



DUE PROCESS

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

By **Shana-Tara O'Toole** (2018-2019 Edition)



Our choice for **BEST CURRENTLY PENDING CERTIORARI PETITION** (as of 9/10/19) goes to: *Asaro v. United States*, No. 19-107 (2019), which seeks review on the question of whether the 6th Amendment right to a jury trial prohibits judges from basing sentencing on charges for which juries have acquitted criminal defendants. Here's hoping the Court finally honors Justice Scalia's legacy (read his fervent dissent in *United States v. Jones*¹) and is guided by the sound jurisprudence of many current Circuit Court judges, including most recently that of Patricia Millett of the D.C. Circuit,² by granting review in this case and ultimately bringing an end to the unconstitutional practice of acquitted conduct sentencing. The court watchers at the Due Process Institute believe the current make-up of the Court makes the eradication of this abhorrent practice a realistic possibility. I'm hopelessly biased on this one: read our *amicus* brief in support of Mr. Asaro's petition at www.idueprocess.org as well as the terrific briefing of Mr. Asaro's Williams & Connolly lawyers at <https://www.scotusblog.com/case-files/cases/asaro-v-united-states/>.



Our utterly biased designation for **MOST DISAPPOINTING DENIAL OF CERTIORARI** (so far) this year results in a tie between: *Turner v. United States*, No. 18-106, in which the court failed to consider the question of whether the 6th Amendment right to counsel attaches before an indictment in a situation where a prosecutor threatens to indict a defendant unless the defendant accepts a plea offer (petition denied June 24, 2019) and *Cabrera-Rangel v. United States*, No. 18-650, which was seeking review on one of our key concerns—acquitted conduct sentencing (petition denied January 14, 2019). Our *amicus* briefs in support of both petitions can be read at www.idueprocess.org.

¹ 135 S. Ct. 8 (2014).

² *United States v. Bagcho*, 923 F.3d 1131 (2019).



Of the cases in which SCOTUS has granted review but for which the world still awaits a published decision, we think these are the **TOP 3 CRIMINAL CASES TO WATCH**:

6TH AMENDMENT / NON-UNANIMOUS VERDICTS: *Ramos v. Louisiana*, No. 18-5924

Does the 14th Amendment fully incorporate the 6th Amendment guarantee of a unanimous jury verdict? Louisiana voters recently amended their state constitution to prohibit non-unanimous verdicts in criminal cases, thus bringing them closer to ~~sanity~~ the approach in practically every other state. But this change did not take effect in time to help this defendant. We'd like to see SCOTUS not only do the right thing for Mr. Ramos, but also issue an opinion that brings this madness to an end in the only remaining state—Oregon—that still allows non-unanimous jury verdicts in criminal cases.

OVERCRIMINALIZATION / FRAUD STATUTES: *Kelly v. United States*, No. 18-1059

Does a public official defraud the government when she engages in an otherwise lawful official action but conceals the “real” motive behind such act? The “fraud” in this case involved publicly advancing a particular policy reason for an official act when it was not the subjective “real” reason. You can easily see all the ridiculous potential prosecution scenarios if the answer is yes. A good decision in this case could help cabin the continued overreaching of novel prosecutorial theories in fraud cases, including in the honest services area where adult supervision at the Department of Justice continues to be needed post *Skilling*.³ A bad decision in this case would bless the ever-expanding creativity of prosecutors seeking to take advantage of vague language in federal criminal laws.

CAPITAL DEFENSE: *McKinney v. Arizona*, No. 18-1109

Was the Arizona Supreme Court required to apply current law regarding the weighing of mitigating and aggravating evidence when determining whether a death sentence was warranted? There is a growing recognition in public opinion and on Capitol Hill of the fundamental unfairness that ensues when criminal law is improved in some way (either through legislative change or judicial interpretation) but the group of people who can benefit from that change is limited by a procedural legal doctrine or a limit to the “retroactivity” of the reform. Our most frequent queries from incarcerated persons and their families involve their disbelief and dismay that a judge or Congress could, in essence, recognize a mistake in the law or determine that certain criminal policy decisions are now unfair or harmful and should be altered, but then not allow the “fix” to apply to the broadest category of people who had been negatively impacted by the previous legal standards. We feel the same way and would love to see judges and legislators engage in more rational and humane approaches on the important question of who is allowed to receive relief or benefit from positive changes in the criminal law.

