SUPREME COURT REVIEW AND PREVIEW

(Cases Granted/Decided 11/28/15 to 2/10/17)

Detroit/Wayne County Criminal Advocacy Program
January 13, 2017
UPDATED February 10, 2017

Kathy Swedlow, MAACS
swedlowk@mimaacs.org

I. First Amendment

***Packingham v North Carolina*, No. 15-1194**
Cert. issue: "The North Carolina Supreme Court sustained petitioner's conviction under a criminal law, NC Gen Stat § 14-202.5, that makes it a felony for any person on the State's registry of former sex offenders to 'access' a wide array of websites – including Facebook, YouTube, and nytimes.com – that enable communication, expression, and the exchange of information among their users, if the site is 'know[n]' to allow minors to have accounts. The law – which applies to thousands of people who, like petitioner, have completed all criminal justice supervision – does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose. The question presented is: Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner – who was convicted based on a Facebook 'post' in which he celebrated dismissal of a traffic ticket, declaring 'God is Good!'"

II. Fourth Amendment

A. Searches

***Birchfield v North Dakota*, 136 S Ct. 2160 (2016)**
"Because breath tests are significantly less intrusive than blood tests … we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving … It is another matter … for a State … to impose criminal penalties on the refusal to submit to [a blood] test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."

B. Seizures

***Manuel v City of Joliet*, No. 14-9496**
Cert. issue: "Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment."

C. Exclusionary Rule

***Utah v Strieff*, 136 S Ct 2056 (2016)**
"We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest."

D. Extraterritorial Application of the Fourth Amendment

***Hernández v Mesa*, No. 15-118**
Cert. issues:
(1) "Whether a formalist or functionalist analysis governs the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States;
(2) "Whether qualified immunity may be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident; and
(3) "Whether the claim in this case may be asserted under *Bivens v. Six Unknown Federal Narcotics Agents*."

III. Fifth Amendment

***Puerto Rico v Valle*, 136 S Ct 1863 (2016)**
"Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government – because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol – the Commonwealth and the United States are not separate sovereigns."

***Bravo-Fernandez v US*, 137 S Ct 352 (2016)**
"[The] … Double Jeopardy Clause [does not] bar the Government from retrying defendants … after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal, and the convictions are later vacated for legal error unrelated to the inconsistency."

IV. Sixth Amendment

A. Counsel of Choice

***Luis v. US*, 136 S Ct 1083 (2016)**
"[T]he pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The nature and importance of the constitutional right taken together with the nature of the assets lead us to this conclusion."

B. Speedy Trial

***Betterman v Montana*, 136 S Ct 1609 (2016)**
"The Sixth Amendment speedy trial right … does not extend beyond conviction, which terminates the presumption of innocence … For inordinate delay in sentencing … a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments."

C. Ineffective Assistance of Counsel

***Lee v US*, No. 14-5369**
Cert. issue: "To establish prejudice under *Strickland v Washington*, 466 US 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' *Hill v Lockhart*, 474 US 52, 59 (1985). In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, the question that has deeply divided the circuits is whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation."

V. Trial Issues

A. *Brady v Maryland*

***Turner v US*, No. 15-1503 & *Overton v US*, No. 15-1504**
Cert. issue: "Whether the petitioners' convictions must be set aside under *Brady v Maryland*, 373 US 83 (1963)?"

B. *Voir Dire*

***Foster v Chatman*, 136 S Ct 1737 (2016)**
"The State's … prosecutors were motivated in substantial part by race when they struck [two prospective jurors] from the jury 30 years ago … Two peremptory strikes on the basis of race are two more than the Constitution allows."

C. Right to Expert Assistance

***McWilliams v Dunn*, No. 16-5294**
Cert. issue: "When this Court held in *Ake [v Oklahoma*, 470 US 68 (1986)] that an indigent defendant is entitled to meaningful expert assistance for the 'evaluation, preparation, and presentation of the defense,' did it clearly establish that the expert should be independent of the prosecution?"

VI. Immigration and Criminal Law

***Torres v Lynch*, 136 S Ct 1619 (2016)**
A state crime that does not include an interstate commerce element but corresponds to a specific federal offense is an aggravated felony under 8 USC § 1101(a)(43) of the Immigration and Naturalization Act.

***Esquivel-Quintana v Lynch*, No. 16-54**
Cert. issue: "Whether a conviction under one of the seven state statutes criminalizing consensual sexual intercourse between a 21-year-old and someone almost 18 constitutes an 'aggravated felony' of 'sexual abuse of a minor' under 8 USC § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal."

***Lynch v Dimaya*, 15-1498**
Cert. issue: "Whether 18 USC 16(b) [defining 'crime of violence'], as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague."

***Lee v US*, No. 14-5369**
See case listing under Sixth Amendment/Ineffective Assistance of Counsel.

VII. Other Criminal Law/Sentencing Issues

Honeycutt v US, No. 16-142
Cert. issue: "Under 21 USC § 853(a)(l), a person convicted of violating a federal drug law must forfeit to the government 'any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.' The question presented is: Does 21 USC § 853(a)(l) mandate joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?"

