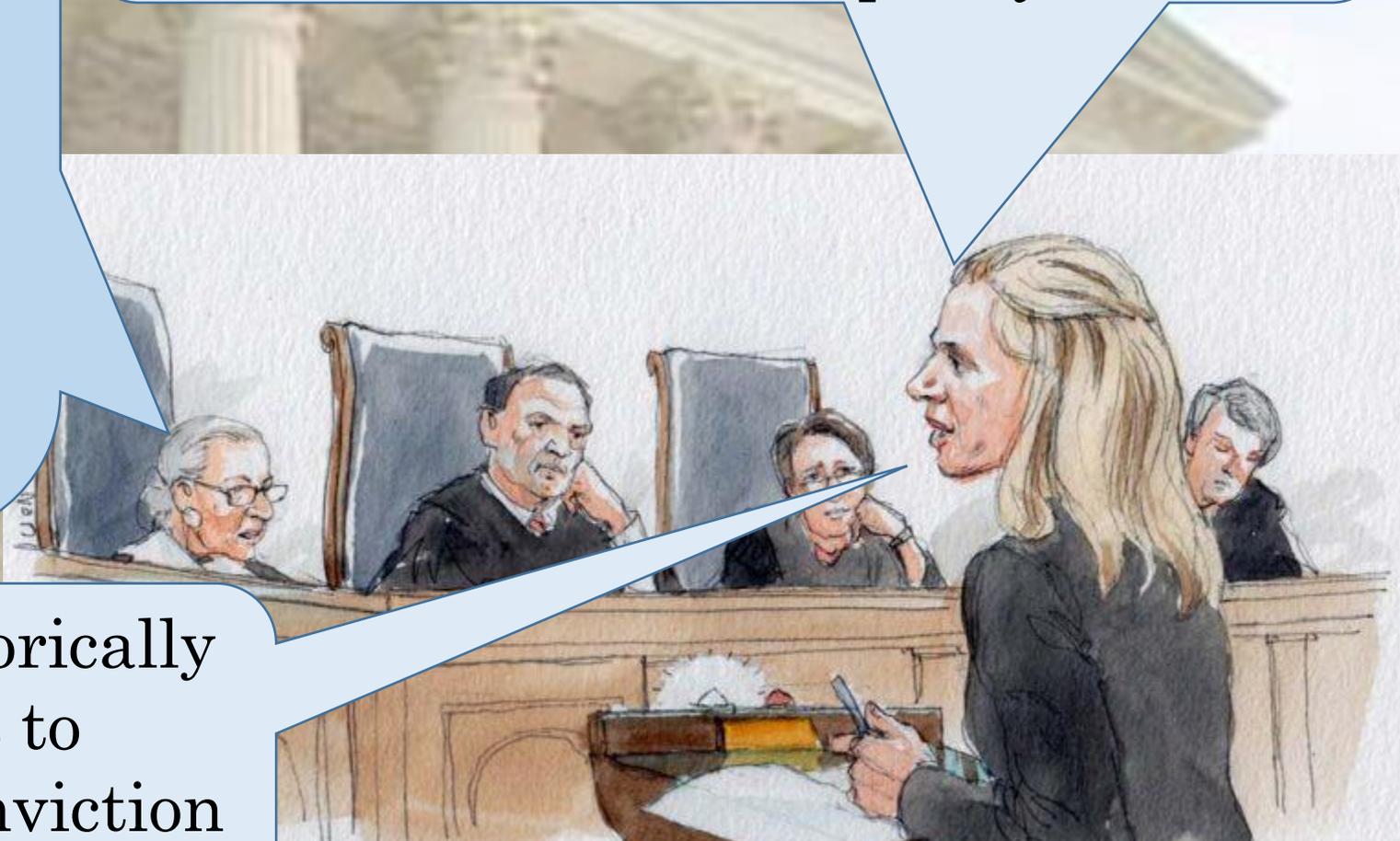
- Does blocking the traditional insanity defense violate the 8th Amendment's ban on "cruel and unusual" punishment?



Ginsburg: Would it violate the Constitution if a state decides to “rethink” the insanity defense, creating the prospect that someone could be found guilty but nonetheless insane and then committed to a psychiatric hospital instead of prison.

For centuries, a defendant’s culpability hinged on his ability to distinguish between right and wrong. The insane lack that capacity.

Someone who is insane historically would not have been subject to prosecution at all. And a conviction could carry a stigmatizing effect.



Schrup
KAHLER v. KAH

Sarah Schrup for Kahler

Alito: “[I]t has been calculated that one in five people in the United States has some mental disorder,” which would mean that many people would be able to raise an insanity defense if you prevailed.

Alito: But if the “general rule” were that a defendant can’t be convicted if he believed that his actions were moral, it would be a “revolutionary change” to criminal law.

The question is whether a defendant can distinguish between right and wrong. People with a mental disorder should “be given the opportunity to at least try” and juries in the states that still offer an insanity defense have been able to draw this distinction.



Alito: Kahler as an “intelligent man” who “sneaked up on the house” owned by his ex-wife’s grandmother. Kahler killed his ex-wife and her grandmother and “executed” his teenage daughters but spared his son “because he didn’t think the son was siding with the mother.” This is the stuff you are going to use to argue that Kahler didn’t know right from wrong?

The defense is “rarely used defense”: “It’s invoked in less than one percent of the cases and successful in only a quarter of that.”