³ *Skilling v. United States*, 561 U.S. 358 (2010).



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

SEARCH + SEIZURE: *Mitchell v. Wisconsin*, No. 18-6210 (June 27, 2019) (*did you hear about the one about a warrantless blood draw from an unconscious motorist?*).

The Court addressed the circumstances under which a police officer may administer a warrantless blood alcohol concentration test to a motorist who appears to have been driving under the influence of alcohol but who is unconscious at the time of the test and therefore cannot be given a breath test. Many states have what are known as “implied consent” laws that authorize blood draws without consent or without a warrant. The Court avoided the broader issue of whether Wisconsin’s implied consent law is legal, and, in a plurality opinion by Justice Alito joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, the Court determined that the 4th Amendment permits blood draws of unconscious suspected drunk drivers under the exigent circumstances exception. Sotomayer’s dissent argued that under the 4th Amendment, “the answer is clear: If there is time, get a warrant.”⁴ Her dissent additionally pointed out that in this particular case the State had conceded that the exigent circumstances exception to the 4th Amendment did not justify the blood test at issue. *Both good points*. Justice Gorsuch dissented, complaining that he thought the Court had granted review of the case to decide whether Wisconsin’s drivers had, in fact, “impliedly consented” to such warrantless blood alcohol tests on the basis of a state statute, yet the Court failed to resolve that issue. *Wow, that’s a good point too*. Glad to hear we aren’t the only ones who wonder about the legitimacy of this kind of legal fiction. Enough to keep a person up at night wondering what else we could all be deemed to have consented to because a legislative body says we did. *Shudder*.

DEFERENCE TO AGENCY INTERPRETATION OF AMBIGUOUS WORDS: *Kisor v. Wilkie*, No. 18-15 (June 26, 2019) (*illustrating that previously long-standing legal concepts requiring courts to defer to an agency’s interpretation of ambiguous laws or regulations are now very much in flux*).

Why are we pointing out this civil case in a criminal law case discussion? Because criminal defense lawyers and reform advocates—those most interested in the Constitution’s safeguards that protect the people from the arbitrary use of governmental

⁴ There’s really no point in providing page citations every time I quote from the opinion that is the main subject of our discussion. This isn’t a law review article. And you aren’t the type of person to care about a pin cite. Also, if you really *did* care, you could easily identify the page number yourself because technology is your friend.

power—should definitely keep a close eye on what is starting to be an interesting debate among the Justices regarding federal agency deference doctrines, such as those announced in *Chevron v. Natural Resources Defense Council*⁵ and *Auer v. Robbins*.⁶ Also, let's be honest. With so many federal regulations that can serve as the basis of a criminal conviction that even our own government can't count them,⁷ it's a good idea for criminal law practitioners to pay attention to the High Court's debate about who gets the final authority to determine the meanings of ambiguous regulatory words that can lead to imprisonment. *Warning: this is going to take a few paragraphs.*

So now that I've told you that even if you don't want to, you should read this opinion, you *really* should because no two people will agree on its import. In a tragically long and disjointed opinion⁸ with no dissents, the Court ultimately rejected the opportunity to overrule one type of federal agency deference, most frequently referred to as *Auer* deference, which requires a court's deference to an agency's reasonable reading of its own ambiguous regulation.

The case was brought by James Kisor, a Vietnam War veteran seeking retroactive disability benefits for his PTSD with the case turning on the question of *Auer* deference. Mr. Kisor asked the Court to overrule *Auer*, mostly on the grounds that the separation of powers doctrine forbids placing “the powers of making, enforcing, and interpreting laws” in the same hands. Chief Justice Roberts and Justices Kagan, Ginsburg, Breyer and Sotomayor declined to overrule *Auer* and if I can summarize their collective feelings for you, I'd say it mostly came down to a combination of respecting *stare decisis* and recognizing that Congress could alter or repeal *Auer* if it wanted to. They skirted the separation of powers issue by playing cute: The role of interpreting agency rules technically remains in the hands of the judicial branch as a functional matter, even if judges are sometimes required to “divine meaning” by deferring to the agency's interpretation.