***Dean v US*, No. 15-9260**
Cert. issue: "Whether, *Pepper v. United States*, 562 US 476, 131 S Ct 1229, 179 L Ed 2d 196 (2011) overruled *United States v. Hatcher*, 501 F3d 931 (CA 8, 2007) and related opinions from the Eighth Circuit Court of Appeals to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence or sentences under 18 USC § 924(c) in determining the appropriate sentence for the felony serving as the basis for the 18 USC § 924 (c) convictions."

***Beckles v US*, No. 15-8544**
Cert. issues:
(1) "Whether *Johnson* [*v US*, 135 S Ct 2551 (2015)], applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in USSG § 4B1.2(a)(2)?;

(2) "Whether *Johnson*'s constitutional holding applies to the residual clause in USSG § 4B1.2(a) (2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?; and
(3) "Whether mere possession of a sawed-off shotgun, an offense listed as a 'crime of violence' only in the commentary to USSG § 4B1.2, remains a 'crime of violence' after *Johnson*?"

***Shaw v US*, 137 S Ct 462 (2016)**
"[A] plan to deprive a bank of money in a customer's deposit account is a plan to deprive the bank of "something of value" within the meaning of the bank fraud statute."

***Voisine v US*, 136 S Ct 2272 (2016)**
A misdemeanor crime with a *mens rea* of recklessness qualifies as a "misdemeanor crime of domestic violence" under 18 USC 922(g)(9).

***Taylor v US*, 136 S Ct 2074 (2016)**
To obtain a conviction under the Hobbs Act, 18 USC § 1951, the government does not need to show that the drugs in question were transported across state lines, or were slated to be transported across state lines. "Rather, to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is 'commerce over which the United States has jurisdiction.'"

***Ocasio v US*, 136 S Ct 1423 (2016)**
"A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right."

***Molina-Martinez v. US*, 136 S Ct 1338 (2016)**
"A defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under Rule 52(b)."

***Lockhart v US*, 136 S Ct 958 (2016)**
The 10-year mandatory minimum sentencing enhancement in 18 USC § 2252(b)(2) applies to prior, state-court "sexual abuse" and "aggravated sexual abuse" convictions, regardless of whether those convictions involved a "minor or ward." In addition, the rule of lenity does not apply where the an interpretation of a statute is "well supported by context" and "sensible grammatical principle[s]."

***Musaccio v US*, 136 S Ct 709 (2016)**
When a trial court's jury instructions erroneously adds an element to the charged crime, a defendant's sufficiency challenge should be evaluated according to elements of the charged crime, and not according to the elements in the jury instructions. The statute of limitations defense set forth in 18 USC § 3282(a) is a non-jurisdictional defense that cannot be raised for the first time on appeal.

VIII. Post-Conviction

A. Juror Impeachment

***Pena-Rodriguez v Colorado*, No. 15-606**
Cert issue: "Most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law. The question presented is whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury."

B. Retroactivity

***Montgomery v Louisiana*, 136 S Ct 718 (2016)**
"[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule… *Miller* announced a substantive rule of constitutional law."

C. AEDPA Review

***Davila v Davis*, No. 15-70013**
Cert. issue: "Does the rule established in *Martinez v Ryan*, 132 S Ct 1309 (2012) and *Trevino v. Thaler*, 133 S Ct 1911, 1921 (2013), that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also apply to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims?"

***Weaver v Massachusetts*, No. 16-240**
Cert. issue: "The question presented is whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts."

***Duncan v Owens*, No. 14-1516**
Writ of certiorari (granted October 1, 2015) is dismissed as improvidently granted.

D. Due Process and Appellate Review

***Williams v Pennsylvania*, 136 S Ct 1899 (2016)**
"Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level… An unconstitutional failure to recuse [is] structural error even if the judge … did not cast a deciding vote."

E. AEDPA Appellate Review

***Buck v Davis*, No. 15-8049**
Cert. issue: "Whether the Fifth Circuit imposed an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied petitioner a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an 'expert' who testified that petitioner was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing."

IX. Eighth Amendment and Capital Issues

A. Death Eligibility

***Moore v Texas*, No. 15-797**
Cert. issue: "Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida* and *Atkins v. Virginia* to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed."

B. Jury Instructions/Sentencing Procedures

***Bosse v Oklahoma*, 137 S Ct 1 (2016) (per curiam)**
Lower courts "remain[] bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban. The state court erred in concluding otherwise."

***Kansas v Carr*, 136 S Ct 633 (2016)**
The Eighth Amendment does not require (1) a capital sentencing jury to be instructed that mitigating circumstances do not need to be proven beyond a reasonable doubt, and (2) separate sentencing proceedings for co-defendants.

C. Capital Sentencing Statutes

***Hurst v Florida*, 136 S Ct 616 (2016)**
Florida's capital sentencing scheme, where the jury makes an advisory sentencing recommendation to the judge, violates the Sixth Amendment.

X. Other

***Nelson v Colorado*, No. 15-1256**
Cert. issue: "Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence to get their money back. The Question Presented is whether this requirement is consistent with due process."