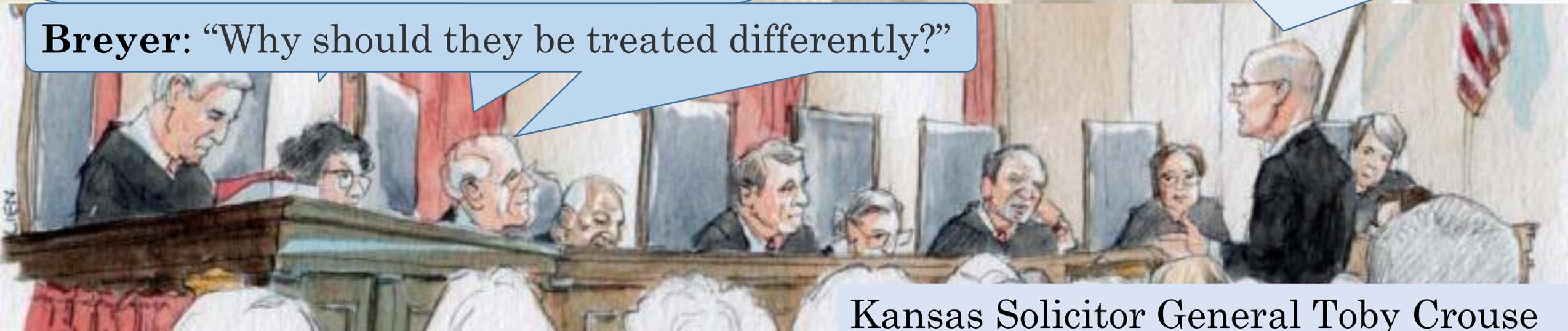


Sotomayor: The Kansas rule, by focusing only on whether a defendant intended to commit the crime, would not excuse someone “who would have been considered a lunatic” in the 15th century or someone who hears voices. Such a defendant might know that he is killing someone but have “no ability to say no.”

Breyer: What about two certified “totally insane” defendants, one who kills someone he thinks is a dog, while the other kills someone he knows is a person because he thinks a dog told him to do it?

The second defendant would have the kind of criminal intent needed for a conviction – because he intended “to commit a crime against a human being” – while the first would not

Breyer: “Why should they be treated differently?”



Kansas Solicitor General Toby Crouse

A ruling for Kahler might create more problems than it solved. Even in the states that recognize an insanity defense, there is “no agreement on when mental illness should excuse criminal responsibility.” For example, with a defendant who hears voices commanding him to kill to save the human race, in a “substantial number” of jurisdictions he would still not have an insanity defense.

Kagan: What you seem to be proposing is an intent requirement having nothing to do with insanity. But looking back at history “there’s just a ton that suggests there was something more than that the defendant be able to form an intent to kill.”



Assistant US Solicitor General Elizabeth Prelogar

SUPREME COURT OF THE UNITED STATES
KAHLER v. KANSAS
March 23, 2020

Held: Conviction Affirmed - 6-3

Abolishing the Insanity Defense does not violate the Constitution.

Kagan Opinion
Breyer dissent with
Ginsburg and
Sotomayor





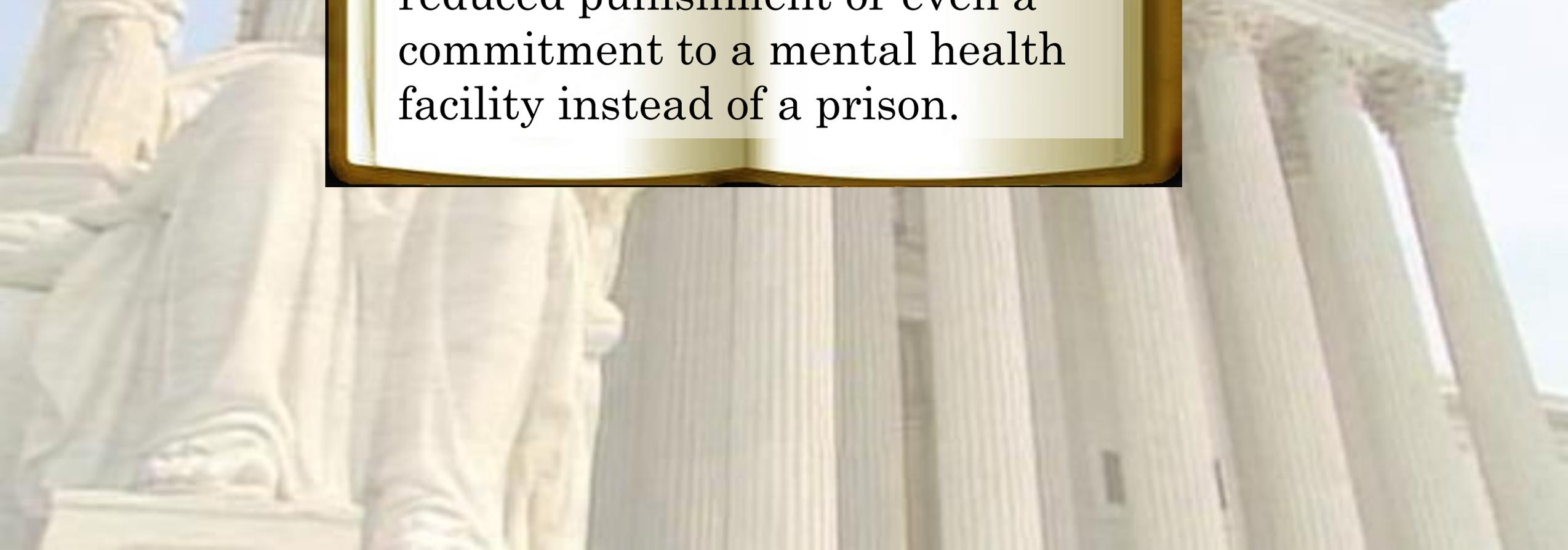
Kahler faced a high bar in arguing a due process violation because a procedure is only unconstitutional if it offends “fundamental” principles of justice – something “so entrenched in the central values of our legal system.”

Decisions about when a mentally ill defendant cannot be held liable for his crimes are the kind of question the Supreme Court has left to the states. “[D]ue process imposes no single canonical formulation of legal insanity.”





The state also allows a defendant to present evidence about his mental health at sentencing, in the hope that it will result in a reduced punishment or even a commitment to a mental health facility instead of a prison.





Breyer Dissent

The “Constitution gives the States broad leeway to define state crimes and criminal procedures ... but Kansas went beyond that.”

The state has “not simply redefined the insanity defense,” but instead has “eliminated the core of a defense that has existed for centuries.”

The idea that, because of his mental illness, a defendant could not be considered morally responsible for his crime is a principle so fundamental that eliminating it violates due process.



Regarding the two defendants with mental illness – one who believed he killed a dog and one who believed the dog told him to kill.

“Under the insanity defense as traditionally understood the government cannot convict either defendant,” because neither defendant understood that his actions were wrong.

But in Kansas the second defendant gets convicted because he intended to kill the person even if only because the dog ordered him to do so.

Tradition “demands that an insane defendant should not be found guilty in the first place”; once an insane defendant is found guilty in Kansas he is “exposed to harsh criminal sanctions up to and including death.”



