Criminal Law Practitioner

Volume 2 | Issue 1 Article 2

2014

Around the Nation

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Supreme Court

- *Kaley v. United States*, 134 S. Ct. 1090 (2014). The Supreme Court held in a 6-3 opinion that the defendants did not have a fifth or sixth amendment right to challenge a grand jury ruling that froze assets that the defendants required to pay their counsel. Kerri and Brian Kaley had planned to use a $500,000 certificate of deposit to pay their defense attorney, but were subject to a grand jury § 853(e)(1) pre-trial asset seizure that effectively froze all assets that were traceable to the offense. The Supreme Court, following *Monsanto v. United States*, held that a defendant is not entitled to judicial re-determination of a grand jury's probable cause ruling that property will ultimately be proved forfeitable, regardless of whether the property was going to be used to pay counsel.

- *Kansas v. Cheever*, 134 S. Ct. 596 (2013). The Supreme Court distinguished *Buchanan v. Kentucky*, finding that the prosecution was permitted to use a state examiner to rebut the defendant's voluntary intoxication defense. Cheever argued that the results of the court-ordered psychiatric examination were a Fifth Amendment violation because he had "neither initiated the mental examination nor put his mental capacity in dispute." The prosecution's introduction of the state examiner's evidence was consistent with the rules of rebuttal testimony because Cheever had offered expert testimony that he was unable to form the requisite *mens rea*.

- *United States v. Davila*, 133 S.Ct. 2139 (2013). A magistrate judge's suggestion to a defendant that the defendant plead guilty does not result in an automatic vacatur of the guilty plea if the record shows no prejudice to the defendant's decision to plead guilty. Davila requested new counsel after his attorney did not discuss trial strategy and instead told him to plead guilty. The magistrate judge told Davila that he would not get new counsel, and given the strength of the government's case, it may be best that he plead guilty. The Supreme Court held that though the judge violated rule 11(c)(1), it was not a "highly exceptional error" requiring automatic vacutor. Rather, the court should examine the plea with all the facts of trial taken into account and determine whether Davila would have gone to trial but for the judge's comments.

- *Fernandez v. California*, 134 S. Ct. 1126 (2014). The Supreme Court held in a 6-3 ruling that a warrantless consent search is permissible, even if a potentially objecting occupant is only absent because he is in police custody. Police observed Fernandez run into an apartment while observing a violent robbery. Officers removed him from the apartment and put him in police custody upon suspicion that he had battered another occupant. Police later gained access to the residence on the consent of the other occupant while Fernandez was in custody. The court held that because police had reasonable grounds to remove Fernandez from the property, he was in the position of any other occupant absent and unable to object to the search.

- *Hinton v. Alabama*, 134 S. Ct. 1081 (2014). The Court found that an attorney's refusal to request additional funds to replace an expert to rebut the State's case qualified as inadequate assistance of counsel. Hinton's attorney mistakenly believed that an Alabama judge could only grant him $1,000 to hire an expert witness. As a result, he hired a deficient expert and Hinton was found guilty. The Court held that an attorney's ignorance of a point of law fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland v. Washington*.

Circuit Courts

1st Circuit

- *Ponte v. Steelcase*, 741 F.3d 310 (1st Cir. 2014). The First Circuit Court of Appeals found that a male employer had not created a hostile work environment when he drove his female employee home and rested his hand on her shoulder. The court found that this sort of contact was not severe or pervasive to create the necessary requirements to eventually warrant a retaliation or discrimination claim.

- *Kosilek v. Spencer*, 740 F.3d 733 (1st Cir. 2014). A rehearing en banc has been granted and an original opinion was withdrawn in this case involving a state prisoner who sought treatment for her gender identity disorder. Michelle Kosilek filed suit when the DOC refused to provide her with gender reassignment surgery. The First Circuit held that the district court was correct in finding that the DOC violated Kosilek's eighth amendment rights because Kosilek has a serious need for the surgery that was not provided to her.

2nd Circuit

- *United States v. Crandall*, No. 12-3313-CR, 2014 WL 1386650 (2nd Cir. 2014). The Second Circuit Court of Appeals held that the Sixth Amendment requires reasonable accommodations for hearing-impaired defendants during judicial proceedings, but a judge is only required to provide accommodations for impairments that he is informed of, or should be reasonably aware of. Several times during his trial, Crandall asked for the microphone to be moved closer or the volume to be turned up, to which the judge complied. Because Crandall testified without any issue and was provided with assistance when counsel asked, the court found that the trial judge had made reasonable accommodations to comport with the Sixth Amendment.

