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CRIMINAL CASE LAW UPDATE[1]

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1 Thanks to Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, for his synopses of U.S. Supreme Court decisions.

ATTORNEYS

Driver's Privacy Protection Act prohibits lawyers from using state motor vehicle databases to solicit new clients for a lawsuit.

***Maracich v. Spears*, 12-25.** The Driver's Privacy Protection Act of 1994 prohibits the disclosure and use of "personal information" maintained in state motor vehicle department databases unless the use of that information falls within several enumerated exceptions. One of those exceptions is when the information would be used in connection with judicial and administrative proceedings, including "investigation in anticipation of litigation." By a 5-4 vote, the Court held that "an attorney's solicitation of clients for a lawsuit" is not covered by that exception, meaning the exception does not authorize persons to use state DMV records for that purpose.

CIVIL RIGHTS

National Voter Registration Act preempts Arizona law that required prospective voters to provide evidence of U.S. citizenship to vote.

***Arizona v. Inter Tribal Council of Arizona, Inc.*, 12-71.** By a 7-2 vote, the Court held that the National Voter Registration Act (NVRA) preempts an Arizona law that requires prospective voters to provide evidence of U.S. citizenship to register to vote. The NVRA requires states to "accept and use" a uniform federal form whose contents are prescribed by a federal agency. The Court concluded that the Arizona law's requirement the voter-registration officials "reject" an application for registration, including a federal form, that is not accompanied by concrete evidence of citizenship conflicts with, and is therefore preempted by, the NVRA's mandate that states "accept and use" the federal form. (In the course of its opinion, the Court ruled that the presumption against preemption does not apply to federal statutes enacted under the Elections Clause.)

Voting Rights Act formula to determine coverage of §5 of Act is unconstitutional.

***Shelby County, Ala. v. Holder*, 12-96.** By a 5-4 vote, the Court held that the formula that determines which states are covered by §5 of the Voting Rights Act – which "captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s" – is disconnected to current voting discrimination and is therefore unconstitutional. The Court added that it "issue[s] no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that" §5 itself is still constitutional.

Party who obtained a permanent injunction against government officials based on civil rights violations was prevailing party and was entitled to attorney's fees.

***Lefemine v. Wideman*, 12-168.** Through a unanimous *per curiam* opinion, the Court summarily reversed a Fourth Circuit decision that had denied attorney's fees under 42 U.S.C. §1988 to a plaintiff who had secured a permanent injunction. The district court permanently enjoined the defendant officials from preventing plaintiff from carrying pictures of aborted fetuses during demonstrations. The Court held that, "[b]ecause the injunction ordered the

defendant officials to change their behavior in a way that directly benefited the plaintiff," he was a "prevailing party" entitled to receive fees.

EQUAL PROTECTION

Proponents of Proposition 8 in California lack standing to appeal a federal district court order declaring proposition 8 unconstitutional.

***Hollingsworth v. Perry*, 12-144.** By a 5-4 vote, the Court held that the official proponents of Proposition 8 – which amended the California Constitution to recognize only marriages between a man and a woman – lacked standing to appeal the district court's order declaring Proposition 8 unconstitutional and enjoining its enforcement. No one disputed that the plaintiffs had standing to initiate the case against the California officials responsible for enforcing Proposition 8. But once those officials declined to appeal the district court order, the only appellants were the official proponents of Proposition 8. The Court observed, however, that the district court "had not ordered them to do or refrain from doing anything." Their only interest "was to vindicate the constitutional validity of a generally applicable California law" – but the Court has "repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." And while "a State must be able to designate agents to represent it in federal court" – usually the state's Attorney General – the proponents of Proposition 8 "hold no office and have always participated in this litigation solely as private parties."

Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

***United States v. Windsor*, 12-307.** By a 5-4 vote, the Court held that §3 of DOMA—which defines "marriage" for all purposes under federal law, including the provision of federal benefits, as being between a man and a woman—deprives liberty in violation of the Fifth Amendment. The Court found that "the State's decision to give [same-sex couples] the right to marry conferred upon them a dignity and status of immense import." It concluded that "DOMA seeks to injure the very class New York seeks to protect," and that "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the State." For this reason, held the Court, "DOMA is an unconstitutional deprivation of the liberty of the person protected by the Fifth Amendment." As a threshold matter, the Court held by a 5-4 vote that the United States – which declined to defend §3's constitutionality but continued to apply it against Windsor and remained in the case – "retains a stake sufficient to support Article III jurisdiction on appeal."

