akron bar association®

2019 Annual J. Dean Carro Criminal Law Update

The United States Supreme Court

Seneca Konturas, Esq.

Supreme Court of the United States
2018-19 Session Update

Presented by:
Seneca Konturas

November 11, 2019

Sentencing – (Armed Career Criminal Act)

United States v. Stitt, 139 S. Ct. 399
Decided 12/10/18
Unanimous decision.

Stitt and Sims were each convicted in federal court of unlawfully possessing a firearm, in violation of 18 U.S.C. § 922(g)(1). The court in each case imposed the mandatory minimum 15–year prison term that the Armed Career Criminal Act requires for § 922(g)(1) offenders who have at least three previous convictions for certain "violent" or drug-related felonies, § 924(e)(1). The Act defines "violent felony" to mean, among other things, "any crime punishable by imprisonment for a term exceeding one year ... that ... is burglary." § 924(e)(2)(B). Respondents' prior convictions were for violations of state burglary statutes that prohibit burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. In both cases, the District Courts found that the state statutory crimes fell within the scope of the federal Act's term "burglary." The relevant Court of Appeals in each case disagreed, vacated the sentence, and remanded for resentencing. On review SCOTUS held that under the 1984 Armed Career Criminal Act (ACCA), "burglary" includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. As such, defendants in Arkansas and Tennessee were subject to the ACCA's enhanced sentencing provisions because their burglary offenses, under each state's criminal code, served as predicate crimes for the enhancement. Reversed and remanded.

Stokeling v. United States, 139 S. Ct. 544
Decided 1/15/19
5-4 decision. 1 dissent.

Stokeling pleaded guilty to possessing a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). Sentencing recommendation was for the mandatory minimum 15–year prison term that the Armed Career Criminal Act (ACCA) provides for § 922(g) violators who have three previous convictions "for a violent felony," § 924(e). Stokeling objected that his prior Florida robbery conviction

was not a "violent felony," which ACCA defines, in relevant part, as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i). The District Court held that Stokeling's actions during the robbery did not justify an ACCA sentence enhancement, but the Eleventh Circuit reversed. SCOTUS affirmed the Eleventh Circuit, holding the ACCA's elements clause encompasses a robbery offense that requires the defendant to overcome the victim's resistance and also that FL's robbery statute requiring "resistance by the victim that is overcome by the physical force of the offender" qualifies as an ACCA-predicate offense under the elements clause such that it is subject to an ACCA sentencing enhancement. Affirmed.

Quarles v. United States, 139 S. Ct. 1872
Decided 6/10/19
Unanimous decision. 1 concurrence.

Quarles plead guilty to a felon in possession of a firearm charge under 18 USC §922(g)(1). He challenged whether a 2002 third-degree home invasion Michigan conviction qualified him for enhanced sentencing under 18 USC §924(e) as the Michigan statute was too broad (challenging the timing of the requisite mens rea of intent). On review, SCOTUS held that: 1) generic burglary based on remaining in a building or structure with intent to commit a crime, as a predicate prior violent felony under enumerated offenses clause of ACCA, occurs when a person forms the intent to commit a crime at any time while unlawfully remaining in a building or structure, and, 2) defendant's prior Michigan conviction for third-degree home invasion qualified as a violent felony under ACCA. Affirmed.

Substantive Law

Rehaif v. United States, 139 S. Ct. 2191
Decided 6/21/19
7-2 decision. 1 dissent.

Rehaif entered the U.S. on a student visa. He was dismissed from university for poor grades. After shooting firearms at a gun range, he was prosecuted and found guilty under 18 USC §922(g), which makes it unlawful for an illegal alien to possess a firearm, and under 18 USC §924(a) allowing imprisonment for up to 10-years for a knowing violation of 922(g). On appeal, SCOTUS held that the court of appeals erred in affirming the conviction of Rehaif for violations of § 922(g) and § 924(a)(2) without proof that he knew he was in the U.S. unlawfully because the statute requires the individual to know not only that he possessed a firearm, but also that he had the relevant status when he possessed the firearm. Reversed and remanded.