-
- ❖ Bureau of Justice Statistics (BJA) = 2006
 - ❖ 56% of state prisoners,
 - ❖ 45% of fed prisoners,
 - ❖ 64% of jail inmates
 - ❖ had mental health problems with symptoms within last 12 months.

What about originalism??




ORIGINALISM
JOSH BLACKMAN
WHY THE TEXT
MATTERS
COMMENTARY BY
STEVE SANDERS




TUESDAY, SEPTEMBER 20, NOON
ROOM 122
FREE FOOD

25th Anniversary of
THE FEDERALIST SOCIETY

ORIGINALISM
A QUARTER-CENTURY
OF DEBATE



Foreword by Justice Antonin Scalia
Edited by Steven G. Calabresi

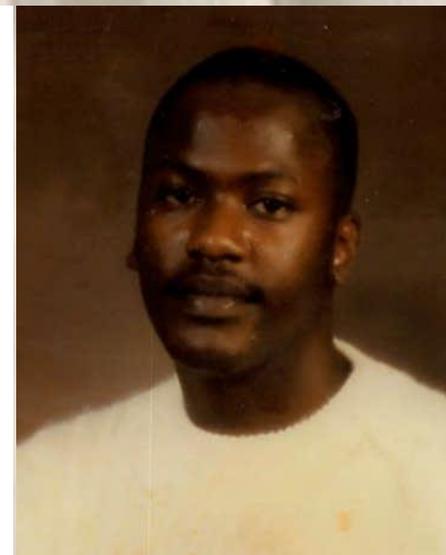
SUPREME COURT OF THE UNITED STATES
FLOWERS v. MISSISSIPPI
June 21, 2019

Black death-row inmate convicted by jury with just one Black person.

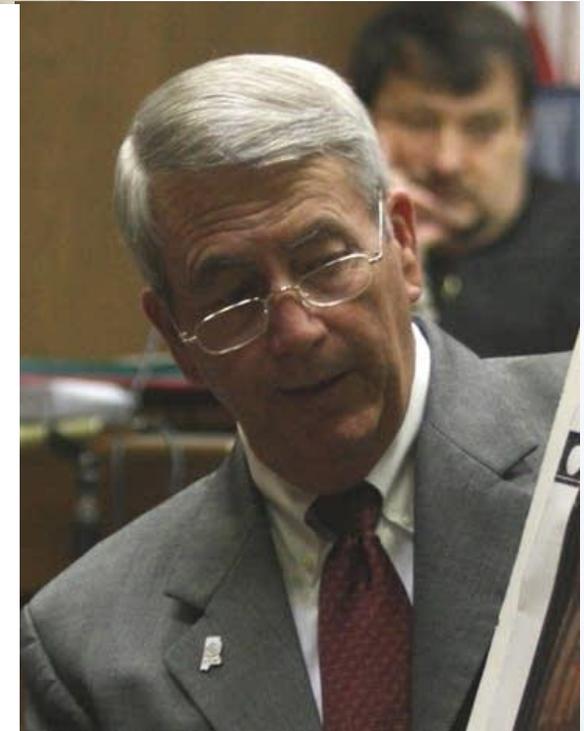
Stated Issue: Did the Mississippi Supreme Court misapply *Batson v. Kentucky*?

Unstated Issue: How does a prosecutor's *Batson* history affect the *Batson* analysis?

- Flowers tried in 2010 for the 6th time for the 1996 murders of four people.
- Convicted and death sentence 2X
- Mississippi Supreme Court reversed for prosecutor Doug Evans' intentional misconduct.



- **Evans prosecuted the next 4 trials.**
- **Trial 3** overturned because Evans violated *Batson* by using 15 peremptory strikes to remove African-Americans jurors.
- **Trials 4 and 5** = deadlocked.
- **Trial 6:** Evans allowed the first of six potential African-American jurors to be seated, but then struck five resulting in a jury with 11 white jurors and just one African-American juror.



The “only plausible interpretation of all of the evidence viewed cumulatively is that Doug Evans began jury selection in” the sixth trial “with an unconstitutional end in mind - to seat as few African American jurors as he could.”