Fifth Circuit used wrong standard under the Equal Protection Clause to analyze University of Texas at Austin's affirmative action program.

***Fisher v. University of Texas at Austin*, 11-345.**

By a 7-1 vote, the Court held that the Fifth Circuit used the wrong standard when it upheld the University of Texas at Austin's affirmative action program. The Court explained that

admissions policies that take race into account are subject to strict scrutiny, and that its precedents establish that obtaining a diverse student body is a compelling governmental interest. The Court further held, critically, that a university should receive no deference from courts with respect to whether its chosen means of attaining diversity is narrowly tailored: "The reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity." The Court ruled that the Fifth Circuit erred on that score, by wrongly granting deference to the University of Texas when undertaking the narrow-tailoring inquiry. (Indeed, the Fifth Circuit held that petitioner could challenge only whether the University's decision to use race as a factor was made in good faith.) The Court remanded for the Fifth Circuit to apply the correct standard.

FIFTH AMENDMENT—SELF INCRIMINATION

Prosecution's use of defendant's silence during out-of-custody interrogation did not violate privilege against self-incrimination where defendant did not expressly invoke the privilege.

***Texas v. Salinas*, 12-246.** During a voluntary interview with a police officer regarding a murder, petitioner answered many questions but declined to answer a specific accusatory question; the prosecution argued at trial that petitioner's failure to answer suggested he was guilty. The Court held that the Fifth Amendment's Self-Incrimination Clause did not bar the prosecution from using petitioner's silence against him. A three-Justice plurality reasoned that, as a general matter, a person who wishes to rely on the privilege against self-incrimination must expressly invoke it; and neither of the exceptions to that general rule applied here. Two Justices (Scalia and Thomas) concurred in the judgment based on their view that *Griffin v. California*, 380 U.S. 609 (1965), was wrongly decided and that prosecutors and judges are entitled to comment on defendants' exercise of their Fifth Amendment privilege.

FIRST AMENDMENT

Forcing federal grant recipient to disavow prostitution violates the First Amendment.

***Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 12-10**

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 requires an organization that wishes to receive federal funding to provide HIV and AIDS programs overseas to agree in its award documents that it opposes prostitution. By a 6-2 vote, the Court held that this requirement violates the First Amendment because "it compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program."

FOURTH AMENDMENT

States may collect DNA samples from arrestees charged with serious crimes.

***Maryland v. King*, 12-207.** By a 5-4 vote, the Court held that the Fourth Amendment allows a state to collect and analyze DNA from people arrested and charged with serious crimes. The Court ruled that because arrestees are already in valid police custody and charged with serious

crimes, the proper inquiry is the reasonableness of the intrusion. And the Court concluded that intrusion is reasonable because the governmental interests – in processing and identifying persons in their custody, ensuring the safety of jail staff, ensuring that the accused show up at trial, and assessing the danger to the public when making bail determinations – outweigh the minimal intrusion of taking a cheek swab to obtain the DNA.

Destruction of blood-alcohol evidence by the body's natural metabolic process is not by itself an exigency that justifies a warrantless blood draw.

***Missouri v. McNeely*, 11-1425.** The Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Instead, the Court will look at the totality of the circumstances to determine whether the facts of the case merit an exception to the warrant requirement, although the "metabolization of alcohol in the bloodstream and ensuing loss of evidence are among the factors" that should be considered.

GUILTY PLEAS

Federal judge's participation in plea negotiations in violation of Rule 11(c)(1), Federal Rules of Criminal Procedure, is subject to harmless error review.

***United States v. Davila*, 12-167.** The Court unanimously held that a magistrate judge's violation of Federal Rule of Criminal Procedure 11(c)(1), which bars judicial participation in plea negotiations, is subject to harmless-error review. The Court therefore reversed an Eleventh Circuit decision which held that a violation of Rule 11(c)(1) requires automatic vacatur of a guilty plea entered after the violation.

IMMIGRATION

Conviction under Georgia law for possession of marijuana with intent to distribute was not an aggravated felony under federal law.