DISSENT (Alito, joined by Thomas): "Today's decision will make it significantly harder to convict persons falling into some of these categories, and the decision will create a mountain of problems with respect to the thousands of prisoners currently serving terms for § 922(g) convictions. Applications for relief by federal prisoners sentenced under § 922(g) will swamp the lower courts. A great many convictions will be subject to challenge, threatening the release or retrial of dangerous individuals whose cases fall outside the bounds of harmless-error review."

Mont v. United States, 139 S. Ct. 1826
Decided 6/3/19
5-4 decision. 1 dissent.

Mont's 5-year term of federal supervised release was scheduled to end on March 6, 2017. On June 1, 2016, he was arrested on new state drug trafficking charges. Mont was held in custody until his sentencing on March 21, 2017, where he received a 6-year sentence with credit for his time in pretrial custody. On March 30, 2017, having previously issued a summons in Nov., 2016, the District Court held a hearing, revoked Mont's supervised release, and ordered 42-months of consecutive imprisonment to run after the conclusion of his 6-year state sentence. Mont challenged the District Court's jurisdiction based on the timing of his sentencing vs. expiration of his supervision term, but the District Court relied on the summons it sent in 2016 and retained jurisdiction. The Sixth Circuit found no support on the summons issue, but affirmed on the basis that Mont's supervised release period was tolled while in pretrial detention. On review, SCOTUS held that pretrial detention for 30 consecutive days or more, which is later credited as time served for a new conviction for a federal, state, or local crime, is "imprisonment in connection with a conviction" for a federal, state, or local crime, as statutory basis for tolling a defendant's period of federal supervised release, even if the federal court must make the tolling calculation after learning whether the time will be credited, abrogating *United States v. Marsh*, 829 F. 3d 705, and *United States v. Morales-Alejo*, 193 F. 3d 1102. Affirmed.

DISSENT (Sotomayor, joined by Breyer, Kagan, and Gorusch): Because I cannot agree that a person "is imprisoned in connection with a conviction" before any conviction has occurred, I respectfully dissent.

Death Penalty – (Mental Deficiency)

Shoop v. Hill, 139 S. Ct. 504
Decided 1/7/19
Per curiam decision.

Habeas relief granted… but only for a moment. After many attempts at avoiding the death penalty in Ohio based on Hill's purported mental deficiencies, Hill finally catches a

break when the Sixth Circuit reverses the District Court's denial of his habeas petition. Unfortunately, it does so based on a section of §2254 not argued by the parties, and further relies on law established *after* the date of the offense, namely Moore v. Texas, though it tried to reason that the decision in Moore was based on Atkins v. Virginia which had been decided prior to Hill's conviction. SCOTUS remanded the case to the Sixth Circuit to determine whether the same conclusion can be sustained based strictly on law that was clearly established *at the relevant time*.

Moore v. Texas, 139 S. Ct. 666
Decided 2/19/19
Per curiam decision.

Moore, convicted of capital murder and sentenced to death, ultimately granted habeas relief and spared the death penalty under the Eighth Amendment protection against execution of an intellectually disabled person due to a finding that the lower courts had applied improper standards when determining Moore lacked an intellectual disability. Now, under Moore, in determining whether a person is intellectually disabled for purposes of Eighth Amendment protection against execution of an intellectually disabled person, the focus is on the adaptive-functioning inquiry on adaptive deficits, not adaptive strengths, especially not adaptive strengths developed in a controlled setting, as a prison surely is.

Madison v. Alabama, 139 S. Ct. 718
Decided 2/27/19
5-3 decision. 1 dissent.

Madison, sentenced to death, asserted an Eighth Amendment claim that his mental condition, relating to a series of strokes and vascular dementia with attendant disorientation and confusion, cognitive impairment, and memory loss, precluded his execution because he could no longer recollect committing the crime for which he had been sentenced to die. SCOTUS held that: 1) a mental disorder that leaves a prisoner without any memory of committing his crime does not necessarily preclude execution; 2) dementia may preclude execution; and 3) Supreme Court was at least unsure whether the state court relied on an incorrect view of the law, i.e., that only delusions, and not dementia, could preclude execution. Vacated and remanded for the state to make that determination.

Ineffective Assistance of Counsel

Garza v. Idaho, 139 S. Ct. 738
Decided 2/27/19
6-3 decision. 1 dissent.

