SUPREME COURT REVIEW AND PREVIEW

(Cases Granted/Decided 2/11/17 to 1/8/18)

Detroit/Wayne County Criminal Advocacy Program
January 12, 2018

Kathy Swedlow, MAACS
swedlowk@mimaacs.org

I. First Amendment

***Packingham v North Carolina*, ___ US ___; 137 S Ct 1730; 198 L Ed 2d 273 (2017)**

Striking North Carolina law that made it a felony for a registered sex offender to "access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." NC Gen Stat Ann §§ 14-205(a), (e).

"[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals – and in some instances especially convicted criminals – might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.… It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech'… That is what North Carolina has done here. Its law must be held invalid."

***Lozman v City of Riviera Beach, Florida*, No. 17-21**

Cert. issue: "Whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law."

II. Fourth Amendment

A. Search

***Byrd v US*, No. 16-1371**

Cert. issue: "A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car, *i.e.*, an expectation of privacy that society accepts as reasonable. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?"

***Carpenter v US*, No. 16-402**
Cert. issue: "Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment."

B. Probable Cause

***Lozman v City of Riviera Beach, Florida*, No. 17-21**
See case listing under First Amendment.

***District of Columbia v Wesby*, No. 15-1485**
Cert. issues: "Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing.

"The questions presented are: (1) Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and (2) Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard."

C. Pretrial Detention

***Manuel v City of Joliet*, ___ US ___; 137 S Ct 911; 197 L Ed 2d 312 (2017)**
"The primary question in this case is whether Manuel may bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement. Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes 'the standards and procedures' governing pretrial detention…. And those constitutional protections apply even after the start of 'legal process' in a criminal case – here, that is, after the judge's determination of probable cause…. Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment…."

D. Automobile Exception

***Collins v Virginia*, No. 16-1027**
Cert. issue: "Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house."

E. Extraterritorial Application of the Fourth Amendment

***Hernández v Mesa*, ___ US ___; 137 S Ct 2003; 198 L Ed 2d 625 (2017) (*per curiam*)**
"The facts alleged in the complaint depict a disturbing incident resulting in a heartbreaking loss of life. Whether petitioners may recover damages for that loss in this suit depends on questions that are best answered by the Court of Appeals in the first instance." On remand, the Court of Appeals is to reconsider petitioners' *Bivens* claims in light of *Ziglar v Abbasi*, __ US __; 137 S Ct 1843; 198 L Ed 2d 290 (2017), and the "special factors counseling hesitation" described in that case. The Court of Appeals erred in holding that the officer was entitled to qualified immunity on petitioners' Fifth Amendment claim, as "Hernández's nationality and the extent of his ties to the United States were unknown to [Officer] Mesa at the time of the shooting."

III. Fifth Amendment

A. Double Jeopardy

***Currier v Virginia*, No. 16-1348**
Cert. issue: "Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal."

B. Incrimination

***City of Hays, Kansas v Vogt*, No. 16-1495**
Cert. issue: "Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial."

IV. Sixth Amendment

***Lee v US*, ___ US ___; 137 S Ct 1958; 198 L Ed 2d 476 (2017)**
Non-citizen Defendant – who pled guilty to a crime in reliance on his attorney's erroneous advice that he would not face deportation if he pled guilty – can show prejudice under *Strickland v Washington* for the attorney's advice. "We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee…. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so."

***McCoy v Louisiana*, No. 16-8255**
Cert. issue: "Whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection."

V. Trial Issues

A. *Brady v Maryland*

***Turner v US & Overton v US*, ___ US ___; 137 S Ct 1885; 198 L Ed 2d 443 (2017)**
Evidence suppressed at the time of trial was favorable to the defense, but was not material. Because "virtually every witness to the crime agreed" to the Government's main theme – that the murder was committed by a "large group of perpetrators" – Petitioners would not have been able to use the suppressed evidence to present a plausible alternative theory that the crime had been committed by only one or two people. To accept Petitioners' alternative theory, jury would have to believe that seven witnesses falsely confessed, "wholly fabricated" their stories, or otherwise testified falsely.

B. Right to Expert Assistance

***McWilliams v Dunn*, ___ US ___; 137 S Ct 1790; 198 L Ed 2d 341 (2017)**
Ake v Oklahoma "clearly established" that a "defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" Without deciding McWilliams's core claim – that *Ake* requires the appointment of an expert who is "independent of the prosecution" – the Court here decided that "Alabama here did not meet … *Ake*'s most basic requirements."

