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The Supreme Court's Criminal Law Decisions In 2018

Part Two of a Two-Part Article

By Harry Sandick and Jacqueline Bonneau

As we noted in Part One of this article (*see*, http://bit.ly/2Figcuo), the U.S. Supreme Court last year continued to express concern about government overreach, and otherwise handed down decisions favorable to defendants. Although the Court rendered only one major criminal law decision in that term, many other cases it decided hold important lessons for defense counsel. We now continue our discussion of these.

Class Decision Allows Post-Plea Challenges to Constitutionality of Statute of Conviction

In *Class v. United States*, 138 S. Ct. 798 (2018), the defendant pleaded guilty to a firearms offense in the District of Columbia. The district court denied his motion to dismiss the indictment based on the Second Amendment, after which he pleaded guilty. He then appealed his conviction, repeating his constitutional claim. The government argued the defendant waived such an appeal when he pleaded guilty. Invoking its prior decision in *Blackledge v. Perry*, 417 U.S. 21 (1974), the Supreme Court held that while a guilty plea does bar the appeal of many claims, including some constitutional violations that occurred prior to the guilty plea, it does not bar the right to challenge the constitutionality of the statute of conviction — even where the defendant does not enter a conditional guilty plea pursuant to Rule 11(a)(2). *Class* allows a defendant to plead guilty and obtain the benefits of acceptance of responsibility at sentencing, without forgoing an appeal of the claim that the underlying statute is unconstitutional or needing to secure the government or the court's consent (as is required for a conditional guilty plea).

Byrd and *Collins* Protect Car-Related Privacy Rights Under Fourth Amendment

There were two notable criminal procedure decisions involving cars — a familiar subject of Fourth Amendment jurisprudence. In each case, the Court ruled for the defendant. First, in *Byrd v. United States*, 138 S. Ct. 1518 (2018), the Supreme Court held that a driver who is using a rental car still can have a reasonable expectation of privacy protected by the Fourth Amendment even if the driver is not listed on the rental agreement. The Court reasoned that a legitimate expectation of privacy can be grounded not only in property law, but in more general societal understandings. While the Court rejected the notion that possession and control of the rental car was sufficient for standing — this test would allow a car thief to invoke the Fourth Amendment — the Court did not agree with the government that a person who breaches a rental car agreement has lost any constitutional expectation of privacy as against law enforcement. The Supreme Court left several interesting questions open for remand, including whether someone who uses a "straw renter" to obtain a car for themselves in order to commit a crime has any greater right to privacy than does a car thief. On remand however, the Third Circuit affirmed the decision to deny the suppression motion based on the good-faith exception to the exclusionary rule. *United States v. Byrd*, No. 16-1509, 2018 U.S. App. LEXIS, 2018 WL 3750932 (3d Cir. Aug. 8, 2018).

In *Collins v. Virginia*, 138 S. Ct. 1663 (2018), the Court declined to extend the automobile exception to the Fourth Amendment to allow law enforcement to enter private property or the curtilage of private property, places that are protected by the Fourth Amendment. The automobile exception does not permit the warrantless search of a car wherever it is located; when the vehicle (here, a motorcycle hidden under a tarpaulin) is located on the curtilage of a home, the police may not cross into the curtilage to search the vehicle, even where the vehicle is visible from a public street. In *Collins*, the Court takes the warrant requirement seriously and protects the home from warrantless intrusion. *Collins* is a reminder that any warrantless search of the home or its curtilage merits a suppression motion.

Harry Sandick, a member of the Business Crimes Bulletin's Board or Editors, is a partner in the Litigation Department of Patterson Belknap and a member of the firm's White Collar Defense and Investigations team. **Jacqueline Bonneau** is a litigation associate at the firm.