Garza, when tendering his guilty plea, signed two plea agreements, each containing clauses waiving his right to appeal. Post-sentencing, Garza informed counsel he wanted to appeal. Counsel failed to file a notice of appeal. Garza's subsequent post-conviction relief attempts were denied and the Idaho Supreme Court ultimately held that the presumption of prejudice established in Roe v. Flores-Ortega, 528 U.S. 470, did not apply in light of the signed waiver. SCOTUS, upon review, held that: 1) defendant's attorney rendered deficient performance by not filing notice of appeal in light of defendant's clear requests, and, 2) attorney's constitutionally deficient failure to file notice of appeal was presumptively prejudicial, despite appeal waivers, abrogating *Nunez v. United States*, 546 F. 3d 450; *United States v. Mabry*, 536 F. 3d 231; *Buettner v. State*, 382 Mont. 410, 363 P. 3d 1147; and *Stewart v. United States*, 37 A. 3d 870. Reversed and remanded.

Eighth Amendment – Excessive Fines Clause

Timbs v. Indiana, 139 S. Ct. 682
Decided 2/20/19
9-0 decision. 2 concurrences.

Timbs pleaded guilty to drug-dealing and theft related crimes in Indiana. At the time of his arrest, police had seized an SUV Timbs had purchased for $42,000 using monies received from and insurance policy when his father died. The state sought civil forfeiture of the vehicle, as it had been used to transport heroin. Indiana's trial and appellate courts agreed with Timbs that the value of the SUV was more than four times the maximum ($10k) fine associated with his conviction. However, the Indiana Supreme Court reversed, holding the Excessive Fines Clause was inapplicable as it relates only to federal action. On review, SCOTUS held that: 1) Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States, and, 2) issue of whether *Austin v. U.S.*, 509 U. S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488, should be overruled was not properly before the Court (Indiana argued that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted – SCOTUS held the Clause was incorporated). Vacated and remanded.

Fourteenth Amendment – (Equal Protection)

Flowers v. Mississippi, 139 S. Ct. 2228
Decided 6/21/19
7-2 decision. 1 dissent.

Flowers was tried six separate times for murder in Mississippi: trials #1-#3 resulted in guilty verdicts with a death sentence; trials #4 & #5 ended in mistrial; and, trial #6 resulted in a conviction with a death sentence. On appeal, the Mississippi Supreme Court reversed the outcome in trials #1 & #2 based on prosecutorial misconduct, in trial #3 based on a violation of Batson v. Kentucky, 476 U.S. 79, ultimately affirming the result of trial #6 (with a dissenting opinion based on another Batson-violation). In all trials, the state used its peremptory strikes to remove 41 of the 42 black prospective jurors it could have struck. In trial #6, struck five of the six black prospective jurors, at least one of whom was similarly situated to un-struck prospective white jurors, further engaging in dramatically different questioning of black and white prospective jurors. On review of the Mississippi Supreme Court's affirmation of the trial court's finding that satisfactory race-neutral reasons were given for the five peremptory strikes in the sixth trial, SCOTUS held that trial court clearly erred in concluding that the State's peremptory strike of black prospective juror was not motivated in substantial part by discriminatory intent, in violation of Batson. Reversed and remanded.

Constitutional Challenges

United States v. Davis, 139 S.Ct. 2319
Decided 6/24/19
5-4 decision. 1 dissent.

Davis was convicted, in part, under 18 U.S.C. § 924(c), which authorizes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal "crime of violence or drug trafficking crime." "Crime of violence" is defined by both the elements clause, § 924(c)(3)(A), and the residual clause, § 924(c)(3)(B). The residual clause defines a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Davis challenged § 924(c)'s residual clause as unconstitutionally vague. On remand in light of Sessions v. Dimaya, 584 U.S. ––––, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), the Fifth Circuit reversed course and held § 924(c)(3)(B) unconstitutional. It then held that Mr. Davis's convictions on the § 924(c) count charging robbery as the predicate crime of violence could be sustained under the elements clause, but that the other count—which charged conspiracy as a predicate crime of violence—could not be upheld because it depended on the residual clause. Held: Section 924(c)(3)(B) is unconstitutionally vague since even if it was possible to read the statute to impose additional punishment, it was impossible to say that Congress

intended that result or that the law gave defendants fair warning that the mandatory penalties of § 924(c) would apply to their conduct.

United States v. Haymond, 139 S. Ct. 2369
Decided 6/26/19
5-4 decision. 1 dissent.