VI. Immigration and Criminal Law

***Lee v US*, ___ US ___; 137 S Ct 1958; 198 L Ed 2d 476 (2017)**
See case listing under Sixth Amendment/Ineffective Assistance of Counsel.

***Esquivel-Quintana v Sessions*, ___ US ___; 137 S Ct 1562; 198 L Ed 2d 22 (2017)**
"We agree with petitioner that, in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16. Because the California statute at issue in this case does not categorically fall within that definition, a conviction pursuant to it is not an aggravated felony under" the Immigration and Nationality Act."

***Sessions 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."

VII. Other Criminal Law/Sentencing Issues

***Honeycutt v US*, ___ US ___; 137 S Ct 1626; 198 L Ed 2d 73 (2017)**
"Forfeiture pursuant to [21 USC] § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime," and does not permit forfeiture based on joint and several liability.

***Dean v US*, ___ US ___; 137 S Ct 1170; 197 L Ed 2d 490 (2017)**
"Nothing in 18 USC § 924(c) restricts the authority conferred on sentencing courts by 18 USC § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count."

***Beckles v US*, ___ US ___; 137 S Ct 886; 197 L Ed 2d 145 (2017)**
Because the federal sentencing guidelines "merely guide the district courts' discretion, [they] are not amenable to a vagueness challenge. If a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be. The advisory Guidelines also do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement."

***Koons v US*, No. 17-5716**
Cert. issues: "(1) Whether the Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline sentencing range was below a statutory mandatory minimum and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence under 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782, which lowered the base offense levels assigned to most drug quantities?

"(2) Whether *Freeman v United States*, 564 US 522 (2011) (plurality opinion) supports the holding that there is a substantive limitation on the term 'based on' in 18 U.S.C. § 3582(c)(2) that prohibits defendants whose initial advisory guideline range was below a statutory mandatory minimum, and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), from being eligible for further reduction in sentence due to retroactive sentencing guideline Amendment 782?"

***Hughes v US*, No. 17-155**
Cert. issue: "This Court explained in *Marks v United States*, 430 US 188, 193 (1977), that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' In *Freeman v United States*, 564 US 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under FR Crim P 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply Freeman's result.

"The questions presented are: (1) Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other; (2) Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed; and (3) Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a FR Crim P 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range."

***Dahda v US*, No. 17-43**
Cert. issue: "Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC 2510-2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction."

***US v Microsoft*, No. 17-2**
Cert. issue: "Whether a United States provider of email services must comply with a probable-cause based warrant issued under 18 USC 2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad."

***Marinello v US*, No. 16-1144**
Cert. issue: "Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action."

VIII. Post-Conviction

A. Juror Impeachment

***Peña-Rodriguez v Colorado*, ___ US ___; 137 S Ct 855; 197 L Ed 2d 107 (2017)**
"[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee…. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances…."

B. Appellate Review

***Rosales-Mireles v US*, No. 16-9493**
Cert. issue: "Whether, in order to meet the standard for plain error review set forth by the Supreme Court in *United States v Olano* that '[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings," it is necessary, as the US Court of Appeals for the 5th Circuit required, that the error be one that 'would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'"

***Class v US*, No. 16-424**
Cert. issue: "Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction."

C. AEDPA

***Dunn v Madison*, ___ US ___; 138 S Ct 9; ___ L Ed 2d ___ (2017) (*per curiam*)**
Because "the state court's determinations of law and fact were not 'so lacking in justification' as to give rise to error 'beyond any possibility for fairminded disagreement,'" Petitioner's habeas claim that he is incompetent to be executed "must fail".

***Kernan v Cuero*, ___ US ___; 138 S Ct 4; ___ L Ed 2d ___ (2017) (*per curiam*)**
Because no Supreme Court opinion clearly establishes that a state court is required to impose a lower sentence on the facts of this case – where defendant pled guilty and received that lower sentence, but where the state court permitted the state to

amend the complaint, which led to a higher sentence – the court below improperly granted habeas relief.

***Davila v Davis*, ___ US ___; 137 S Ct 2058; 198 L Ed 2d 603 (2017)**
"Petitioner asks us to extend *Martinez* [and *Trevino]* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim. We decline to do so."

***Weaver v Massachusetts*, ___ US ___; 137 S Ct 1899; 198 L Ed 2d 420 (2017)**
Unpreserved claim that defendant's trial was closed to the public during *voir dire*, raised outside of direct appeal and in the context of an ineffectiveness claim, requires a showing of prejudice.