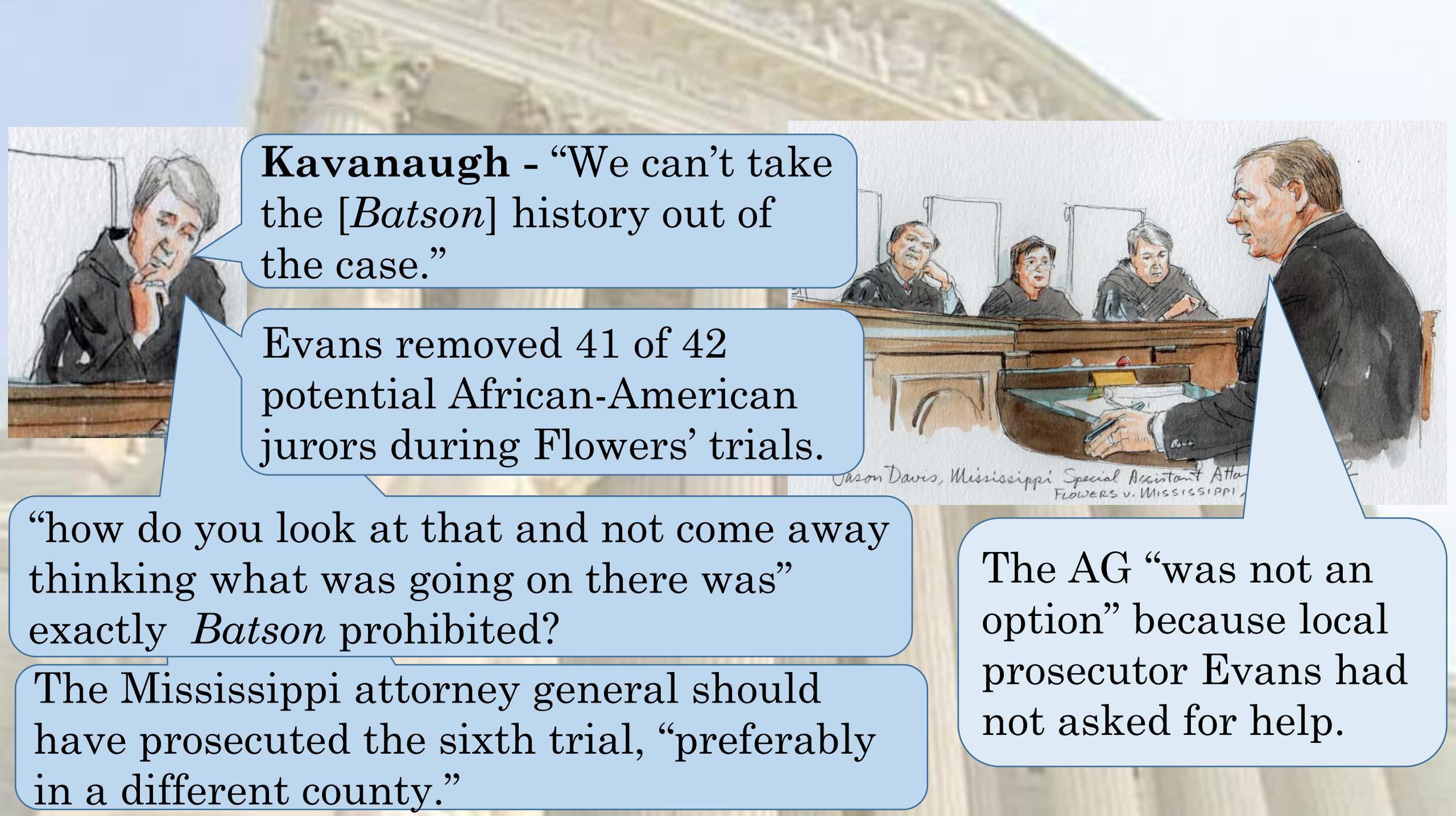


It did by “clear and convincing” evidence of discrimination.



Alito - The “history of this case prior to this trial is very troubling.” But did the 6th trial standing violate *Batson*?

What about Evan’s nondiscriminatory reasons for striking?



Kavanaugh - “We can’t take the [*Batson*] history out of the case.”

Evans removed 41 of 42 potential African-American jurors during Flowers’ trials.

“how do you look at that and not come away thinking what was going on there was” exactly *Batson* prohibited?

The Mississippi attorney general should have prosecuted the sixth trial, “preferably in a different county.”

The AG “was not an option” because local prosecutor Evans had not asked for help.

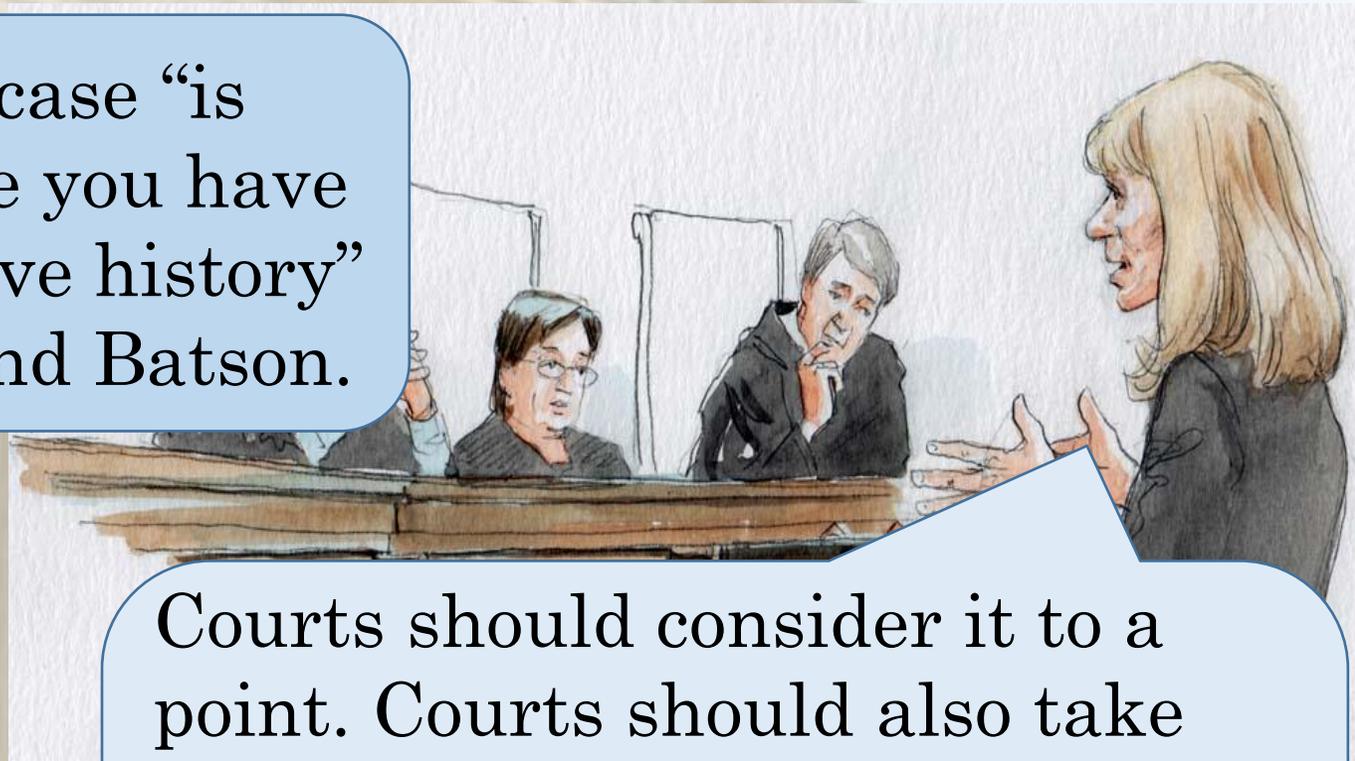
Jason Davis, Mississippi Special Assistant Attorney General
FLOWERS V. MISSISSIPPI



Roberts - This case “is unusual because you have [Evan’s] extensive history” of misconduct and Batson.

But how far back should courts look to evaluate a prosecutor’s past misconduct?

If the prosecutor violated Batson once 20 years ago is that something courts should consider now?



Courts should consider it to a point. Courts should also take into account how recently the misconduct happened, “whether it’s on a relatively similar matter, whether the person has the same motive.”