⁵ 467 U.S. 837 (1984).

⁶ 519 U.S. 452 (1997).

⁷ See Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019) (a great book and not at all a shameless plug for the author who happens to be a DPI Board Member); see also Gary Fields & John R. Emshwiller, “Many Failed Efforts to Count Nation's Federal Criminal Laws,” *WALL ST. J.* (July 23, 2011) (noting that estimates of the number of criminal regulations at the time ranged from 10,000 to 300,000).

⁸ Read this paragraph only if you think my contention that this was a “tragically long and disjointed opinion” might be hyperbole. Justice Kagan announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B, III-B, and IV, in which Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor joined, and an opinion with respect to Parts II-A and III-A, in which Justices Ginsburg, Breyer and Sotomayor joined. Chief Justice Roberts filed an opinion concurring in part. Justice Gorsuch filed an opinion concurring in the judgment, in which Justice Thomas joined, in which Justice Kavanaugh, joined as to Parts I, II, III, IV, and V, and in which Justice Alito joined as to Parts I, II, and III. And Justice Kavanaugh filed an opinion concurring in the judgment, in which Justice Alito joined. *I think. Don't quote me. Ask a law professor.*

The remaining four justices would have overruled *Auer* although they did not dissent from the ruling because they agreed with the majority’s ultimate procedural disposition of Mr. Kisor’s case. Justice Gorsuch (joined by Justices Thomas, Alito and Kavanaugh) contends that the Court managed to keep *Auer* “on life support,” but in so doing deprived us all of the judicial independence that our Constitution guarantees since *Auer* “tells the judge that he must interpret” an agency’s rules to mean “not what he thinks they mean, but what an executive agency says they mean.” *Yep*.

So why do I think that it is unclear what this opinion will ultimately mean for the concept of *Auer* deference when a law school student would tell you that the holding of this case is that *Auer* deference survives? Because while the Court voted not to overrule it, the *Kisor* majority certainly cabined its scope by adopting a series of exceptions that you would need to take an administrative law class to try to understand. (*Side bar: I want to tell every law student in America that an administrative law class is one of the few classes of truly practical use.*) In sum, trust me when I say that *Kisor*’s new “range of considerations” and “limits” to *Auer* deference, which are “not susceptible to any rigid test,” nor can be “reduce[d] to any exhaustive test,” but instead rely on “some especially important markers,” are as ambiguous as any regulation to which *Auer* would apply.

Chief Justice Roberts and Justice Kavanaugh reminded us that this case certainly does not prohibit the Court from reconsidering the question of *Chevron* deference (a court’s deference to an agency’s interpretation of an ambiguous law). If you have been keeping score on whether *Chevron* deference as most of us know it might soon be altered, you know that both Justices Kennedy and Breyer have raised concerns or questions over it in other recently published opinions. Justices Alito and Thomas have each previously questioned the validity or wisdom of judicial deference to agency interpretations of their own regulations in previous cases. Some writing of Justice Kavanaugh contains criticism of the doctrine. And as a circuit court judge, Justice Gorsuch dissed *Chevron* deference as “a judge-made doctrine for the abdication of the judicial duty.”⁹

It is my ardent hope that when this issue does takes center stage at the Court, the Justices will engage in thoughtful analyses of how concepts such as *Chevron* deference impact the interpretation of criminal law—in which the government wields the power to deny liberty and even life—a discussion that is frequently lacking. If you’re interested in this sort of thing, check out our recent *amicus* brief in the 10th Circuit written by DPI Board Member John Cline arguing that the rule of lenity should take precedence over canons of construction like *Chevron* deference for criminal statutes given the risk to life and liberty (see *Aposhian v. Barr* at www.idueprocess.org/amicus).

⁹ *Gutierrez-Brizuela v. Lynch*, No. 14-9585 (10th Cir. 2016).

5TH AMENDMENT / DOUBLE JEOPARDY: *Gamble v. United States*, No. 17-646 (June 17, 2019) (holding that, apparently, the Constitution doesn't mean what it says).