3rd Circuit

- *United States v. Gumbs*, No 12-3630, 2014 WL 1275467 (3rd Cir. 2014). The Third Circuit Court of Appeals held that a judge was not required to question or remove a juror who cried while viewing a video of a defendant engaged in sexual activity with his underage victim. The court found that the judge acted appropriately by taking into consideration the juror's conduct throughout the entire trial and finding that further questioning was unnecessary.

- *United States v. Woronowicz*, 744 F.3d 848 (3rd Cir. 2014). A sentence of forty-one months for counterfeiting currency in excess of $200,000 was found to be substantively and procedurally reasonable by the Third Circuit Court of Appeals. The sentence was a result of a twelve-level enhancement because of the face value amount of counterfeit currency. Upon determination that the sentence was procedurally sound, the court followed the standard in *United States v. Tomko* and affirmed the sentence because it was within the range of sentencing guidelines and "more likely to be reasonable than those that fall outside this range."

4th Circuit

- *United States v. Washington*, 743 F.3d 938 (4th Cir. 2014). The Fourth Circuit Court of Appeals held that the government is not required to prove that the defendant had knowledge that a victim is a minor to prove interstate transportation of a minor with intent that the minor engage in prostitution or sexual activity. Looking to past cases and statutes, the court held that previous decisions did not intend to "establish a bright-line rule that specified that *mens rea* applied to every element of the offense." Thus, the knowledge requirement of moving the minor across state lines to commit sexual activity did not necessarily mean the government must show that the defendant had knowledge of the victim's age.

5th Circuit

- *United States v. Lagrone*, 743 F.3d 122 (5th Cir. 2014). A defendant cannot be convicted of multiple felony counts if the defendant is only charged with two thefts and the aggregate value of the theft is less

than $1,000. The Fifth Circuit Court of Appeals vacated the lower court's decision to charge Sheryl Lagrone with two felony counts for stealing $880 worth of postal stamps. Lagrone was sen-tenced to forty-five months imprisonment and over $20,000 in restitution. The court adopted the rule of lenity for ambiguous statutory law to avoid subjecting Lagrone to punishment that is not clearly prescribed.

- *Stauffer v. Gearhart*, 741 F.3d 574 (5th Cir. 2014). The Fifth Circuit Court of Appeals found a prisoner's claims to be moot after he sued his prison for confiscating automotive magazines that may have contained sexually provocative pictures of women (the prisoner was in a sex offender treatment program). The prisoner moved for injunctive and monetary relief. The court found the claims to be moot because the program changed their policies to require an individualized review of magazines for sexually provocative content. The court also rejected Stauffer's monetary claims because he received no physical injury in connection with the claims.

6th Circuit

- *United States v. Duval*, 742 F.3d 246 (6th Cir. 2014). The Sixth Circuit Court of Appeals found that a deputy's omission of the defendants' status as patients and caregivers under the state's medical marijuana act in his warrant affidavit did not destroy probable cause to search the defendants' farm. The defendants were permitted to grow limited amounts of marijuana under the Act as caregivers and patients. The court upheld the warrant because the deputy had "clear and uncontroverted evidence" that the defendants were not in compliance with the strict rigors of the Michigan Medical Marijuana Act.

7th Circuit

- *United States v. Balthazar*, 735 F.3d 634 (7th Cir. 2013). The Seventh Circuit Court of Appeals affirmed the lower court's ruling and found that police officers did not conduct a search of an apartment when they accidentally knocked down the apartment's door Police were unable to control the momentum of the battering ram and erroneously broke open the door of an apartment. They immediately moved to the correct door without entering the wrong apartment. The court made it clear that while police do not have to enter an apartment for a search to occur, there has to be some showing that the police were actually searching, not just an ability to see into the apartment.

8th Circuit

- *United States v. Rodriguez*, 741 F.3d 905 (8th Cir. 2014). The Eighth Circuit Court of Appeals found that an eight minute delay between removing a suspect from his vehicle and conducting a dog sniff was reasonable. The officer articulated to the court that the delay was a result of him waiting for a second officer, as there were two suspects in the vehicle. The court found that this was a delay that had been found to be reasonable in other circumstances.