**Clarence Thomas for the first time since
2016 asked a question!**



**Thomas – Did Flowers’ lawyer
use peremptory strikes and, if so,
what was the race of the jurors?**

The trial lawyer only removed white jurors;
“her motivation is not the question here. The
question is the motivation of Doug Evans.”



SUPREME COURT OF THE UNITED STATES
FLOWERS v. MISSISSIPPI
June 21, 2019

Held: Conviction Reversed on Batson's challenge - 7-2 opinion by Justice Kavanaugh

Question: Did it create new law?

Batson Rule Restated:
Prosecutors cannot discriminate based on race with peremptory strikes under Flower's "extraordinary facts."





Kavanaugh Opinion

At Flowers' sixth trial Evans struck five of the six prospective black jurors. Evans allowed one black juror to sit on Flowers' jury, but in a 2005 case the Supreme Court suggested that a Texas prosecutor might have accepted a black juror as

Rule: *Batson* indicates a prosecutor's actions in past cases is relevant.

same tactic may have been used.

"The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury."



Before striking the five prospective black jurors, the prosecution asked them an average of 29 questions, compared with just one question for each of the white jurors.

“One can slice and dice the statistics and come up with all sorts of ways to compare ... [b]ut any analysis yields the same basic

Rule: Batson indicates an analysis of the questioning process.

the accepted white jurors.

Asking black jurors more questions than white jurors does not, standing alone, violate the Constitution, it can “supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent.”



Alito concurrence

Flowers' case was "highly unusual" and

Rule: Alito argues no new rule here

likely pass muster and the jury selection process if it were."

Rule: Alito in his statement recognizes the rule that a prosecutor's past behavior with jurors is a relevant *Batson* analysis.

agree with the sentence "cannot stand."



Thomas Dissent

We should never have agreed to review this case.

Prosecutors had good reasons – that had nothing to do with race – for striking the five black jurors at Flowers’ final trial.

And to the extent that the court relied on the prosecution’s conduct at Flowers’ earlier trials, has no basis in the record.”



Thomas Dissent

Thomas attacks
Batson.

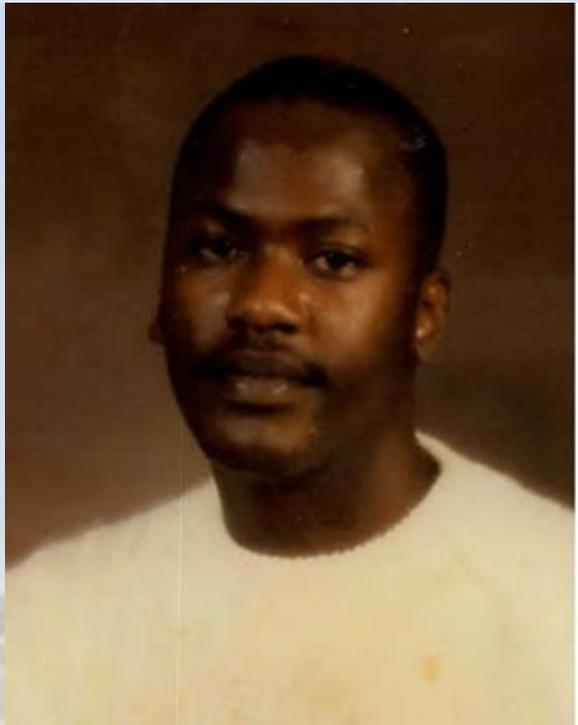
Batson was “suspect when it was announced” and I am “even less confident [of it] now.” *Batson* gives a “windfall to a convicted criminal.”

Any competent prosecutor would have exercised the same strikes as the State did in this trial.”

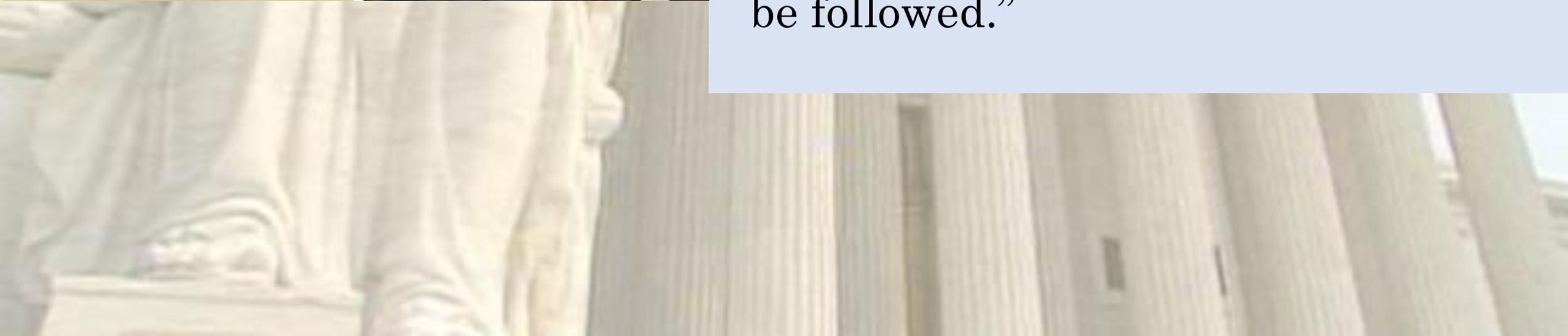
“[A]lthough the Court’s opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims’ families.”

Thomas’ view and *stare decisis* and judicial activism.

Future trial for Flowers????



- ❖ Mississippi Attorney General Jim Hood stated that when the case returns to Mississippi, “it will be the duty of the district attorney” – Evans – “to re-evaluate the case.”
- ❖ If the decision is to retry the case he is “confident the Court’s guidance will be followed.”



**COMING
ATTRACTIONS**

**SUPREME COURT OF THE
UNITED STATES
RAMOS v. LOUISIANA
No. 18-5924**

**COMING
ATTRACTIONS**



I'M WAITING!!!

