

# UNITED STATES SUPREME COURT CRIMINAL LAW UPDATE – 2017 TERM



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M. ANNE KELLY

DIVISION DIRECTOR, CRIMINAL APPEALS DIVISION

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# CERT GRANTED – 11/2/18

## *Flowers v. Mississippi*, 17-9572

- ▶ “Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U.S. 79 (1986), in this case.” The defendant argues that the Mississippi Court failed to take into account the prosecutor’s alleged “history of adjudicated purposeful race discrimination . . . when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors.”

# TO BE DECIDED IN 2018 TERM

## ***Garza v. Idaho*, 17-1026**

- ▶ In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court held that trial counsel who refuses a criminal defendant's request to file a notice of appeal has performed deficiently and that prejudice will be presumed.
- ▶ Court will address whether this same rule applies where the defendant has pleaded guilty under a plea agreement and waived his right to appeal.
- ▶ *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, held that the presumption of ineffective assistance of counsel established in *State v. Duran*, 1986-NMCA-125, 105 N.M. 231, does not apply to guilty pleas.

# TO BE DECIDED IN 2018 TERM

## *Gamble v. United States, 17-646*

- ▶ The petition asks the Court to overrule the “dual sovereign” exception to the Double Jeopardy Clause, which allows a person to be prosecuted for the same criminal conduct if the prosecutions are brought by two separate sovereigns.
- ▶ Petitioner contends that the exception is “inconsistent with the plain text and original meaning of the Constitution, and outdated in light of incorporation and a vastly expanded system of federal criminal law.”
- ▶ 36 states, including NM, have joined in an amicus brief on behalf of States’ rights to bring separate prosecutions.

# FOURTH AMENDMENT – PROBABLE CAUSE

## *District of Columbia v. Wesby, 138 S.Ct. 577 (2017)*

- ▶ The Court held that police officers had probable cause to arrest for trespassing a group of individuals who were partying at a vacant house
- ▶ The Court relied on the totality of the circumstances – including the “near-barren” condition of the house, the partiers’ turning the living room into a “make-shift strip club”, the presence of drugs, and the partiers’ reaction to the officers – to find the officers would reasonably infer they knew the party as not authorized
- ▶ The lower court erred (1) in viewing the facts in isolation and (2) in dismissing circumstances that were “susceptible of innocent explanation.” “But probable cause does not require officers to rule out a suspect’s innocent explanation for suspicious facts.” “The relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.”
- ▶ The Court also unanimously held that the officers were entitled to qualified immunity from the partiers’ § 1983 action against them

# FOURTH AMENDMENT – REASONABLE EXPECTATION OF PRIVACY

## *Byrd v. United States*, 138 S.Ct. 1518 (2018)

- ▶ The Court unanimously held that “as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.”
- ▶ The Court vacated the opinion from the Third Circuit holding that police did not need probable cause (or even reasonable suspicion) to search a car driven by petitioner, whose girlfriend rented the car and who was not named in the rental agreement.
- ▶ Court noted that (1) a person need not have a “recognized common-law property interest” in order to claim a reasonable expectation of privacy but (2) a “legitimate presence on the premises . . . standing alone” is not enough to claim a reasonable expectation of privacy. The Court relied on the “general property-based concept” of right to exclude as a “guide[s] to resolving this case.”
- ▶ The Court remanded to the lower court to address the government’s argument that the general rule should not apply because petitioner “should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company . . . to aid him in committing a crime.”

# FOURTH AMENDMENT – CELL PHONE RECORDS

## *Carpenter v. United States*, 138 S.Ct. 2206 (2018)

- ▶ By 5-4 vote, the Court held that “the Government conducts a search under the Fourth Amendment when it accesses [at least seven days of] historical cell phone records that provide a comprehensive chronicle of the user’s past movements” and a warrant is required.
- ▶ Under Stored Communications Act, the govt can compel production of the content of stored communications when “specific and articulable acts show [] that there are reasonable grounds to believe that the contents of a wire or electronic communication . . . are relevant and material to an ongoing criminal investigation.” This is a lower standard than the probable cause required by a warrant.
- ▶ Quoting *United States v. Jones*, 565 U.S. 400 (2012), the Court held that “‘society’s expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalogue every single movement of an individual’s car for a very long period.’” In *Jones*, the Court held that the attachment of a GPS to Jones’ vehicle was a Fourth Amendment search.
- ▶ “Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.’”