- *United States v. Goodale*, 738 F.3d 917 (8th Cir. 2013). An officer's seventeen-second viewing of a defendant's laptop fell within the scope of the private search exception when the laptop was brought to police by a third-party victim. The Eighth Circuit Court of Appeals affirmed the decision of the lower court when reviewing a case in which a thirteen year-old victim brought the defendant's laptop to police to show evidence of sexual abuse. Because the search was neither instigated nor performed by the police (the victim showed lewd, illegal websites to the officers, and the officers never touched the computer), the court held that the search was private and conducted by a private party.

9th Circuit

- *Haskell v. Harris*, No. 10–15152, 2014 WL 1063399 (9th Cir. 2014). The Ninth Circuit Court of Appeals held that California's DNA and Forensic Database Act did not violate the Fourth Amendment. The act requires law enforcement to

collect DNA samples from all adults arrested for felonies. The court followed the Supreme Court's decision in *Maryland v. King*, finding that searches using buccal swabs to obtain DNA after a serious offense were reasonable.

10th Circuit

- *United States v. Gordon*, 741 F.3d 64 (10th Cir. 2014). The Tenth Circuit Court of Appeals found that an officer was not justified in seizing a shotgun from a home, incident to arrest, when that shotgun was not related to the crime, and the seizure of the shotgun did not warrant suppression. Officers seized the defendant's shotgun after the arrest and after the scene and defendants were secure. The defendant moved to suppress, but the court held that it was a *de minimus* intrusion on the defendant's rights that was "seemingly benign and did not warrant suppression."

11th Circuit

- *United States v. Rivera*, No. 13–10459, 2014 WL 46113 (11th Cir. 2014). Following *United States v. Broadwell*, the Elev-enth Circuit upheld an aiding and abetting charge in a case involving sex trafficking of a minor because "the aiding and abetting statute allows the jury to find a person guilty of a substantive crime even though that person did not commit all acts constituting elements of the crime." Ramirez was subsequently found guilty because the state was able to show that she mentored the trafficker and demonstrated what kind of sexual favors the minor should complete. Through her affirmative actions, she associated herself with the crime and aided its success.

D.C. Circuit

- *United States v. Glover*, 736 F.3d 509 (D.C. Cir. 2013). The D.C. Circuit Court found that a warrant for electronic surveillance on a defendant's truck was insufficient on its face because the court authorized a bug outside of its jurisdiction. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes electronic bugs "within the territorial jurisdiction of the court in which the judge is sitting." A D.C. District Court judges i g n e d the warrant, and the bug was placed in Maryland, thus invalidating the warrant.

Federal District Courts

- *United States v. Ramirez*, No. 13–20866–CR, 2014 WL 105320 (S.D.F.L. 2014). The District Court for the Southern District of Florida found that a defendant's statements after a police officer warned the defendant that "it would be worse for him if he did not speak to police" were involuntary. Ramirez was arrested and removed from his residence and subsequently warned by police that having a lawyer would be disadvantageous because the lawyer would advise Ramirez not to answer questions. The court found that these facts, along with the fact that the defendant had poor English skills, rendered his comments involuntary.

Nationwide Policies

- **Eric Holder seeks to lower drug offenses by two levels.** On March 13, 2014, Attorney General Eric Holder testified in front of Congress in support of lowering by two levels the base offense associated with various drug quantities in certain trafficking schemes. The United States Sentencing Commission projects that this change will lower the prison population by 6,550 inmates at the end of five years.

- **Bitcoin theft sparks lawsuits.**[1] Over $470 million in bitcoins were stolen from the world's largest bitcoin exchange and hundreds of investors are taking action to reclaim their lost assets. United States residents have filed suits against Mt. Gox, the Tokyo based bitcoin exchange. Because there is no regulation or judicial precedence on bitcoin

1 Martha Neil, *Thefts of $470M in bitcoins spur lawsuits, calls for regulation; a 'bitcoin paradox,' law prof says*, ABA Journal (Mar. 5, 2014), available at http://www.abajournal.com/mobile/article/multiple_reports_of_hackers_stealing_bitcoins_spur_class_action_litigants/.

exchanges, the results of these lawsuits are difficult to predict.

State Policies

- Washington, D.C. decriminalizes marijuana. Incumbent D.C. Mayor signed into law the "Marijuana Possession Decriminalization Amendment Act of 2013."[2] The bill will decriminalize possession of up to one ounce (twenty-eight grams) of marijuana.[3] The measure is next up for a sixty-day congressional review because Congress is granted constitutional power to review local D.C. laws.

