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Supreme Court Update

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I. Scope of This Outline[1]

This outline contains all criminal law and criminal procedure cases heard by the Supreme Court in its 2018 Term *except* those pertaining solely to federal practice. In each section, cases already decided are discussed first, followed by a description of the issues presented in those still awaiting decision at the time of writing. The final section briefly describes cases slated to be heard in the October 2019 Term.

A terrific resource for all of these cases, and to track the Court's jurisprudence in general, is SCOTUSblog.com, which, for each case on which certiorari is granted, compiles the decision below, the briefs, the transcript of oral argument, and the Court's opinion, as well as expert commentary.[2]

I. Fourth Amendment

Mitchell v. Wisconsin, No. 18-6210: Warrantless blood draw and implied consent

Background and issue: In 2013, Gerald Mitchell was arrested for operating a vehicle while intoxicated. During the drive to the police station, Mitchell's physical condition quickly deteriorated and he became "lethargic." After reaching the police station, officers determined that Mitchell needed medical attention, so they opted to drive him to a nearby hospital. Upon arrival at the hospital, Mitchell was transported to the emergency room where officers read him the statutorily mandated form regarding the state implied consent law. However, Mitchell was too incapacitated to indicate his understanding or consent and soon thereafter fell unconscious. Despite that, one of the officers directed hospital staff to draw a sample of Mitchell's blood, which they did. The blood sample later revealed that Mitchell's blood alcohol concentration was .222.

Mitchell was subsequently charged with driving with a prohibited alcohol concentration, as well as operating a motor vehicle while intoxicated. Prior to trial, Mitchell moved to suppress the results of the blood test on the ground that his blood was taken without a warrant and in the absence of any exceptions to the warrant requirement. The State contended that Mitchell had consented to the blood draw when he drove his van on Wisconsin highways according to a subsection of Wisconsin's implied-consent law. The trial court ruled the blood test admissible, and Mitchell was ultimately convicted on both counts.

Mitchell appealed his conviction on the sole contention that the warrantless blood draw violated his Fourth Amendment right to be free from unreasonable searches and seizures. The Wisconsin Supreme Court ultimately upheld the blood draw in a 5-2 vote, with no single rationale garnering a majority of the justices. Three justices upheld the conviction on the basis of the Wisconsin implied consent statute. Two justices reasoned that the blood draw must meet the strictures of the Fourth Amendment, and found it did so as a reasonable search incident to arrest because (distinguishing the Supreme Court's recent decision in

[1] Many thanks to Tyler Ames, UT Law '19, for terrific research assistance in preparing these materials.
[2] *See*, *e.g.*, SCOTUSblog, http://www.scotusblog.com.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), the defendant's unconsciousness meant that there was no less-intrusive means of obtaining the evidence.

The Supreme Court granted certiorari to answer the question whether a statute that authorizes a blood draw from an unconscious motorist creates a permissible exception to the Fourth Amendment warrant requirement. Mitchell takes the position that a warrant (or recognized exception to the requirement thereof) or *actual* and not implied consent is required to accomplish the physical intrusion of the blood draw – a position endorsed by the Texas Court of Criminal Appeals (along with many other state courts of last resort) in *State v. Villarreal*, 475 S.W.3d 784, 798 (Tex. Crim. App. 2014).

Mitchell is the third case on warrantless blood draws that the Supreme Court has heard in the last six years. In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Court held that the natural dissipation of alcohol from the blood stream does not constitute per se exigent circumstances that justify the warrantless drawing of blood from an individual suspected of drunk driving. And in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), the Court held that a blood draw is not a reasonable search incident to arrest.

II. Fifth Amendment

Gamble v. United States, No. 17-646: Separate sovereigns exception to Double Jeopardy

Background and issue: Terance Gamble was prosecuted by the State of Alabama for possession of marijuana and possession of a weapon while having a prior felony conviction. He was convicted and sentenced to one year in prison (a sentence he has completed). While that state prosecution was pending, prosecutors in the Southern District of Alabama indicted him for violating 18 U.S.C. § 922(g)(1) – possessing a firearm while having a prior felony conviction – for the same incident. Gamble entered a conditional plea that preserved his right to raise a Double Jeopardy challenge to the federal prosecution. Gamble was sentenced to forty-six months of imprisonment.

In *Abbate v. United States*, 359 U.S. 187 (1959), the Supreme Court held 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. Elaborating on this distinction in *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863 (2016), the Court explained that states were separate sovereigns from the federal government because they rely on authority belonging to them before admission to the Union and preserved to them by the Tenth Amendment. In affirming the district court's ruling, the Eleventh Circuit held that "unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine." The Supreme Court granted certiorari to consider whether it should do precisely that.

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