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2018 ANNUAL J. DEAN CARRO RECENT DEVELOPMENTS IN CRIMINAL LAW

LEGISLATIVE UPDATE

IILC
§2951.041

- Delete provisions allowing the prosecuting attorney to control access to IILC for prior felony convictions
- No longer conditioning eligibility upon the person not having previously been granted intervention
- Allow IILC for persons charged with committing an offense while a victim of compelling prostitution

§2951.041 (B)

- *(1) The offender previously has not been convicted of or pleaded guilty to a felony offense of violence*
- Delete: or previously has been convicted of or pleaded guilty to any felony that is not an offense of violence and the prosecuting attorney recommends that the offender be found eligible for participation in intervention in lieu of treatment under this section, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose a community control sanction on the offender under division (B)(2) of section 2929.13 of the Revised Code or with a misdemeanor.
- (3) ...is not charged with a violation of section 2925.11 of the Revised Code that is a felony of the first, or second, ~~or third~~-degree

ELIGIBLE PERSONS

- (A)(1) If an offender is charged with a criminal offense, including but not limited to a violation of section 2913.02, 2913.03, 2913.11, 2913.21, 2913.31, or 2919.21 of the Revised Code, and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged or that, at the time of committing that offense, the offender had a mental illness, was a person with an intellectual disability, or was a victim of a violation of section 2905.32 or **2907.21** of the Revised Code and that the mental illness, status as a person with an intellectual disability, or fact that the offender was a victim of a violation of section 2905.32 or 2907.21 of the Revised Code was a factor leading to the offender's criminal behavior
- §2907.21- Compelling prostitution
- §2905.32- Trafficking in persons (already in statute)

CIRCUMSTANCES ALLOWING FOR ELIGIBILITY

- drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged
- at the time of committing that offense, the offender
 - had a mental illness,
 - was a person with an intellectual disability
 - was victim of a violation of §2905.32
 - was victim of a violation of §2907.21
 - that the circumstances were factor leading to the offender's criminal behavior

THINGS TO REMEMBER

- Specifically includes theft, unauthorized use of a vehicle, passing bad checks, misuse of credit cards, forgery, and nonsupport.
- Includes “intellectual disabilities”
- Drug Trafficking at the F-5 level (div. (B)(3))
- Drug Possession at the F-3 level without needing the prosecutor’s recommendation

MORE IILC CHANGES

- March, 2018: Under previously existing law, if a person on an intervention-in-lieu-of-conviction plan failed to comply with any term or condition of the plan, the court “shall” enter a finding of guilty for the underlying offense. Now, judges have greater discretion.
- §2951.041 (F): ...If the court determines that the offender has failed to comply with any of those terms and conditions, it ~~shall~~**may continue the offender on intervention in lieu of conviction, continue the offender on intervention in lieu of conviction with additional terms, conditions, and sanctions,** or enter a finding of guilty and shall **may** impose an appropriate sanction under Chapter 2929. of the Revised Code.

EXPUNGEMENT AND SEALING

- Expungement: §2953.31. As used in sections 2953.31 to 2953.36 of the Revised Code:
- (A)(1) "Eligible offender" means anyone either of the following:
 - (a) Anyone who has been convicted of one or more offenses, *but not more than five felonies*, in this state or any other jurisdiction, if all of the offenses in this state are *felonies of the fourth or fifth degree or misdemeanors* and *none* of those offenses are an offense of violence or a felony sex offense and all of the offenses in another jurisdiction, if committed in this state, would be felonies of the fourth or fifth degree or misdemeanors and none of those offenses would be an offense of violence or a felony sex offense;
- *Or the old language*

TIME TO FILE §2953.32

- For misdemeanors and a single felony, it remains the same: one year and three years after final discharge, respectively.
- When eligible for multiple felonies to be expunged,
 - at the expiration of four years after the offender's final discharge if convicted of two felonies
 - at the expiration of five years after final discharge if convicted of three, four, or five felonies.

§2953.38
**EXPUNGEMENT OF THE CRIMINAL RECORD
OF A HUMAN TRAFFICKING VICTIM**

- Allows a person convicted of certain prostitution-related offenses to apply for the expungement of the conviction record of *any* offense, other than a specified disqualifying offense, if the person's participation in which was a result of having been a human trafficking victim.
- (B) Any person who is or was convicted of a violation of section 2907.24, 2907.241, or 2907.25 (*these are the certain prostitution-related offenses*) of the Revised Code may apply to the sentencing court for the expungement of the record of conviction of any offense, other than a record of conviction of a violation of section 2903.01, 2903.02, or 2907.02 of the Revised Code, if the person's participation in the offense in which was a result of the person having been a victim of human trafficking.
- *This may include first and second degree felonies if several criteria are met.*

§2953.521
EXPUNGEMENT OF RECORDS OF HUMAN
TRAFFICKING VICTIM FOUND NOT GUILTY
OR AGAINST WHOM CHARGES ARE
DISMISSED

- Any person who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information may apply to the court for an order to expunge the person's official records in the case if the complaint, indictment, information, or finding of not guilty that is the subject of the application was the result of the *applicant having been a victim of human trafficking*.

