Appellate Court Decisions - Week of 2/20/17

Note: This is not a comprehensive list of every case released this week.

First Appellate District of Ohio

Nothing to report.

Second Appellate District of Ohio

***State v. Donley*, 2017-Ohio-562**

Having Weapons While Under Disability: Sufficiency

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-562.pdf

Appellant's conviction for having weapons while under disability was based on insufficient evidence where the gun in question was found under the hood of the vehicle, the vehicle belonged to Appellant's wife, there was no evidence they shared the vehicle or if anyone else routinely used it, and there was no evidence Appellant wore the clothing items found with the gun.

Third Appellate District of Ohio

***In re D.P.*, 2017-Ohio-606**

Juvenile: Probation Revocation: Right to Counsel

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2017/2017-Ohio-606.pdf

Summary from the Third District: "The trial court erred in (1) failing to inform the appellant-juvenile of his right to counsel or to obtain a valid waiver of the right to counsel and (2) failing to conduct a proper Juv.R. 29(D) colloquy with the appellant-juvenile and allowing appellant-juvenile to enter an admission on the record prior to revoking the appellant-juvenile's probation and invoking a prior commitment of the appellant-juvenile to DYS."

Fourth Appellate District of Ohio

Nothing to report.

Fifth Appellate District of Ohio

***In re R.D.*, 2017-Ohio-589**

Juvenile: Sex Offender Registration

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-589.pdf

The trial court erred in denying Appellant's motion to vacate his juvenile sex offender registration where his Tier III classification was void because his offenses were committed prior to the enactment of the Adam Walsh Act, and the juvenile court lost jurisdiction to reclassify him when he turned 21.

Sixth Appellate District of Ohio

Nothing to report.

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

Nothing to report.

Ninth Appellate District of Ohio

Nothing to report.

Tenth Appellate District of Ohio

Nothing to report.

Eleventh Appellate District of Ohio

***State v. Hudson*, 2017-Ohio-615**

Sentencing: Possession of Cocaine: *Gonzales*

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/11/2017/2017-Ohio-615.pdf

Appellant's conviction for possession of cocaine is reversed and remanded with an order to resentence him to a fifth-degree felony because the state failed to the establish the weight "of cocaine" excluding the amount of filler materials at trial.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

Keep an eye on this:

2015-0677. State v. Aalim. Montgomery App. No. 26249, 2015-Ohio-892. On appellee's motion for stay of execution of judgment. Motion granted. O'Connor, C.J., and O'Neill, J., dissent. **(This is the mandatory bindover case).**

Sixth Circuit Court of Appeals

***Thomas v. Westbrooks*, No. 15-5399**

Evidence: *Brady*

Full Decision: http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0045p-06.pdf

Summary from the Sixth Circuit:

"In this Tennessee death penalty case, Petitioner Andrew Lee Thomas, Jr., appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254.1 Thomas's primary claim on appeal is that the State violated his rights under Brady v. Maryland, 373 U.S. 83 (1963), when it suppressed evidence that the key witness against him had been paid $750 by the Federal Bureau of Investigation prior to trial. We agree that the prosecutor had a duty to disclose this payment rather than allow the witness to commit perjury by denying its existence, and we REVERSE and REMAND the district court's denial of the writ."

Supreme Court of the United States

***Buck v. Davis*, Slip Opinion No. 15-8049**

Capital Punishment: Ineffective Assistance

Full Decision: https://www.supremecourt.gov/opinions/16pdf/15-8049_f2ah.pdf

Syllabus of the Court:

Petitioner Duane Buck was convicted of capital murder in a Texas court. Under state law, the jury was permitted to impose a death sentence only if it found unanimously and beyond a reasonable doubt that Buck was likely to commit acts of violence in the future. Buck's attorney called a psychologist, Dr. Walter Quijano, to offer his opinion on that issue. Dr. Quijano had been appointed to evaluate Buck by the presiding judge and had prepared a report setting out his conclusions. To determine the likelihood that Buck would act violently in the future, Dr. Quijano had considered a number of statistical factors, including Buck's race. Although Dr. Quijano ultimately concluded that Buck was unlikely to be a future danger, his report also stated that Buck was statistically more likely to act violently because he is black. The report read, in relevant part: "**Race.** Black: Increased probability." App. 19a. Despite knowing the contents of the report, Buck's counsel called Dr. Quijano to the stand, where he testified that race is a factor "know[n] to predict future dangerousness." Id., at 146a. Dr. Quijano's report was admitted into evidence at the close of his testimony. The prosecution questioned Dr. Quijano about his conclusions on race and violence during cross-examination, and it relied on his testimony in summation. During deliberations, the jury requested and received the expert reports admitted into evidence, including Dr. Quijano's. The jury returned a sentence of death.

Buck contends that his attorney's introduction of this evidence violated his Sixth Amendment right to the effective assistance of counsel. Buck failed to raise this claim in his first state postconviction proceeding. While that proceeding was pending, this Court received a petition for certiorari in *Saldano v. Texas*, 530 U. S. 1212, a case in which Dr. Quijano had testified that the petitioner's Hispanic heritage weighed in favor of a finding of future dangerousness. Texas confessed error on that ground, and this Court vacated the judgment below. Soon afterward, the Texas Attorney General issued a public statement identifying six similar cases in which Dr. Quijano had testified. Buck's was one of them. In the other five cases, the Attorney General confessed error and consented to resentencing. But when Buck filed a second state habeas petition alleging that his attorney had been ineffective in introducing Dr. Quijano's testimony, the State did not confess error, and the court dismissed the petition as an abuse of the writ on the ground that Buck had failed to raise the claim in his first petition.