Mr. Gamble was convicted of possession of a firearm by a convicted felon. His appeal argued that the double jeopardy clause of the 5th Amendment prohibited the federal government from prosecuting him for a crime that Alabama had already prosecuted him for. Just as a reminder, the 5th Amendment states: “No person shall . . . be twice put in jeopardy” “for the same offence.” Yet, Mr. Gamble was subjected to two convictions and two prison sentences—one in state court and one in federal court—for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of his life behind bars. *Wait . . . what?*

This happens because of something called the “separate sovereigns” doctrine, which has long been recognized in American law as an exception to the Double Jeopardy Clause, but for which there is no real textual basis in the Constitution. The Supreme Court rejected Mr. Gamble’s request to overrule the separate sovereigns doctrine (7-2) in an opinion authored by Justice Alito. Justice Thomas filed a concurring opinion. Justices Ginsberg and Gorsuch (*the new “Wonder Twins” of good criminal law opinions*) filed dissenting opinions. Ginsberg would maintain the “separate sovereign” doctrine but have it understood to prohibit successive prosecutions for the same offense “by parts of the whole USA,” which would have prevented the second prosecution in this case. Gorsuch thinks the Court can’t read the Constitution. As a former writing instructor, you should know that I always preached avoiding long block quotes. But I can’t help putting this quote right here for all of us to enjoy:

“A free society does not allow its government to try the same individual for the same crime until it’s happy with the result. Unfortunately, the Court today endorses a colossal exception to this ancient rule against double jeopardy. My colleagues say that the federal government and each State are ‘separate sovereigns’ entitled to try the same person for the same crime. So if all the might of one ‘sovereign’ cannot succeed against the presumptively free individual, another may insist on the chance to try again. And if both manage to succeed, so much the better; they can add one punishment on top of the other. But this ‘separate sovereigns exception’ to the bar against double jeopardy finds no meaningful support in the text of the Constitution, its original public meaning, structure, or history. Instead, the Constitution promises all Americans that they will never suffer double jeopardy. I would enforce that guarantee” (emphasis for awesomeness added).

I know it’s just a dissent. And please know there are other Gorsuch opinions that elicit a different response from me, but this one makes me feel all the patriotic feels.

CIVIL ASSET FORFEITURE / EXCESSIVE FINES: *Timbs v. Indiana*, No. 17-1091 (February 20, 2019) (in which the Court starts to take notice of the government's highway robbery of its own citizens).

When Mr. Timbs pled guilty to a drug charge, he was ordered to forfeit his vehicle via the state's civil asset forfeiture program, on the grounds that he had used it in the commission of his crime. The problem was, his vehicle was worth more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction. A state appeals court agreed with Mr. Timbs that such a forfeiture was unconstitutional under the 8th Amendment's clause prohibiting excessive fines. The Indiana Supreme Court reversed the decision, stating that SCOTUS had never ruled that the excessive fines clause applied to state governments. By a vote of 9-0, the Supreme Court reminded us that the 8th Amendment's protection against excessive fines "guards against abuses of government's punitive or criminal law-enforcement authority," declared this particular safeguard as "fundamental to our scheme of ordered liberty," and held that the 8th Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the 14th Amendment's Due Process Clause.

What makes this case important? From a purely legal perspective, not much—although it meant a lot to Mr. Timbs. But also, the Due Process Institute is part of a broad and diverse coalition of organizations attempting to bring rationality and fairness to the civil asset forfeiture process (or to abolish it outright), so we were happy to see the Court rule as it did. *Fun Fact: In some years, law enforcement takes more money and property from Americans through civil asset forfeiture than convicted "criminals" do.* If this statistic surprises you, you should read more about this pernicious practice in the numerous bipartisan *amicus* briefs we've joined at www.idueprocess.org/amicus.

APPELLATE WAIVERS: *Garza v. Idaho*, No. 17-1026 (February 27, 2019) (are we the only ones who wonder how these things can be constitutional at all given the fundamentally coercive nature of plea bargaining in the United States?).

In simple terms, Mr. Garza signed two plea agreements and as part of those agreements, waived his right to appeal—just as the overwhelming majority of criminal defendants are currently required by federal prosecutors to do in order to receive the benefits of a "plea bargain." Despite acceptance of his plea agreements containing appellate waiver provisions, Mr. Garza later requested his attorney to appeal the convictions. His attorney did not do so because of the existence of the appellate waivers. Mr. Garza sought post-conviction relief of his attorney's failure to file an appeal. The Idaho Supreme Court held that Mr. Garza's attorney was allowed to ignore Mr. Garza's request. The Supreme Court voted 6-3 to reverse the Idaho Supreme Court's holding, which is a good thing.