# FOURTH AMENDMENT – CELL PHONE RECORDS cont.

- ▶ The Court notes that technology has enhanced the “Government’s capacity to encroach upon areas normally guarded from inquisitive eyes[.]”
- ▶ The “third-party doctrine” – which provides that a person cannot have a legitimate expectation of privacy in information he voluntarily discloses to a third party – should not be extended “to cover these novel circumstances” and it isn’t a voluntary sharing. This “detailed chronicle” of a person’s movements implicates far-reaching privacy concerns.
- ▶ Court does not address is fewer days would be constitutionally acceptable – just says seven days makes it a search.
- ▶ Kennedy’s dissent, joined by Thomas and Alito, argues that the third-party doctrine should apply and that these records are not fundamentally different from bank or other business records
- ▶ Also cites to the “equilibrium adjustment theory” – new technology makes both criminal activity and law enforcement easier and the balance “often will be difficult to determine during periods of rapid technological change.” The Court should therefore refrain from incorporating “arbitrary and outside limit[s].”
- ▶ Thomas’ dissent was simply that the records did not belong to the petitioner but to MetroPCS and Sprint.
- ▶ NOTE: the *US v. Miller*, 425 U.S. 435 (1976), issue is currently before our Supreme Court in *State v. Adame*, S-1-SC-36839. Two issues: whether the NM Constitution should diverge from *Miller* and grant persons a privacy interest in their bank records and whether such records were lawfully obtained by grand jury subpoena.

# FOURTH AMENDMENT – AUTOMOBILE EXCEPTION

## *Collins v. Virginia*, 138 S.Ct. 1663 (2018)

- ▶ By 8-1 vote, the Court held that the Fourth Amendment's automobile exception does not "permit[] a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein."
- ▶ "[T]he rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house" and therefore do not "justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage."
- ▶ In 1997, our Supreme Court rejected the federal bright-line automobile exception and held that a warrantless search of an automobile requires exigent circumstances. *State v. Gomez*, 1997-NMSC-777, 932 P.2d 1

# DOUBLE JEOPARDY – SUCCESSIVE TRIALS

## *Currier v. Virginia*, 138 S.Ct. 2144 (2018)

- ▶ By 5-4 vote, the Court held that a defendant who consents to severance of multiple charges into sequential trials may not successfully claim that his second trial violated the issue-preclusion component of the Double Jeopardy Clause.
- ▶ Petitioner was acquitted of burglary and larceny and then convicted of possession of a firearm in a subsequent trial
- ▶ In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Court held that the government may not retry any issue that was necessarily decided by a jury's acquittal in a prior trial.
- ▶ However, relying on *Jeffers v. United States*, 432 U.S. 137 (1977), the Court held that "it's different when the defendant consents to two trials where one could have done. If a single trial on multiple charges would suffice to avoid a double jeopardy complaint, 'there is not violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . Offenses tried separately and persuades the trial court to honor his election.'"
- ▶ The Court also held that issue preclusion principles have only "guarded application . . . in criminal cases." *Bravo-Fernandez v. U.S.*, 137 S.Ct. 352 (2016)
- ▶ In NM, double jeopardy cannot be waived. See NMSA 1978, § 30-1-10 (1963)

# SIXTH AMENDMENT

## *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018)

- ▶ By 6-3 vote, the Court held that “a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.”
- ▶ Under the Sixth Amendment, certain decisions such as whether to plead guilty or whether to waive a jury trial are reserved for the client and that “[a]utonomy to decide that the objective of the defense is to assert innocence belongs in [that] category.”