COMPARED TO SEALING FOR OTHER DEFENDANTS

- All criminal charges need not be acquitted
- Not precluded if there any criminal charges pending (but considered)
- Expiration of statute of limitations for dismissed without prejudice considered but not dispositive
- May be more extensive sealing

2935.36
PRE-TRIAL DIVERSION PROGRAMS FOR
ADULT OFFENDERS; LIMITS;
PROCEDURE

- People who are not eligible:
- (3) Persons accused of a violation of Chapter 2925. or 3719. of the Revised Code, ***with the exception that the prosecuting attorney may permit persons accused of any of the following to enter a pre-trial diversion program:***
 - ***(a) A misdemeanor, fifth degree felony, or fourth degree felony violation of section 2925.11 (possession);***
 - ***(b) A misdemeanor violation of section 2925.12 (possessing drug abuse instruments), 2925.13 (permitting drug abuse), or division (C)(1) of section 2925.14 (use or possess to use drug)***

SENTENCING

PURPOSES OF FELONY SENTENCING

- Sec. 2929.11. (A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and, to punish the offender, ***and to promote the effective rehabilitation of the offender*** using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.

§2929.13

- §2929.13(B)(1)(a): Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction ~~of at least one year's duration~~ if all of the following apply:
- Removes “of at least one year’s duration” throughout

§2929.16
COMMUNITY CONTROL SANCTIONS;
FELONY

- (6) If the offender is sentenced to a community control sanction and violates the conditions of the sanction, a new term of up to six months in a community-based correctional facility that serves the county, in a halfway house, or in a jail, which term shall be in addition to any other term imposed under this division

SENTENCING HEARING

§2929.19

- No longer require a defendant to “not ingest or be injected with a drug of abuse”
- Credit for time served:
 - Determine, notify the offender of, and include in the sentencing entry the *total* number of days, *including the sentencing date but excluding conveyance time*, that the offender has been confined.
 - No longer excludes ODRC time on the current offense (resentencing)
 - ODRC “shall rely upon the latest journal entry of the court in determining the total days of local confinement for purposes of division (B)(2)(f)(i) to (iii) of this section and 2967.191 (Credit for confinement awaiting trial and commitment)”

REVISED DRUG LAWS- FENTANYL

- Amend §§ 2925.01, 2925.02, 2925.03, 2925.04, 2925.05, 2925.11, 2925.13, 2925.36, 2929.01, 2929.13, 2929.14, 2941.1410, 3719.41, 3719.99, and 4729.99 of the Revised Code
- Increased penalties for drug trafficking, drug possession and aggravated funding of drug trafficking. The law could add as many as eight years to sentences of drug offenders convicted of serious crimes involving drugs containing fentanyl.

FENTANYL

- Previously, up to 19g of fentanyl, F5. Now, possession of up to 1g of fentanyl or a fentanyl-related compound F5. 1g to 5g is F4, over 5g to less than 10 g is F3, 10g to less than 20 g is F2, 20g to less than 50g is F1, 50g to 100g is F1 with max mandatory F1 time, if over 100g same plus with a major drug offender specification that would include a mandatory prison sentence of up to three to eight years
- For possession, if don't know mixture of other drug and fentanyl, won't be subject to new sentencing laws; but knowledge only counts for trafficking when it is a mixture of marijuana and fentanyl.
- When a fentanyl-related drug conviction is connected to a homicide conviction, the law would require that prison sentences for each conviction run consecutively.
- Also, adds lisdexamfetamine (Lisdexamfetamine is a substituted amphetamine) to the list of schedule II controlled substances.

PERMITTING DRUG ABUSE §2925.13.