- Decriminalizing marijuana is the new trend! Washington, D.C. is not the trailblazer in the marijuana decriminalization movement. Currently, Alaska, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, and Vermont all have laws that decriminalize small amounts of cannabis.[4] Colorado and Washington passed voter initiatives legalizing recreational marijuana use in the past year.[5]

- Eyewitness testimony procedures overhauled in several states. Prince Georges County in Maryland now requires its police stations to conduct lineups using the double-blind, sequential method.[6] This trend is occurring across the country, such as in Texas where departments are required to adopt the Law Enforcement Management Institute of Texas' guidelines for lineups, or submit a different plan that conforms to the current Texas law.[7] Meanwhile, the New Jersey Attorney General has been suggesting double-blind, sequential lineups for almost thirteen years.[8]

- A fifth person has been exonerated in Washington, D.C. after reanalyzing hair samples found at the crime scene.[9] Kevin Martin was officially released from prison after spending thirty years in jail for a rape and murder he didn't commit. Hair analysis from the crime scene led to his arrest and eventual conviction. Martin took an Alford plea, but maintained his innocence. A resampling of the hair determined that Martin was not at the crime scene, making him the fifth person since 2009 to be released after a hair resampling.

2 Eyder Peralta, *D.C. Mayor Signs Bill Decriminalizing Some Marijuana Use*, NATIONAL PUBLIC RADIO, Mar. 31, 2014, available at http://www.npr.org/blogs/thetwo-way/2014/03/31/297339798/d-c-mayor-signs-bill-decriminalizing-some-marijuana-use.

3 Marijuana Possession Decriminalization Amendment Act of 2013.

4 *States That Have Decriminalized*, NORML.ORG (last visitied Apr. 18, 2014), http://norml.org/aboutmarijuana/item/states-that-have-decriminalized.

5 Niraj Chokshi, *After legalizing marijuana, Washington and Colorado are starting to regulate it*, THE WASHINGTON POST, Oct. 9, 2013, http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/09/after-legalizing-marijuana-washington-and-colorado-are-starting-to-regulate-it/.

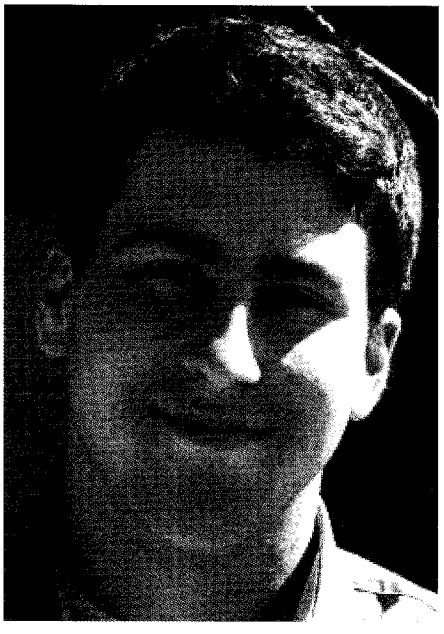
6 Lynh Bui, *Prince George's police to transform photo lineups*, THE WASHINGTON POST, Feb. 9, 2014, available at http://www.washingtonpost.com/local/crime/prince-georges-police-transform-photo-lineups/2014/02/09/e1513fe4-8e8a-11e3-b227-12a45d109e03_story.html.

7 Tex. Code Crim. Proc. Ann. art. 38.20 (2011).

8 Letter from John J. Farmer Jr., Att'y Gen. for the State of New Jersey (April 18, 2001), available at http://www.njdcj.org/agguide/photoid.pdf.

9 Paul Wagner, *5th DC man sent to prison on false hair analysis exonerated by DNA*, WWW.MYFOXDC.COM, Mar. 13, 2014, available at http://www.myfoxdc.com/story/24971004/5th-dc-man-sent-to-prison-on-false-hair-analysis-exonerated-by-dna#axzz2vzzCm6kV.

About the AUTHOR



Calen Weiss received his Juris Doctor from American University Washington College of Law in May of 2014 and was the Articles Editor for the *Criminal Law Practitioner* in his third year. He is originally from Los Angeles, California, but attended the University of Connecticut for his undergraduate studies. While at WCL, Calen has held internships with the D.C. Superior Court and Department of Homeland Security. Additionally, Calen has worked as a law clerk for the Dolan Law Firm in San Francisco and the National Association of College and University Attorneys in Washington, D.C.