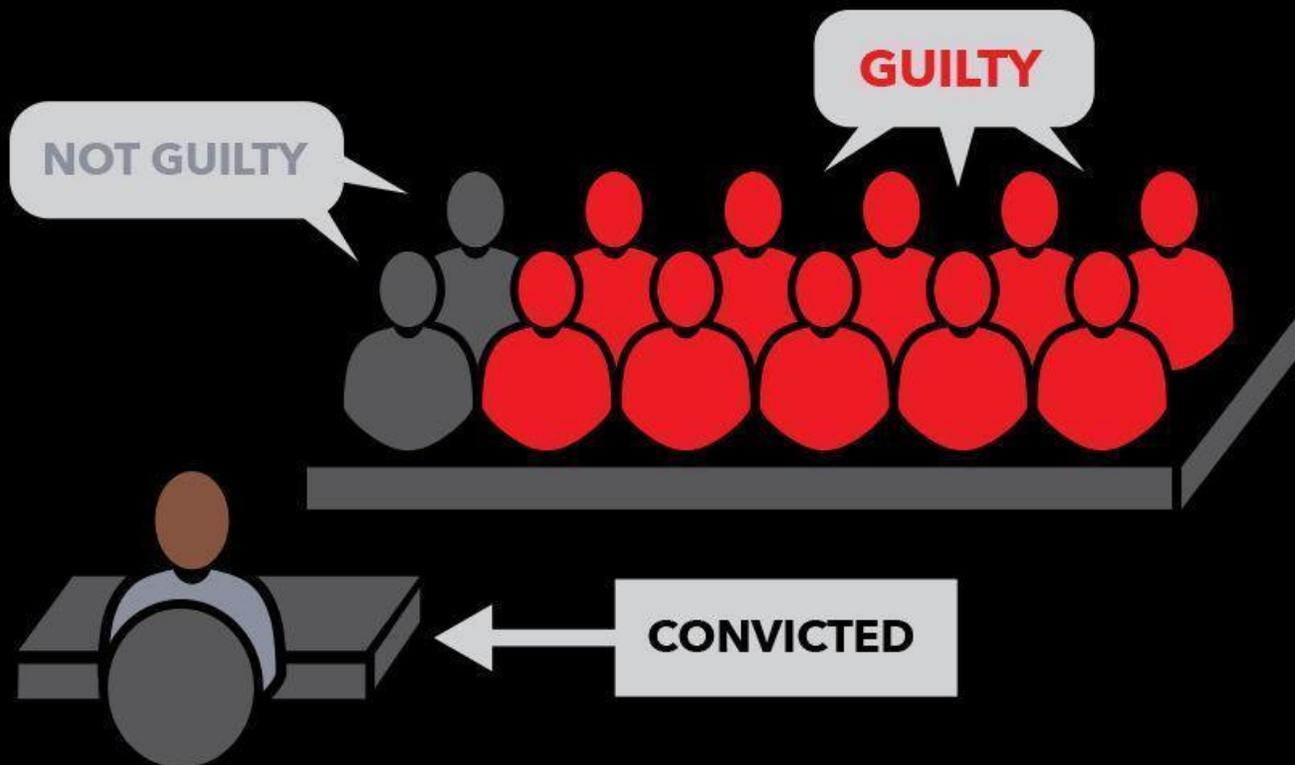
COMING
ATTRACTIONS

SUPREME COURT OF THE
UNITED STATES
RAMOS *v.* LOUISIANA
No. 18–5924

COMING
ATTRACTIONS

Issue: Does the 14th Amendment fully incorporate the 6th Amendment guarantee of a unanimous verdict.

- Court may fix *Apodaca v. Oregon*, 406 U.S. 404 (1972) holding state juries may convict of felony by a less-than-unanimous verdict.





RAMOS *v.* LOUISIANA, No. 18–5924

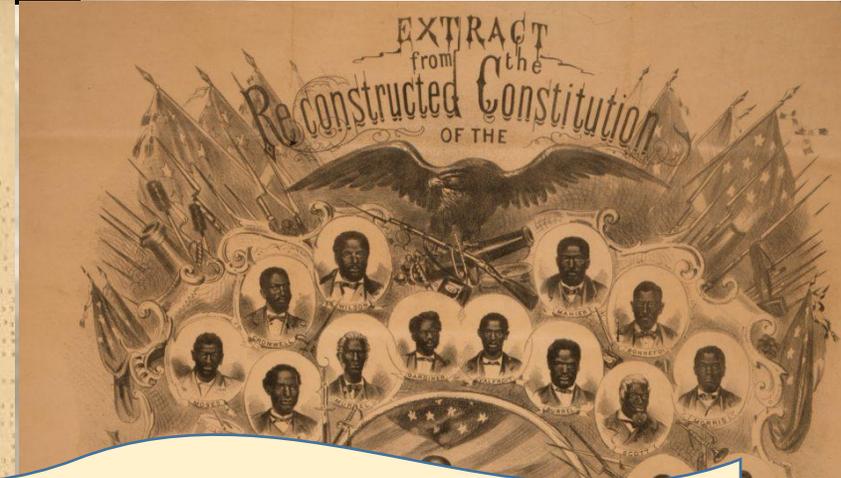
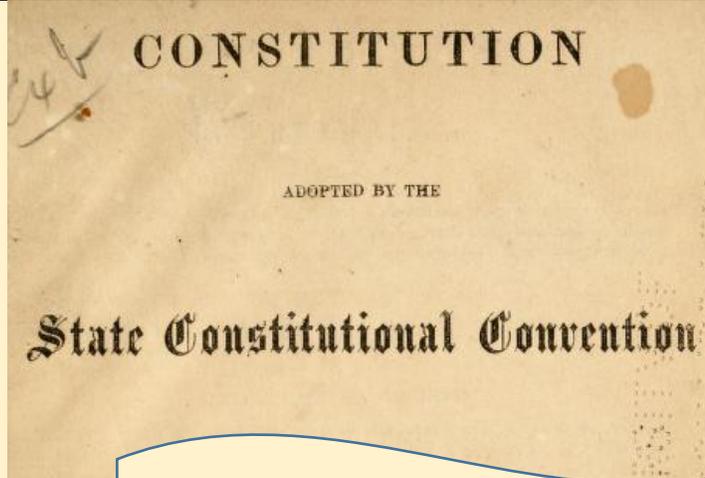
- *Apodaca* = plurality
 - Four justices = 6th Amend didn't require unanimous juries in either state or federal trials;
 - Four others = 6th Amend requires unanimous juries in *both* state and federal trials.
 - Justice Lewis F. Powell Jr. = wrote 6th Amend required unanimous juries in federal trials but not in state cases even though the 14th Amend applied to the states.
- Louisiana's voters in November approved an unanimity requirement as of January 1, 2019.
- Louisiana argues this moots the case.
- But still have Louisiana prisoners convicted with non-unanimous juries.