Haymond was convicted of possessing child pornography, a crime that carries a prison term of zero to 10 years. After imprisonment for 38 months, and while on supervised release, Mr. Haymond was again found with what appeared to be child pornography. The government sought to revoke his supervised release and secure a new and additional prison sentence. A district judge, acting without a jury, found by a preponderance of the evidence that Mr. Haymond knowingly downloaded and possessed child pornography. Under 18 U.S.C. § 3583(e)(3), the judge could have sentenced him to a prison term of between zero and two additional years. But because possession of child pornography is an enumerated offense under § 3583(k), the judge instead imposed that provision's 5-year mandatory minimum. On review, the Tenth Circuit and SCOTUS, in a plurality decision, held that § 3583(k)'s mandatory minimum was unconstitutional because it violated the right to trial by jury guaranteed by the Fifth and Sixth Amendments.

Gundy v. United States, 139 S. Ct. 2116
Decided 6/20/19
5-3 decision with no majority opinion. 1 dissent.

The Attorney General issued a rule specifying that SORNA's registration requirements apply in full to pre-Act offenders. Gundy, a pre-Act offender, was convicted of failing to register. Both the District Court and the Second Circuit rejected his claim that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. SCOTUS held that SORNA's provision authorizing the Attorney General to specify the applicability of SORNA's registration requirements to offenders convicted of sex offenses before SORNA's enactment did not violate the nondelegation doctrine. Affirmed.

Fourth Amendment – (Unconscious Blood Draw)

Mitchell v. Wisconsin, 139 S. Ct. 2525
Decided 6/27/19
5-4 decision with no majority opinion. 2 dissents.

Mitchell was arrested for operating a vehicle while intoxicated and was given a preliminary breath test revealing a 0.24% BAC. He was placed in holding where he became too lethargic for an evidentiary-level breath test. While en route to a hospital, Mitchell became unconscious. At the hospital, while still unconscious, an officer read

Mitchell a notice required by Wisconsin's implied consent law allowing him opportunity to refuse. He did/could not refuse. No warrant was ever sought. Mitchell's blood was tested 90 minutes after arrest revealing a 0.22% BAC. His motion to suppress on Fourth Amendment grounds was denied and he was convicted. SCOTUS's plurality held: 1) exigent-circumstances exception to Fourth Amendment's warrant requirement almost always permits blood test without a warrant where driver suspected of drunk driving is unconscious and therefore cannot be given a breath test; 2) State of Wisconsin did not waive argument that Supreme Court adopted, namely that exigent circumstances almost always permitted warrantless blood test on unconscious drunk-driving suspect; and, 3) the decreased time required to obtain a search warrant did not preclude warrantless blood draws from unconscious drunk-driving suspects. Mitchell's case was vacated and remanded because the plurality "[did] not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

DISSENT: "Under the Fourth Amendment, the answer is clear: If there is time, get a warrant. * * * The State of Wisconsin conceded in the state courts that it had time to get a warrant to draw Gerald Mitchell's blood, and that should be the end of the matter. Because the plurality needlessly casts aside the established protections of the warrant requirement in favor of a brand new presumption of exigent circumstances that Wisconsin does not urge, that the state courts did not consider, and that contravenes this Court's precedent, I respectfully dissent."

42 U.S.C. § 1983 Actions

City of Escondido v. Emmons, 139 S. Ct. 500
Decided 1/7/19
Per curiam decision.

In a case involving officers responding to a 911 domestic disturbance call, arrestee brought § 1983 action against city police officer and sergeant, asserting claim for excessive force in violation of the Fourth Amendment. The District granted summary judgment in favor of officer and sergeant based on qualified immunity. The Ninth Circuit reversed and remanded. Upon review, SCOTUS held that: 1) Court of Appeals' unexplained reinstatement of arrestee's excessive force claim against sergeant was erroneous; and, 2) Court of Appeals failed to properly analyze whether clearly established law barred officer from stopping and taking down arrestee in the manner that the officer did at scene of reported domestic violence incident, and thus, remand was required to allow Court of Appeals to conduct proper analysis with respect to

whether officer was entitled to qualified immunity. Reversed in part, vacated in part, and remanded.

Bucklew v. Precythe, 139 S. Ct. 1112
Decided 4/1/19
5-4 decision. 2 dissents.