So why am I about to complain bitterly anyway? Because this opinion ignores what actually should matter to our highest court and to us all—whether the entire concept of appellate waivers are unconstitutional, unethical, or unconscionable. *Yeah, that wasn't the question presented. But whatever.* This opinion unfortunately joins several others from the Court that illustrate the Justices' failure to recognize these critical issues and instead focus myopically on whether a particular appeal right may or may not be waived or relatedly narrow issues such as the one here, which technically involved whether the attorney's failure to file the appeal based on the existence of an appellate waiver provision in a plea agreement is entitled to a presumption of prejudice to the defendant per *Roe v. Flores-Ortega*.¹⁰ The Court does spend some time making clear that no appeal waiver can ever eliminate *all* possible grounds for an appeal, which is always good to hear. For example, the right to challenge a guilty plea as unknowing or involuntary cannot be waived. Also, either the defendant or the government can nullify an appellate waiver by materially breaching terms of an agreement. And, the government might even choose to voluntarily waive some portion of an appeal waiver. In fact, the Department of Justice's Criminal Resource Manual *encourages* prosecutors to voluntarily waive enforcement of an appeal waiver provision if their particular case might risk eliciting a court decision that could limit or prevent the government's overall ability to ~~foree~~ bargain for a defendant's waiver of appeal rights. *I'm sorry—does anyone else read DOJ's Manual and wonder how many times it breaches the fundamental principle recognized in Berger v. United States*¹¹ *that a prosecutor's job is to ensure justice is done, not win cases—or is it just me?*

Given the fact that nearly all criminal cases in both state and federal court are resolved through plea bargaining, serious scholars and jurists from every political persuasion are deeply concerned with the coercive nature of plea bargaining as it currently operates in the American criminal legal system. A reckoning of that reality is coming. The federal prosecutorial office policy to require waivers of critical constitutional and statutory guarantees as part of the one-sided plea-bargaining process must be meaningfully addressed. Concerningly, while the prosecutorial policy of requiring appellate waivers in federal plea agreements is only a few decades old, it has already become nearly universal in every district. While it is understood that in choosing to accept a plea bargain, an accused person is obviously waiving their Constitutional right to a jury trial and other trial-related rights, they should not also be required to waive other rights for the privilege of accepting a plea agreement and admitting guilt. Currently, nearly all persons accused of crime in this country engage in plea bargaining rather than exercise their right to a jury trial. Judges and legislators need to pay more attention to the factors that are causing such a profound abandonment of criminal trials and be concerned that our system is moreover compelling most individuals who have been accused of a federal crime to automatically waive practically all other meaningful rights to an appeal.

¹⁰ 528 U. S. 470 (2000).

¹¹ 295 U.S. 78 (1935).

Importantly, these waivers on their face purport to protect all manner of prosecutorial misconduct, such as coerced false confessions, evidence tampering, and the withholding of discovery from judicial review despite fundamental constitutional and statutory guarantees to the contrary. In addition, numerous ethical issues arise that go unexplored. Consider that both the attorney who represented the defendant and the prosecutor requiring the waiver in the underlying criminal matter are attempting to hamstring the accused from appealing their conduct—conduct that is almost certainly unknown to the defendant at the time of waiver. Furthermore, unless a defendant is lucky enough to be represented by one of a dozen lawyers in this country who are equally competent trial lawyers as they are appellate lawyers, I’d submit that nearly all advice from even a good trial lawyer about a defendant’s appellate rights should be considered *per se* ineffective assistance of counsel. And how does this entire situation, in the context of an already structurally coercive plea-bargaining system, constitute a “knowing and voluntary” waiver? *I think you get my point.*

The prosecutorial policy of requiring appellate plea waivers infringes on the fundamental guarantee of due process and sooner rather than later the Supreme Court should meaningfully address this infringement and explore if there are *any* circumstances in which appellate waivers can be adopted or enforced. Further, the Supreme Court’s modern jurisprudence should recognize many other fundamental failures of current prosecutorial practice and of modern plea-bargaining practice. Why doesn’t it? Well, of the nine justices, six have no direct or meaningful experience either bringing or defending criminal cases. The other three are former prosecutors. In fact, it has been a quarter of a century since a former criminal defense lawyer served on the Supreme Court. Nor do we have a Defender General, whose office could hire the best and brightest to educate the Court as to how our system is actually working in a way that would be blessed with the *imprimatur* of government service versus a “biased” zealous advocate defending the individual case. *Just some personal musings of mine.*

NONDELEGATION DOCTRINE: *Gundy v. United States*, No. 17-6086 (June 20, 2019).