Limited Death Penalty Litigation

There were no major death penalty cases this term, and the Court did not take Justice Stephen Breyer's suggestion made in *Glossip v. Gross*, 576 U.S. __ (2015) (Breyer, J., dissenting), to reconsider the death penalty's constitutionality. The leading death penalty case was *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which stands for the proposition that the decision whether to admit to having committed a homicide is a decision that belongs to the client, not defense counsel, even if counsel believes that there is a strategic benefit to making this admission. Justice Ginsburg explained that while the lawyer must take the steps necessary to carry out the defense strategy, the selection of the overall strategy belongs to the client.

Justice Sonia Sotomayor, who joined Justice Breyer's dissent in *Glossip*, seems poised to continue pressing her colleagues to revisit this issue. In August, she dissented from a denial of a stay of execution in a case involving the use of midazolam in a three-drug protocol for lethal injection — which the defendant alleged would cause him to experience "sensations of drowning, suffocating, and being burned alive from the inside out." *Irick v. Tennessee*, No. 18A142, 2018 U.S. LEXIS 4162, 2018 WL 3767151 (Aug. 9, 2018). In her dissent, Justice Sotomayor exclaimed that she could not "in good conscience join in this 'rush to execute' without first seeking every assurance that our precedent permits such a result. If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism." *Id*.

Guidelines and Resentencing Litigation

The most significant case involving the Guidelines this term was *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), which held that where the Guidelines range is miscalculated, the Court of Appeals should reverse so long as the *Olano* plain error standard is satisfied. Even without mandatory guidelines, and even where the imposed sentence falls within the correct Guidelines range, the case should be sent back for resentencing. This is already the rule in most Circuits.

There were also three cases (*Hughes v. United States*, 138 S. Ct. 1765 (2018); *Koons v. United States*, 138 S. Ct. 1783 (2018); and *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018)) about the eligibility of defendants for reduced sentences in the aftermath of retroactive Guidelines reductions for certain narcotics defendants. The amendment permitting this reduction has led to a wave of litigation under 18 U.S.C. §3582(c)(2), the statute that governs retroactive sentence reductions. In *Hughes*, the Court held that a defendant who entered into a Rule 11(c)(1)(C) plea agreement could take advantage of the Guidelines reductions, but in *Koons*, the Court held that a defendant whose sentence was based on a mandatory minimum sentence, reduced by virtue of substantial assistance, could not. In *Hughes*, but not in *Koons*, the defendant's sentence was "based on" the Guidelines range, as required by §3582(c)(2). In *Chavez-Meza* — argued by Deputy Attorney General Rod Rosenstein — the Court held that the district court has no duty to state its reasons when it imposes a particular sentence pursuant to this statute.

Restitution Limited

Lagos v. United States, 138 S. Ct. 1684 (2018), took the minority side of a Circuit split and limited the scope of recoverable costs of investigation under one of the several relevant federal restitution statutes. This decision could be undone by an amendment clarifying that the majority rule prior to *Lagos* is more consistent with the purposes of restitution.

Double Jeopardy Read Narrowly

Finally, one setback for defendants this term came in *Currier v. Virginia*, 138 S. Ct. 2144 (2018). If a defendant seeks a severance of counts, an acquittal in the first trial does not prohibit the government from relitigating at the second trial issues resolved at the first trial, notwithstanding that under the double jeopardy clause, the doctrine of issue preclusion is one of constitutional dimension. Here, the defendant was indicted for burglary, grand larceny, and possession of a firearm after a felony conviction. The parties agreed to a severance, with the first trial to involve the burglary and larceny counts. He was acquitted of these counts, but the trial court did not prohibit the government from relitigating any issue resolved in his favor at the first trial; at the second trial, he was convicted on the felon-in-possession count. Having consented to two trials, the Court saw no role for the double jeopardy clause. The Court had very little sympathy for the defendant's argument that he had no choice but to seek two trials because a joint trial on all of the causes of action would have been prejudicial (the jury would have learned about his prior convictions for burglary and larceny). Justice Ruth Bader Ginsburg wrote a powerful dissent, arguing that even if the defendant consented to two trials, he was still entitled to invoke the doctrine of issue preclusion.

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