- (C)(3) Permitting drug abuse is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender, if the **either** of the following applies:
 - (a) The felony drug abuse offense in question is a violation of section 2925.02 or, 2925.03, or **2925.04** (Illegal manufacture of drugs - illegal cultivation of marijuana - methamphetamine offenses) of the Revised Code.
 - **(b) The felony drug abuse offense in question is a violation of section 2925.041 of the Revised Code and the offender had actual knowledge, at the time the offender permitted the vehicle, premises, or real estate to be used as described in division (A) or (B) of this section, that the person who assembled or possessed the chemicals in question in violation of section 2925.041 of the Revised Code had assembled or possessed them with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.**
- *In some cases, the penalty for permitting drug abuse involving fentanyl will increase from a first-degree misdemeanor (a maximum of six months in jail) to a fifth-degree felony (up to a year in prison).*

DATING VIOLENCE

- Amend sections 109.42, 2151.34, 2903.214, 2919.26, 3113.31, and 3113.33
- Authorize the issuance of a domestic violence civil protection order with respect to conduct directed at a petitioner alleging violence in a dating relationship of a specified nature, to provide access to domestic violence shelters for victims of violence in such a dating relationship, and to require the Attorney General's victim's bill of rights pamphlet to include a notice that a person alleging violence in such a dating relationship has the right to petition for a domestic violence civil protection order.

ENHANCE PENALTY FOR MOVING VIOLATIONS WHILE DISTRACTED

- §4511.991: established an enhanced penalty for committing a moving violation while distracted if the distraction is a contributing factor to the commission of the violation
- No longer will need to prove a driver is texting, but only that a moving violation has occurred and the driver was distracted at the time.
- Adds to many moving violations: If the offender commits the offense while distracted and the distracting activity is a contributing factor to the commission of the offense, the offender is subject to the additional fine established under section 4511.991 (some over and some not more than \$100, depending on the offense it attaches to)
- Can avoid additional fine by taking one-hour online course.

REINSTATEMENT FEE AMNESTY INITIATIVE

- Effective 11/2/18
- The new law will require the Ohio Registrar of Motor Vehicles to establish a 6 month driver's license reinstatement fee reduction and amnesty program 90 days from the effective date
- Eligible offenses will not involve alcohol, drugs or deadly weapon

SUPREME COURT OF THE UNITED STATES

2017 TERM (OCT. 2017 - SEPT. 2018)

***CARPENTER V. UNITED STATES*, 138 S.C.T.
2206 (2018)
JUNE 22, 2018**

- Opinion by Chief Justice Roberts.
- The government's acquisition from wireless carriers of defendant's historical cell-site location information (CSLI) was a search under the Fourth Amendment. When the government accessed defendant's CSLI, it invaded his reasonable expectation of privacy in the whole of his physical movements, and the fact that the government obtained the information from a third party did not overcome defendant's claim to Fourth Amendment protection;
- A court order was not a permissible mechanism for accessing historical CSLI because the showing required fell well short of probable cause. A warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

***KERNAN V. CUERO*, 138 S.C.T. 4 (2017)
NOV 6, 2017**

- Per curiam decision.
- The appellate court erred when it held that federal law as interpreted by the U.S. Supreme Court clearly established that specific performance of the plea agreement after it was allegedly breached by the State's motion to amend the complaint was constitutionally required because no holding of the Supreme Court required the remedy of specific performance under the circumstances.

MCCOY V. LOUISIANA, 138 S.CT. 1500 (2018)
MAY 14, 2018

- Opinion by Justice Ginsburg
- The Court held that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his 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. The client's autonomy, not his counsel's competence, is the issue.
- The Sixth Amendment rights of defendant, who was charged with three murders, were violated because even though he vociferously insisted that he did not engage in the charged acts and objected to any admission of guilt, the state trial court permitted counsel at the guilt and sentencing phases of the capital trial to tell the jury that defendant was guilty of committing the charged murders;
- Counsel could not admit his client's guilt of a charged crime over the client's intransigent objection to that admission, and violation of a defendant's Sixth Amendment secured autonomy constituted structural error, warranting a new trial, because the admission blocked the defendant's right to make fundamental choices about his own defense.

***BYRD V. UNITED STATES*, 138 S.CT. 1518
(2018)
MAY 14, 2018**

- Opinion by Justice Kennedy.
- As a general rule, someone in otherwise lawful possession and control of a rental car had a reasonable expectation of privacy in it even if the rental agreement did not list him or her as an authorized driver;
- A remand was necessary to address the government's argument that the general rule did not apply to petitioner in the circumstances presented, i.e., an unauthorized driver of a rental car, especially as it was unclear from the record whether the government's inferences painted an accurate picture of what occurred;
- On remand, the lower court was not required to assess petitioner's reasonable expectation of privacy before addressing the other aspects of the merits of the Fourth Amendment claim because Fourth Amendment standing was subsumed under substantive Fourth Amendment doctrine and was not a jurisdictional question.