***Moncrieffe v. Holder*, 11-7702.** By a 7-2 vote, the Court held that a noncitizen's conviction under Georgia law of possession of marijuana with intent to distribute is *not* an "aggravated felony" within the meaning of the Immigration and Nationality Act (INA), which provides that an alien "who is convicted of an aggravated felony at any time after admission is deportable" and ineligible for discretionary relief. Under the INA, aggravated felonies include those state law offenses that are equivalent to felonies punishable under the federal Controlled Substances Act (CSA). The CSA provides that a person commits a felony if he possesses with intent to distribute less than 50 kilograms of marijuana, except that a person commits only a misdemeanor if he distributes a small amount of marijuana "for no remuneration." The Court applied its "categorical approach," which asks whether the state drug offense "necessarily" proscribes conduct that is a felony under the CSA. The Court found that the Georgia drug offense for which Moncrieffe was convicted does not meet that standard because one could be convicted of that offense for selling only a small amount of marijuana and without remuneration – conditions that correspond to a federal misdemeanor, not felony.

MARITIME LAW

Petitioners floating home was not a vessel and was not, therefore, subject to federal maritime jurisdiction.

***Lozman v. City of Riviera Beach, Florida*, 11-626.** By a 7-2 vote, the Court held that petitioner's floating home – which has no rudder or steering mechanism, is unable to generate electricity without land connections, and has no ability to propel itself – is not a "vessel" under 1 U.S.C. §3 and therefore is not subject to federal maritime jurisdiction. The Court held that a structure is not a vessel "unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." And it found that petitioner's floating home, though theoretically capable of moving over water, did not meet that test.

POST-CONVICTION

Federal law is not yet clearly established as to whether trial judge has discretion to deny request for counsel after defendant waives counsel.

***Marshall v. Rodgers*, 12-382.** Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had granted habeas relief based on a purported violation of a defendant's Sixth Amendment right to counsel. The state trial court denied Rodgers' request for counsel to assist in filing a new trial motion after he was convicted at a trial in which he elected to represent himself. The Ninth Circuit held that the California Court of Appeal, in affirming the conviction and the trial judge's denial of Rodgers' post-trial request for counsel, unreasonably applied "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). Reversing, the Court explained that *it* has not yet resolved "whether, after a defendant's valid waiver of counsel, a trial judge has discretion to deny the defendant's later request for reappointment of counsel," and that the answer involves resolving tension between two competing principles (the right to counsel and the right to proceed without counsel). That the Ninth Circuit had resolved the issue in its own precedents does not create the necessary "clearly established" law.

Petitioner may challenge trial counsel's effectiveness despite defaulting that claim in state court, where state appeal procedure denies defendant a meaningful opportunity to challenge his trial counsel's effectiveness.

Trevino v. Thaler, 11-10189. In *Martinez v. Ryan*, 566 U.S. ___ (2012), the Court held that when a state inmate is not permitted by state law to pursue a claim of ineffective assistance of trial counsel on direct review, the ineffectiveness of the inmate's counsel on state collateral review may constitute cause that would excuse his state-court default of his ineffective-assistance-of-trial-counsel claim and therefore permit him to assert that claim on federal habeas. Here, by a 5-4 vote, the Court extended that rule to states that technically permit defendants to raise an ineffective-assistance-of-trial-counsel claim on direct review, "but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so." The Court found that Texas' procedural system fits that definition.

Proving actual innocence will excuse habeas petitioner's failure to meet one-year statute of limitations under AEDPA.

***McQuiggin v. Perkins*, 12-126.** By a 5-4 vote, the Court held that a claim of actual innocence, if proved, can excuse a habeas petitioner's failure to meet AEDPA's one-year statute of limitations for filing a federal habeas petition. A prisoner can meet this "actual-innocence gateway" only by showing "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." The Court further held that a habeas petition does not have to prove diligence to invoke the exception, though "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing [of innocence]."

Sixth Circuit erred in reversing the Michigan court of appeals' retroactive application of a Michigan Supreme Court's decision.