RAMOS *v.* LOUISIANA, No. 18–5924

- Ramos cites historical evidence the 1898 state constitutional conviction put in the non-unanimous-jury rule to “establish white supremacy in this state.”
- The non-unanimous rule was to prevent minority black jurors from blocking a white majority’s decision to punish black defendants.

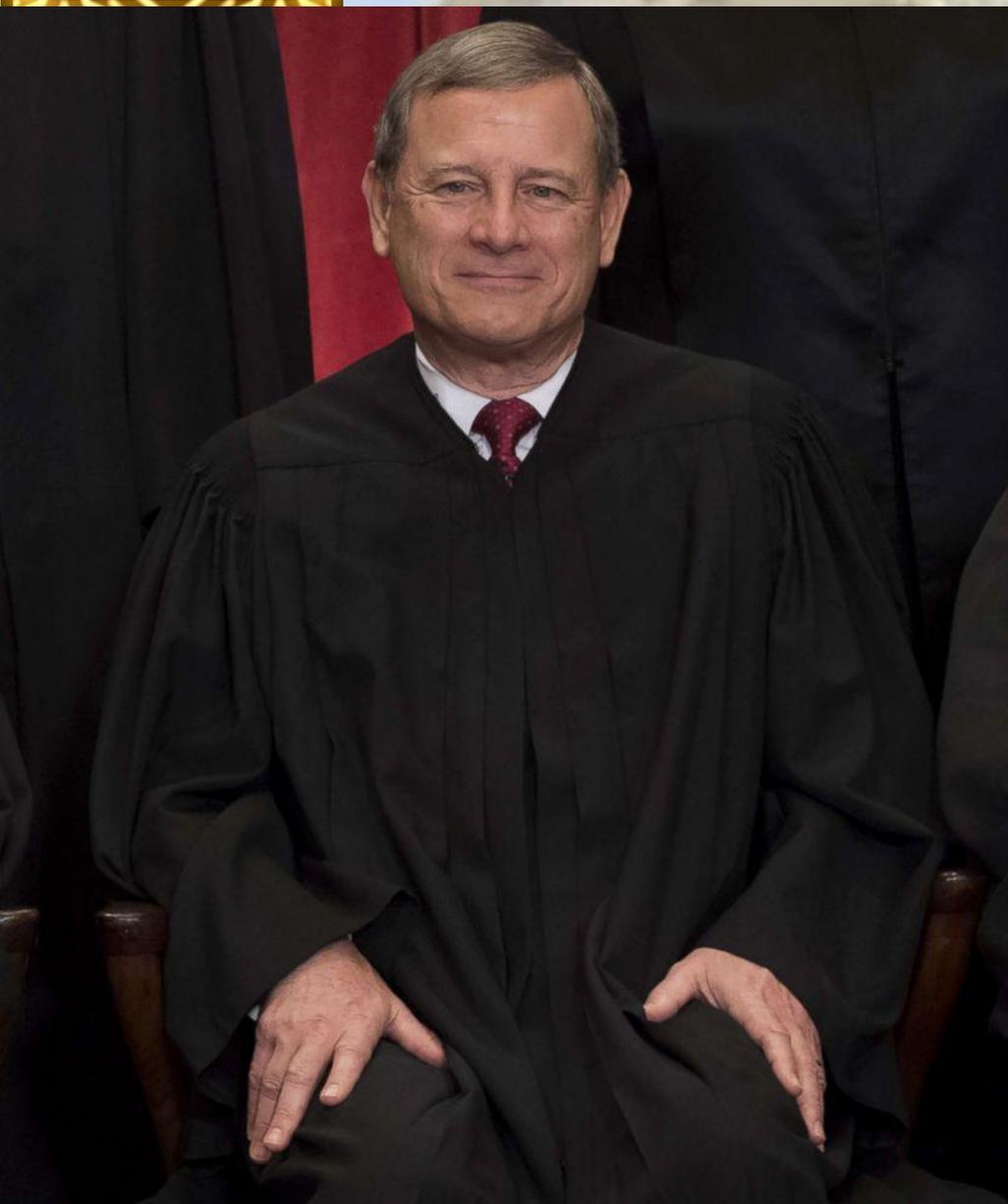


Purpose of 1898 convention was to eliminate the 1868 Constitution.

Printed by the New Orleans Republican, in accordance with a resolution of the Constitutional Convention, adopted March 7th, 1868.

NEW ORLEANS :
PRINTED AT THE REPUBLICAN OFFICE, 67 ST. CHARLES STREET.
1868.