# PLEA AGREEMENTS

## *Kernan v. Cuero*, 138 S.Ct. 4 (2017)

- ▶ Unanimous *per curiam* opinion
- ▶ After the court accepted the petitioner's guilty plea, but before sentencing, California determined that another of the petitioner's prior convictions qualified as a "strike" which raised his sentence from 14 to 25 years. California moved to amend the complaint. Petitioner withdrew his initial plea, pled guilty to the new complaint, and was sentenced to 25 to life.
- ▶ He sought federal habeas relief and the Ninth Circuit granted it, finding that the original plea was an enforceable contract with the only remedy being specific performance.
- ▶ The Court summarily reversed and held that it is "unable to find in Supreme Court precedent that 'clearly established federal law' demanding specific performance as a remedy."
- ▶ The Ninth Circuit relied on *Santobello v. N.Y.*, 404 U.S. 257 (1971), but the Court had previously held that *Santobello* "expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea." *Mabry v. Johnson*, 467 U.S. 504 (1984).
- ▶ See *State v. Pieri*, 2009-NMSC-019, 146 N.M. 155, where the NMSC allowed defendant the opportunity to withdraw her plea or be resentenced by another judge as a remedy for broken prosecutorial promise.

# PLEA AGREEMENTS

## *Class v. United States, 138 S.Ct. 798 (2018)*

- ▶ By 6-3 vote, the Court held that a guilty plea does not “bar a [federal] criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution.”
- ▶ Defendant claimed that his conviction – for possession of a firearm on U.S. Capitol grounds – violated the Second Amendment and this claim “did not contradict the terms of the indictment or the written plea agreement.”
- ▶ Therefore, a defendant who pleads guilty may still “challenge the Government’s power to criminalize [his] (admitted) conduct.”

# INEFFECTIVE ASSISTANCE OF COUNSEL

## *Sexton v. Beaudreaux*, 138 S.Ct. 2555 (2018)

- ▶ By 8-1 vote, the Court summarily reversed a Ninth Circuit decision that granted habeas relief to a prisoner on the ground that his counsel was ineffective for failing to file a motion to suppress a witness's identification testimony.
- ▶ Witness gave vague initial description of the shooter and there was a 17-month lapse between shooting and the ID. However, witness had good opportunity to view the shooter, chose petitioner's picture in both photo lineups, and was "sure" about his ID once he saw petitioner in person.
- ▶ Due process concerns arise in eyewitness identification only when the identification procedure is "both suggestive and unnecessary" and improper police conduct created "a substantial likelihood of misidentification."
- ▶ Under AEDPA, a "fairminded jurist could conclude that counsel's performance was not deficient because counsel reasonably could have determined that the motion to suppress would have failed."
- ▶ The Court admonished the Ninth Circuit for considering arguments petitioner did not make to the state court and by "essentially evaluat[ing] the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable."

# COMPETENCY

## *Dunn v. Madison*, 138 S.Ct. 9 (2017)

- ▶ Unanimous *per curiam* opinion
- ▶ The Court summarily reversed the Eleventh Circuit's decision granting habeas relief to a defendant on the ground he was incompetent to be executed because he could not recall commission of the murder.
- ▶ The Court has held that the Eighth Amendment forbids execution of a person who lacks the mental capacity to understand he is being executed as punishment for a crime. However, this clearly established federal law does not extend where there is a "failure to remember his commission of the crime" as opposed to "a failure to rationally comprehend the concepts of crime and punishment as applied to his case."

# RACE AS A FACTOR IN DEATH VERDICT

## *Tharpe v. Sellers*, 138 S.Ct. 545 (2018)

- ▶ By 6-3 vote, the Court summarily reversed the Eleventh Circuit's decision that denied a death row inmate's motion to reopen his habeas case based on a juror's affidavit indicating his race played a part in the jury's sentencing decision.
- ▶ The juror's affidavit was "remarkable" and provided a strong factual basis that petitioner's race affected the verdict
- ▶ Affidavit opined there were "good black folks" and "[n-words]" and stated "I have wondered if black people even have souls."