Metrish v. Lancaster, 12-547. In People v. Carpenter, 627 N.W.2d 276 (2001), the Michigan Supreme Court construed a state statute as not authorizing a "diminished capacity" defense – even though the state intermediate appellate court had consistently recognized the defense. Here, the Michigan Court of Appeals held that Carpenter applied retroactively to respondent, and that such retroactive application did not violate due process. The Sixth Circuit granted habeas relief on the ground that the Michigan Court of Appeals' ruling was objectively unreasonable. The U.S. Supreme Court unanimously reversed, explaining that it "has never found a due process violation in circumstances remotely resembling [this] case – i.e., where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute." AEDPA therefore foreclosed habeas relief.

Nevada court's refusal in rape case to allow defendant to admit evidence that victim had previously accused him of rape or assault was not an unreasonable application of clearly established law and thus did not justify post-conviction relief.

Nevada v. Jackson, 12-694. Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had granted habeas relief based on a purported violation of a defendant's constitutional right to present a defense. In this rape case, the defendant sought to introduce police reports and the testimony of police officers regarding prior instances when the victim had claimed the defendant had raped or assaulted her. The Nevada Supreme Court held that the trial court properly excluded such extrinsic evidence. The U.S. Supreme Court held that that decision was not an unreasonable application of clearly established law under 28 U.S.C. §2254(d)(1). The Court's precedents clearly establish a defendant's right to *cross-examine* witnesses, not to present *extrinsic evidence* for impeachment purposes.

PRIVILEGES AND IMMUNITIES (YEAH, THAT'S RIGHT—PRIVILEGES AND IMMUNITIES)

Virginia FOIA that denies access to public records to citizens of other states does not violate the Privileges and Immunities Clause or the Commerce Clause.

***McBurney v. Young*, 12-17.** The Court unanimously held that the Virginia Freedom of Information Act, which grants access to all public records to citizens of Virginia but not citizens

of other states, does not violate the Privileges and Immunities Clause of Article IV or the dormant Commerce Clause. The Court found that Virginia provides non-citizens with access to certain records through other state laws. And it found that the state does not abridge "fundamental" rights of non-citizens in not providing them with certain other records. In reaching that conclusion, the Court ruled that the Virginia law does not abridge petitioner's right to earn a living obtaining property records from state governments because "the distinction that the statute makes between citizens and noncitizens has a distinctly nonprotectionist aim," namely, providing "a mechanism by which those who ultimately hold sovereign power (*i.e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power." The Court also ruled that access to public information is not a "fundamental" privilege of citizenship.

SENTENCING

Jury must find beyond reasonable doubt any fact that increases the mandatory minimum sentence for a crime, overruling *Harris v. United States*, 536 U.S. 545 (2002).

***Alleyne v. United States*, 11-9335.** By a 5-4 vote, the Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that a jury must find beyond a reasonable doubt any fact that increases the mandatory minimum sentence for a crime. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Court here concluded that mandatory minimums increase the penalty for a crime and are therefore subject to the *Apprendi* rule.

Applying federal sentencing guidelines that were promulgated after crime was committed violated Ex Post Facto Clause.

***Peugh v. United States*, 12-62.** By a 5-4 vote, the Court held that the *Ex Post Facto* Clause is violated "when a defendant is sentenced under [U.S. Sentencing] Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." Although the Guidelines are no longer mandatory, see *United States v. Booker*, 543 U.S. 220 (2005), they "cabin the exercise of [ ] discretion" by district courts. As a result, held the Court, the higher range "creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation."

SOVEREIGN IMMUNITY

Waiver of federal sovereign immunity for intentional torts based on acts or omissions of investigative law enforcement officers covers more than just searches, seizures, and arrests.

***Millbrook v. United States*, 11-10362.** The Federal Tort Claims Act excepts from the United States' waiver of sovereign immunity certain intentional torts, but contains a proviso that extends the waiver of immunity to claims for six intentional torts, including assault and battery, that are based on the "acts or omissions" of an "investigative law enforcement officer." 28 U.S.C. §§1346(b), 2680(h). The Court unanimously rejected a lower court ruling that this

proviso only applies when the tortious conduct occurs in the course of executing a search, seizing evidence, or making an arrest. The statute defines an "investigative law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." But, held the Court, the proviso applies to an "investigative law enforcement officer's" "acts or omissions," without limiting them to conduct during the course of executing searches, seizing evidence, or making arrests.

SPEEDY TRIAL RIGHTS

Court dismisses Louisiana speedy trial rights appeal as improvidently granted.