Bucklew was convicted of murder and sentenced to death. Missouri plans to execute him by lethal injection using a single drug, pentobarbital. Bucklew presented an as-applied Eighth Amendment challenge to the State's lethal injection protocol, alleging that, regardless whether it would cause excruciating pain for all prisoners, it would cause him severe pain because of his particular medical condition. The District Court dismissed his challenge. The Eighth Circuit, applying the Baze-Glossip test, remanded the case to allow Mr. Bucklew to identify a feasible, readily implemented alternative procedure that would significantly reduce his alleged risk of pain. Bucklew identified nitrogen hypoxia, but the District Court found the proposal lacking and granted the State's motion for summary judgment. The Eighth Circuit affirmed. Upon review SCOTUS held that: 1) a state death-row inmate asserting an as-applied constitutional challenge to a State's method of execution must meet the same standard that would apply to a facial challenge; 2) inmate failed to offer evidence that his proposed alternative method of execution, which would use nitrogen hypoxia as a lethal gas, was feasible and readily implemented; and, 3) inmate failed to offer evidence that his proposed alternative method of execution would significantly reduce the allegedly substantial risk of severe pain. Affirmed.

Nieves v. Bartlett, 139 S. Ct. 1715
Decided 5/28/19
8-1 decision. 1 dissent.

Respondent's claim that two police officers retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest during a winter sports festival could not survive summary judgment. The only evidence of retaliatory animus identified by the court of appeals was respondent's affidavit alleging that one of the officers said "bet you wish you would have talked to me now." But that allegation said nothing about what motivated the second officer, who had no knowledge of respondent's prior run-in with the first officer. Respondent's retaliatory arrest claim against both officers could not succeed because they had probable cause to arrest him. The existence of probable cause to arrest respondent defeated his First Amendment claim as a matter of law.

McDonough v. Smith, 139 S. Ct. 2149
Decided 6/20/19
6-3 decision. 1 dissent.

McDonough alleged that prosecutor Smith secured a grand jury indictment using fabricated evidence. Smith then presented allegedly fabricated testimony at trial. That trial ended in a mistrial. Smith again elicited allegedly fabricated evidence in a second trial, which ended on December 21, 2012, with McDonough's acquittal on all charges. On December 18, 2015, McDonough sued Smith under 42 U.S.C. § 1983, asserting, a claim for fabrication of evidence. The District Court dismissed the claim as untimely, and the Second Circuit affirmed. The court held that the 3-year limitations period began to run "when (1) McDonough learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence." The court concluded McDonough's claim was untimely because those events undisputedly had occurred by the time McDonough was arrested and stood trial. On review SCOTUS held the statute of limitations for McDonough's § 1983 fabricated-evidence claim began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial. Reversed and remanded.

Fifth Amendment – (Separate Sovereigns)

Gamble v. United States, 139 S. Ct. 1960
Decided 6/17/19
7-2 decision. 2 dissents.

Gamble entered a guilty plea to violating Alabama's felon-in-possession-of-a-firearm statute. He was then indicted for the same instance under federal law. Gamble argued that the federal indictment was for "the same offence" as his state conviction, thus exposing him to double jeopardy under the Fifth Amendment. The District Court invoked the dual-sovereignty doctrine and denied his motion. Gamble entered a guilty plea, but appealed on double jeopardy grounds. The Eleventh Circuit affirmed. SCOTUS held that under principles of stare decisis, historical evidence and other sources did not overcome numerous major decisions of the Supreme Court, spanning 170 years, recognizing that under the dual-sovereignty doctrine, the Double Jeopardy Clause allows successive prosecutions by separate sovereigns. Affirmed.

"[O]ur Constitution rests on the principle that the people are sovereign, but that does not mean that they have conferred all the attributes of sovereignty on a single government. Instead, the people, by adopting the Constitution, " 'split the atom of sovereignty.' " Alden v. Maine, 527 U.S. 706, 751, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). "[B]oth the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'" Gregory v. Ashcroft, 501 U.S. 452,

457 [111 S.Ct. 2395, 115 L.Ed.2d 410] (1991).” Murphy v. National Collegiate Athletic Assn., 584 U.S. ––––, ––––, 138 S.Ct. 1461, 1475, 200 L.Ed.2d 854 (2018).