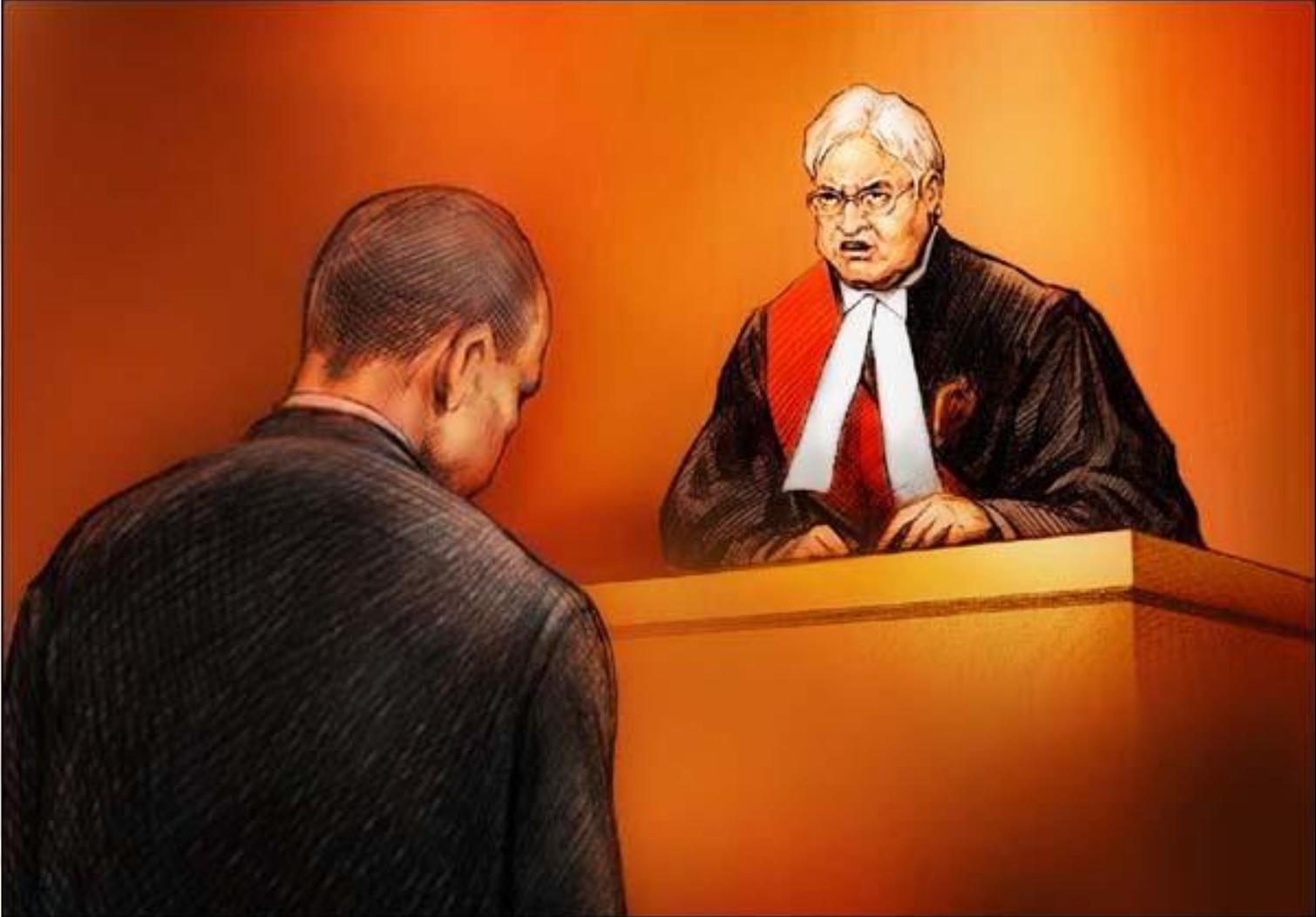




- **Underlying issue: Does the 14th Amendment “incorporate” all the Bill of Rights?**
- In *McDonald v. City of Chicago* (2010) 2nd Amend “right to bear arms” applies to states.
- See next case, *Timbs v. Indiana* regarding the 8th Amend. “excessive fines” clause.



The 8th Amendment



EIGHTH

AMENDMENT

NO CRUEL AND UNUSUAL PUNISHMENTS.

The Eighth Amendment

"EXCESSIVE BAIL SHALL NOT BE REQUIRED, NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLECTED."

The first part of this amendment says that bail or fines must not be set too high. Bail is the money an accused person must give the court until he or her trial is held. It is a way to make sure that person shows up for the trial. The other part of the amendment has to do with punishments given to criminals. In the past, as the drawing here shows, people were often whipped or had their eyes put out for small crimes. This part of the EIGHTH AMENDMENT is meant to stop such unfair punishments. In recent years, many people have said that punishing criminals to death goes against this part of the amendment. Others strongly disagree. As of now, our nation's courts say that the death penalty for certain very serious crimes does not go against the EIGHTH AMENDMENT.

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SUPREME COURT OF THE UNITED STATES
McKinney v. Arizona, February 25, 2020

Holding: When a capital sentencing error under *Eddings v. Oklahoma* is found on collateral review, a state appellate court may conduct the reweighing of aggravating and mitigating evidence, as permitted by *Clemons v. Mississippi*.

Judgment:

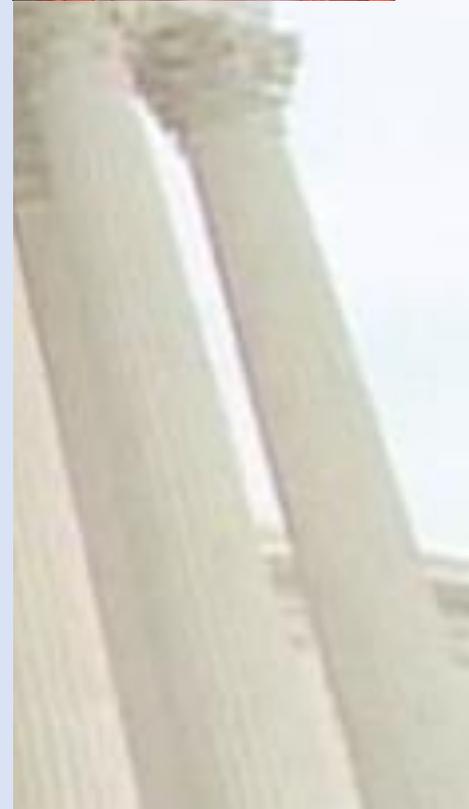
5-4

Ginsburg dissent
with Breyer,
Sotomayor and
Kagan.



SUPREME COURT OF THE UNITED STATES
McKinney v. Arizona, February 25, 2020

- ❖ James McKinney sentenced to death for two murders in 1991.
- ❖ 9th Circuit overturned death sentence
- ❖ Arizona Supreme Court reinstated death rejecting 2 arguments.
 1. Arizona SCt rejected argument that a jury, rather than a judge, should resentence him.
 2. Arizona SCt determined mitigating evidence not “sufficiently substantial” to warrant a lesser sentence.





Kavanaugh Opinion

Argument 1: *Ring* and *Hurst* requiring a jury to find the aggravating death factors are not retroactive. The law was different in his original 1993 trial. McKinney's conviction became final on direct review in 1996 before *Ring* and *Hurst*.

Argument 2: That a jury, rather than a judge, should resentence "does not square with" the Supreme Court's 1990 decision in *Clemons v. Mississippi*.

Because state courts can reweigh the aggravating factors making death appropriate, they can also evaluate mitigating factors.



Ginsburg
Dissent

Argument 1: The Arizona Supreme Court were direct, rather than collateral, review because they were “essentially a replay of the initial direct review proceeding.”

Because the state asked the court “to resume and redo direct review, this time in accord with *Eddings*,” McKinney’s death sentences should be unconstitutional under *Ring* and *Hurst*.



End