***Boyer v. Louisiana*, 11-9953.** By a 5-4 vote, the Court dismissed the writ of certiorari as improvidently granted. The Court had granted certiorari to address "[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where the failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes." An opinion concurring in the dismissal of the writ explained, however, that the record showed that the delay was not caused by Louisiana's failure to provide funding. Rather, it was primarily caused by defense requests for continuances of hearings on the issue of funding. "Having taken up the case on the basis of a mistaken premise," the Court dismissed the writ.

STANDING

Challengers to constitutionality of FISA lacked Article III standing.

***Clapper v. Amnesty Int'l USA*, 11-1025.** By a 5-4 vote, the Court held that a group of U.S. citizens (attorneys, journalists, and human rights, labor, legal, and media organizations) who filed suit challenging the constitutionality of the FISA Amendments Act of 2008 (FAA) do not have Article III standing. The FAA allows the government to engage in electronic surveillance of communications of non-U.S. persons located abroad without specifying the individuals or facilities to be monitored. The plaintiffs argued that their work "requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under" the law. The Court held that their claim of actual injury is too speculative, for they have no knowledge that the government is targeting calls to which they are parties. Nor, held the Court, can they show that any injury in fact is fairly traceable to the FAA, for their calls might be targeted by the government under a different legal authority.

CERT GRANTS TO WATCH

***Burt v. Titlow*, 12-414.** Under review is a Sixth Circuit decision granting habeas relief based on *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (holding that a defendant who is convicted after a fair trial may maintain an ineffective-assistance-of-counsel claim based on a rejected plea offer). The first two questions presented seek review of the Sixth Circuit's conclusion that trial counsel was ineffective for not investigating a plea offer the prosecution had made to the defendant's prior trial counsel, which the defendant accepted but then withdrew because he wanted to

maintain his innocence. The third question presented addresses the relief ordered by the Sixth Circuit. It asks "[w]hether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to 'remedy' the violation of the defendant's constitutional right."

***Kansas v. Cheever*, 12-609.** The Court granted certiorari limited to the first question presented, which asks: "When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?"

***Fernandez v. California*, 12-782.** In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held that when one occupant of a premises consents to a warrantless search by police, "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." At issue is whether the same result obtains when an occupant objects to police entry into the premises, is later arrested and removed from the premises, and then a co-occupant consents to the police's entry. Distinguishing *Randolph*, the California Court of Appeal held that such a search does not violate the Fourth Amendment.

***White v. Woodall*, 12-794.** At issue is whether a defendant who pled guilty to capital murder and to aggravating circumstances is entitled, at his capital sentencing proceeding, to an instruction that tells the jury not to draw an adverse inference from his decision not to testify during the proceeding. The Sixth Circuit not only held that the defendant is entitled to such an instruction, it granted habeas relief to the defendant under 28 U.S.C. §2254(d)(1).

***Town of Greece, New York v. Galloway*, 12-696.** The Town of Greece opens its monthly town board meetings with a prayer delivered by volunteer clergy. In practice, almost all of the prayers were delivered by Christian clergy, who often invoked explicitly Christian themes. Under review is a Second Circuit decision holding that this practice violated the Establishment Clause because it constituted an endorsement of a particular religious viewpoint. The Town argues that that ruling conflicts with *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the practice of starting legislative sessions with an invocation based on the practice's "unambiguous and unbroken history."

***McCullen v. Coakley*, 12-1168.** At issue is the constitutionality of a Massachusetts law that bars persons from entering or remaining "on a public way or sidewalk" within 35 feet of an abortion clinic. Relying on *Hill v. Colorado*, 530 U.S. 703 (2000), the First Circuit upheld the law. Petitioners, in arguing that the law violates the First Amendment, emphasize that it creates an exception for clinic employees and agents.

***NLRB v. Noel Canning*, 12-1281.** Under review is the D.C. Circuit decision that dramatically limits the President's authority to make recess appointments. The court interpreted the

Recess Appointments Clause of the Constitution as empowering the President to make recess appointments (1) only during recesses that occur between enumerated sessions of the Senate (and not during intra-session breaks in the Senate's business), and (2) only to fill vacancies that first *arose* during the recess (and not to fill vacancies that might *exist* during a recess). The Court asked the parties also to brief and argue an issue the D.C. Circuit did not reach: "Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions."

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