***COLLINS V. VIRGINIA*, 138 S. CT. 1663 (2018)**
MAY 29, 2018

- Opinion by Justice Sotomayor
- The Court held that the automobile exception to the Fourth Amendment does not permit the warrantless entry of a home or its curtilage – “the area ‘immediately surrounding and associated with the home’” – in order to search a vehicle therein.
- A partially enclosed section of a driveway where a motorcycle was parked constituted curtilage protected by the Fourth Amendment. The driveway enclosure was an area adjacent to a home and to which the activity of home life extended;
- The automobile exception did not permit an officer to enter the curtilage without a warrant to search the motorcycle. The automobile exception did not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it did not justify an intrusion on a person’s separate and substantial Fourth Amendment interest in his home and curtilage.

***LOZMAN V. CITY OF RIVIERA BEACH,
FLORIDA, 585 U.S. ___ (2018)
JUNE 18, 2018***

- Opinion by Justice Kennedy.
- Court held that a finding of probable cause for Fane Lozman's arrest for disrupting a city council meeting does not bar Mr. Lozman's First Amendment claim of retaliatory arrest under the circumstances of this case.

CLASS V. U.S., 138 S.C.T. 798 (2018)
FEBRUARY 21, 2018

- Opinion by Justice Breyer
- A guilty plea by itself did not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal;
- Petitioner did not relinquish his right to appeal the district court's constitutional determinations simply by pleading guilty because petitioner's constitutional claims did not contradict the terms of the indictment or the written plea agreement, and the claims did not focus upon case-related constitutional defects that occurred prior to the entry of the guilty plea. The claims called into question the government's power to constitutionally prosecute him because the claims challenged the government's power to criminalize petitioner's (admitted) conduct.

CURRIER V. VIRGINIA, 138 S.CT. 2144
(2018)
JUNE 22, 2018

- Opinion by Justice Gorsuch.
- Because Mr. Currier consented to a severance of the charges against him, his trial and conviction on a felon-in-possession charge, following an acquittal on charges of burglary and larceny, did not violate the Double Jeopardy Clause, which provides that no person may be tried more than once “for the same offence.” A defendant who consents to sequential trials for multiple, overlapping offenses loses double jeopardy protection.
- Consenting to two trials when one would have avoided a double jeopardy problem preclude any constitutional violation associated with holding a second trial because, in those circumstances, the defendant won a potential benefit and experienced none of the prosecutorial oppression the Double Jeopardy Clause existed to prevent. Thus, there was no good reason to treat Ashe double jeopardy complaints more favorably than traditional ones when a defendant consented to severance.

***SAUSE V. BAUER*, 138 S.C.T. 2561 (2018)**
JUNE 28, 2018

- Per curiam decision.
- Dismissal of a 42 U.S.C.S. § 1983 complaint alleging that two police officers violated petitioner's First Amendment rights was error where petitioner's claim demanded consideration of the ground on which the officers were present in her apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering those matters, neither the free exercise issue nor the officers' entitlement to qualified immunity could be resolved, and as a result, petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address those matters.

GAMBLE V. U.S. **ORAL ARGUMENT: DECEMBER 5**

- **What's at stake:** Should the "separate sovereigns" loophole in the Fifth Amendment be closed? In other words, does getting convicted of the same crime by the state and the feds count as a violation of the amendment's ban on double jeopardy?
- **The story:** Terrance Martez Gamble was convicted of second-degree robbery in 2008. As a result of that conviction, he was prohibited from owning a firearm under both state and federal law.
- In 2015, Gamble was stopped by the cops, who found a handgun in his car. He was convicted of unlawfully possessing a firearm by both the state of Alabama and the federal government. He will not be released from prison until February 2020—three years later than if he had been convicted only at the state level. Gamble appealed his federal conviction on the ground that he was being punished twice for the same crime, which the Fifth Amendment explicitly forbids.
- The federalization of many crimes in recent decades means there is now significant overlap between state and federal offenses, creating more opportunities for multiple convictions based on the same actions.

TIMBS (AND A 2012 LAND ROVER) V.
INDIANA
ORAL ARGUMENT: NOVEMBER 28

- **What's at stake:** Does the Eighth Amendment's prohibition against "excessive fines" apply to the states as well as the federal government?
- **Legal background:** The Supreme Court has a long track record of ruling that limits imposed by the Bill of Rights on the federal government also apply to the states via the 14th Amendment's Due Process Clause. In 2015 it reached the same conclusion regarding the amendment's ban on excessive bail. But the Court has never explicitly stated that states are constrained by the amendment's prohibition of excessive fines.
- **Why it matters:** A decision applying the Excessive Fines Clause to the states would make it far easier to challenge unreasonable fines and fees, including not just forfeiture but cases where local governments hit homeowners with massive civil penalties for offenses such as unapproved paint jobs or Halloween decorations.