# HABEAS – STATE COURT RECORD

## *Wilson v. Sellers*, 138 S.Ct. 1188 (2018)

- ▶ Under Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant habeas relief only if a state court decision “was contrary to, or involved an unreasonable application, of clearly established Federal law.”
- ▶ Issue here was which state court decision a federal habeas court should analyze in applying this standard – the state appellate court affirmed without explanation a reasoned lower court decision.
- ▶ By 6-3 vote, the Court held that the federal habeas court “should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.”
- ▶ The State may rebut this presumption by showing that alternative grounds that were briefed or argued to the state court.

# INVESTIGATION AND EXPERT SERVICES



## *Ayestas v. Davis*, 138 S.Ct. 1080 (2018)

- ▶ In a unanimous opinion, the Court held that the Fifth Circuit applied a federal provision allowing investigative and expert services to defendants in capital cases in an unduly restrictive manner when it required the petitioner to show a “substantial need” for the services.
- ▶ The statute requires only a showing that the services are “reasonably necessary” and “substantial” imposes a heavier burden.
- ▶ The Court also rejected Texas’ contention that the district court’s denial of the funding was an administrative decision, not subject to judicial review. The Court held that it was indisputably part of the judicial proceeding and therefore required application of a legal standard.

# FIRST AMENDMENT - ELECTIONS

## *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018)

- ▶ By 7-2 vote, the Court held that a Minnesota law that prohibits individuals who enter a polling place from wearing a “political badge, political button, or other political insignia” violates the First Amendment.
- ▶ The Court agreed with the State that (1) a polling place is a nonpublic forum where speech may be regulated if the regulation is “reasonable in light of the purpose served by the forum” and (2) that the purpose of the law – to provide an “island of calm” was permissible
- ▶ However, the law did not draw a “reasonable line” because an election judge attempting to enforce the law has no way of determining what issues or organizations may not be represented on buttons or badges. “A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable.” The Court questioned, for example, whether a “Support Our Troops” shirt or a “#MeToo” logo would be banned.
- ▶ One of the petitioners was turned away for wearing a “Please I.D. Me” button and a t-shirt with “Don’t Tread on Me” and a Tea Party Patriots logo.

# FIRST AMENDMENT – RETALIATORY ARREST

## *Lozman v. City of Riviera Beach, Florida*, 138 S.Ct. 1945 (2018)

- ▶ In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that the existence of probable cause defats a claim of retaliatory prosecution in violation of the First Amendment.
- ▶ Here, the issue is whether the same rule applies to a retaliatory arrest. The petitioner spoke at a city council meeting and made critical comments. When he refused a councilmember's request to stop making the remarks, the councilmember told the police to "carry him out." Petitioner claimed his arrest was made in retaliation for his lawsuit and public criticisms of city officials.
- ▶ In 8-1 vote, the Court declined to answer that question and instead held that because petitioner alleged "more governmental action than simply an arrest", he did not have to prove the absence of probable cause.
- ▶ Petitioner's allegations were of a "premeditated plan to intimidate him" and the retaliation against his speech was "elevated to the level of an official policy."
- ▶ Court will decide the issue in *Nieves v. Bartlett*, 17-1174

# FIRST AMENDMENT – RELIGIOUS RIGHTS

*Masterpiece Cakeshop Ltd. V. Colorado Civil Rights Comm’n*, 138 S.Ct. 1719 (2018)

- ▶ By 7-2 vote, the Court held that the Colorado Civil Rights Commission violated the baker’s free exercise rights by not considering “with the religious neutrality that the Constitution requires” the baker’s religious objections to baking a wedding cake for a same sex couple.
- ▶ Court declined to address the baker’s freedom of speech claims and just held that the Comm’n’s more favorable treatment of non-religious conscience-based objections to creating cakes was “inconsistent with what the Free Exercise Clause requires.”