***Wilson v Sellers*, No. 16-6855**
Cert. issue: "Did this Court's decision in *Harrington v Richter*, 562 US 86 (2011), silently abrogate the presumption set forth in *Ylst v Nunnemaker*, 501 US 797 (1991) – that a federal court sitting in habeas proceedings should 'look through' a summary state court ruling to review the last reasoned decision – as a slim majority of the *en banc* Eleventh Circuit held in this case, despite the agreement of both parties that the *Ylst* presumption should continue to apply?"

***Ayestas v Davis*, No. 16-6795**
Cert. issue: "While Carlos Ayestas' federal habeas proceeding was pending, the Harris County District Attorney's Office ('HCDA') accidentally disclosed a document memorializing the basis of its charging decision. The author of that HCDA charging memo had provided as one of two typewritten reasons for seeking the death penalty: 'THE DEFENDANT IS NOT A CITIZEN.' The lower federal courts have denied the routine stay-and-amendment procedure necessary to exhaust the claims associated with the HCDA memo in state court.

"The lower courts have also denied Mr. Ayestas' motion, under 18 U.S.C. § 3599, for 'investigative, expert, [and] other services' that were 'reasonably necessary' to develop facts associated with a separate Sixth Amendment ineffective-assistance-of-counsel ('IAC') claim that had been forfeited by his state habeas lawyer. The Fifth Circuit interprets 'reasonably necessary' to require an inmate to show 'substantial need,' an interpretation of § 3599(f) that forms an express circuit split with other federal courts of appeal. Through the substantial-need standard, the Fifth Circuit withholds expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself.

"This case therefore presents the following question: Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds 'reasonably necessary' resources to investigate and develop an IAC claim that state habeas counsel forfeited, where

the claimant's existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made."

D. AEDPA Appellate Review

***Tharpe v Sellers*, ___ US ___; ___ S Ct ___ ; ___ L Ed 2d ___ (2018) (*per curiam*)**
The Court of Appeals erred in failing to issue a certificate of appealability (COA); Petitioner's claim that a juror based his capital sentencing decision on race – as evidenced by the juror's "remarkable" (majority) affidavit that displayed "certainly odious" (dissent) views about race – and presented in a FR Civ P 60(b) motion was debatable.

***Buck v Davis*, ___ US ___; 137 S Ct 759; 197 L Ed 2d 1 (2017)**
The Court of Appeals erred in evaluating the merits of Petitioner's claim when it reviewed his request for a certificate of appealability (COA); the COA inquiry "is not coextensive with a merits analysis." Instead, the Court of Appeals should only ask "if the District Court's decision was debatable." In addition, trial counsel was ineffective for introducing expert testimony at capital sentencing "that Buck's race increased his propensity for violence."

IX. Eighth Amendment and Capital Issues

***Wright v Florida*, ___ US ___; 138 S Ct 360; __ L Ed 2d ___ (2017)**
Writ granted, judgment vacated, and case remanded to state court for further consideration in light of *Moore v Texas*, ___ US ___; 137 S Ct 1039; 197 L Ed 2d 416 (2017).

***Weathers v Davis*, ___ US ___; 138 S Ct 315; __ L Ed 2d ___ (2017)**
Writ granted, judgment vacated, and case remanded to state court for further consideration in light of *Moore v Texas*, ___ US ___; 137 S Ct 1039; 197 L Ed 2d 416 (2017).

***Long v Davis*, ___ US ___; 138 S Ct 72; 199 L Ed 2d 3148 (2017)**
Writ granted, judgment vacated, and case remanded to state court for further consideration in light of *Moore v Texas*, ___ US ___; 137 S Ct 1039; 197 L Ed 2d 416 (2017).

***Moore v Texas*, ___ US ___; 137 S Ct 1039; 197 L Ed 2d 416 (2017)**
The "*Briseno* factors" – used by the Texas courts to evaluate claims of intellectual disability in the capital sentencing context – are based on "superseded medical standards" and create an "unacceptable risk that persons with intellectual disability will be executed." "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake."

X. Other

***Nelson v Colorado*, ___ US ___; 137 S Ct 1249; 197 L Ed 2d 611 (2017)**
"When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes. Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process."

***US v Sanchez-Gomez*, No. 17-312**
Cert. issue: "Whether the court of appeals erred in asserting authority to review respondents' interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents' individual claims were moot."