Just kidding. I’m not going to write about this case. It was really, really exciting to ~~think~~ tweet about this case until the Supreme Court issued its decision. #ConstitutionalLimitsToRoleOfExecutiveInCrimLaw #SeparationOfPowers #Fairness Now, all you need to know is that the Supreme Court still hasn’t invalidated a congressional action on nondelegation grounds since 1935. *Bummer.*

CRIMINAL INTENT / STATUTORY INTERPRETATION: *Rehaif v. United States*, No. 17-9560 (June 21, 2019) (in which the Court agrees with the Due Process Institute that Congress should pay closer attention to how it drafts criminal laws).

The Court was asked to grapple with whether a “knowingly” provision in a criminal statute applied to just one element of the offense or to multiple elements. In a 7-2 opinion authored by Justice Breyer, the Court correctly held that the statute in question required prosecutors to prove both that an individual knew that he had engaged in the underlying relevant criminal conduct and also that he knew he fell within a specific relevant status required in the statute (i.e. that he was a previously convicted person) in order to convict.

The Due Process Institute is constantly trying to explain to the people who draft our criminal laws how much it matters—as an issue of fundamental fairness—that each element of a criminal offense correspond to a meaningful *mens rea* standard and that writing complicated criminal statutes is actually really hard and if it isn’t done carefully, people will go to jail who shouldn’t. We like it when the Court steps in to clarify a particular criminal statute, but we think it would be even better if people could rely on fair and clearly written criminal laws from Congress rather than relying on the years’ long, not guaranteed, and rather limited *certiorari* petition process. *But hey, I’m a lobbyist for the Constitution so I am paid to think that* founded a nonprofit that educates lawmakers about that solemn responsibility.

SUPERVISED RELEASE / RIGHT TO JURY: *United States v. Haymond*, No. 17-1672 (June 26, 2019) (in which prosecutors try but fail to imprison a formerly incarcerated person on a new criminal count without an actual conviction).

Mr. Haymond was convicted of possession and attempted possession of child pornography in 2010. Five years later, while on supervised release, probation officers seized multiple devices during a surprise search of his apartment. After searching the devices, they discovered that he had committed violations of the conditions of his supervised release and was subsequently automatically sentenced to an additional five years in jail. Mr. Haymond’s appeal argued that, in so doing, the court violated his 5th and 6th Amendment rights. Justice Gorsuch’s opinion (joined by Justices Ginsberg, Sotomayor, Kagan) begins:

“Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.”

Hurray for due process! (By this point, it shouldn't surprise you that you can read our amicus in support of Mr. Haymond's case at www.idueprocess.org/amicus.)

Additional good news: at oral argument several justices ~~seemed surprised about how our criminal legal system operates~~ articulated constitutional concerns about the current supervised release violation process (see my earlier unbiased point re: how none of the current Justices have legal experience defending criminally accused persons and how that lack of experience profoundly negatively impacts American jurisprudence).

VOID FOR VAGUENESS: *United States v. Davis*, No. 18-431 (June 24, 2019) (in which the Court says it better than I can: “vague laws . . . hand off the legislature’s responsibility for defining criminal behavior to unelected prosecutors and judges, and . . . leave people with no sure way to know what consequences will attach to their conduct”).

In a 5-4 decision authored by Justice Gorsuch, the Court held that a criminal statute that provides enhanced penalties for using a firearm during a “crime of violence,” is unconstitutionally vague. The opinion begins:

“In our constitutional order, a vague law is no law at all. Only the people’s elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature’s responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. **When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again**” (emphasis for the impatient reader added).

Lesson: Lawyers of the world, keep making arguments involving unconstitutional vagueness in criminal statutes. It matters. And sometimes you win.

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