Buck then sought federal habeas relief under 28 U. S. C. §2254. The State again declined to confess error, and Buck's ineffective assistance claim was held procedurally defaulted and unreviewable under *Coleman v. Thompson*, 501 U. S. 722. This Court's later decisions in *Martinez v. Ryan*, 566 U. S. 1, and *Trevino v. Thaler*, 569 U. S. ___, modified the rule of *Coleman*. Had they been decided before Buck filed his federal habeas petition, Buck's claim could have been heard on the merits provided he had demonstrated that (1) state postconviction counsel had been constitutionally ineffective

in failing to raise the claim, and (2) the claim had some merit. Following the decision in *Trevino*, Buck sought to reopen his §2254 case under Federal Rule of Civil Procedure 60(b)(6). To demonstrate the "extraordinary circumstances" required for relief, *Gonzalez v. Crosby*, 545 U. S. 524, 535, Buck cited the change in law effected by *Martinez* and *Trevino*, as well as ten other factors, including the introduction of expert testimony linking Buck's race to violence and the State's confession of error in similar cases. The District Court denied relief. Reasoning that "the introduction of any mention of race" during Buck's sentencing was "*de minimis*," the court concluded, first, that Buck had failed to demonstrate extraordinary circumstances; and second, that even if the circumstances were extraordinary, Buck had failed to demonstrate ineffective assistance under *Strickland v. Washington*, 466 U. S. 668. Buck sought a certificate of appealability (COA) from the Fifth Circuit to appeal the denial of his Rule 60(b)(6) motion. The Fifth Circuit denied his application, concluding that he had not shown extraordinary circumstances justifying relief from the District Court's judgment.

Held:

1. The Fifth Circuit exceeded the limited scope of the COA analysis. The COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U. S. C. §2253. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U. S. 322, 327. Here, the Fifth Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the case on the merits, repeatedly faulting Buck for having failed to demonstrate extraordinary circumstances. The question for the Court of Appeals was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. The State points to the Fifth Circuit's thorough consideration of the merits to defend that court's approach, but this hurts rather than helps its case. Pp. 12–15.

2. Buck has demonstrated ineffective assistance of counsel under *Strickland*. Pp. 15–20.

(a) To satisfy *Strickland*, a defendant must first show that counsel performed deficiently. 466 U. S., at 687. Buck's trial counsel knew that Dr. Quijano's report reflected the view that Buck's race predisposed him to violent conduct and that the principal point of dispute during the penalty phase was Buck's future dangerousness. Counsel nevertheless called Dr. Quijano to the stand, specifically elicited testimony about the connection between race and violence, and put Dr. Quijano's report into evidence. No competent defense attorney would introduce evidence that his client is liable to be a future danger because of his race. Pp. 15–17.

(b) *Strickland* further requires a defendant to demonstrate prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. It is reasonably probable that without Dr. Quijano's testimony on race and violence, at least one juror would have harbored a

reasonable doubt on the question of Buck's future dangerousness. This issue required the jury to make a predictive judgment inevitably entailing a degree of speculation. But Buck's race was not subject to speculation, and according to Dr. Quijano, that immutable characteristic carried with it an increased probability of future violence. Dr. Quijano's testimony appealed to a powerful racial stereotype and might well have been valued by jurors as the opinion of a medical expert bearing the court's imprimatur. For these reasons, the District Court's conclusion that any mention of race during the penalty phase was *de minimis* is rejected. So is the State's argument that Buck was not prejudiced by Dr. Quijano's testimony because it was introduced by his own counsel, rather than the prosecution. Jurors understand that prosecutors seek convictions and may reasonably be expected to evaluate the government's evidence in light of its motivations. When damaging evidence is introduced by a defendant's own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value. Pp. 17–20.

3. The District Court's denial of Buck's Rule 60(b)(6) motion was an abuse of discretion. Pp. 20–26.

(a) Relief under Rule 60(b)(6) is available only in "extraordinary circumstances." *Gonzalez*, 545 U. S., at 535. Determining whether such circumstances are present may include consideration of a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U. S. 847, 863–864. The District Court's denial of Buck's motion rested largely on its determination that race played only a *de minimis* role in his sentencing. But there is a reasonable probability that Buck was sentenced to death in part because of his race. This is a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are. That it concerned race amplifies the problem. Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process, *Davis v. Ayala*, 576 U. S. ____, ____, a concern that supports Rule 60(b)(6) relief. The extraordinary nature of this case is confirmed by the remarkable steps the State itself took in response to Dr. Quijano's testimony in other cases. Although the State attempts to justify its decision to treat Buck differently from the other five defendants identified in the Attorney General's public statement, its explanations for distinguishing Buck's case from Saldano have nothing to do with the Attorney General's stated reasons for confessing error in that case. Pp. 20–24.

(b) Unless *Martinez* and *Trevino*, rather than *Coleman*, would govern Buck's case were it reopened, his claim would remain unreviewable and Rule 60(b)(6) relief would be inappropriate. The State argues that *Martinez* and *Trevino* would not govern Buck's case because they announced a "new rule" under *Teague v. Lane*, 489 U. S. 288, that does not apply retroactively to cases (like Buck's) on collateral review. This argument, however, has been waived: the State failed to advance it in District Court, before the Fifth Circuit, or in its brief in opposition to Buck's petition for certiorari. Pp. 24–26. 623 Fed. Appx. 668, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.