Appellate Court Decisions - Week of 4/16/18

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

Nothing to report.

Third Appellate District of Ohio

Nothing to report.

Fourth Appellate District of Ohio

Nothing to report.

Fifth Appellate District of Ohio

Nothing to report.

Sixth Appellate District of Ohio

Nothing to report.

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

***State v. Kafantaris*, 2018-Ohio-1397**

Preindictment Delay

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-1397.pdf

Summary from the Eighth District: "The trial court did not err in granting defendant-appellee's motion to dismiss for preindictment delay. Unavailable evidence, including the missing case file and unavailable phone

records that could have negatively impacted the alleged victim's credibility, constituted actual prejudice, and the state was unable to justify the delay."

***State v. Pratt*, 2018-Ohio-1394**

Sentencing

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-1394.pdf

Summary from the Eighth District: "Combination of jail term and community control sanctions was not authorized by statute where defendant was ordered to serve maximum jail term followed by community control.

Ninth Appellate District of Ohio

***State v. Syed*, 2018-Ohio-1438**

Forfeiture

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/9/2018/2018-Ohio-1438.pdf

Appellant was convicted of multiple crimes for his involvement in an illegal gambling establishment. Some money was found in a rental car outside his family home, and it was ordered to be forfeited. The appellate court, however, ruled that the evidence supported appellant's claim that the money was related to his gentleman's club business, not his illegal gaming business. Therefore, the trial court erred in ordering the money forfeited.

Tenth Appellate District of Ohio

***State v. Brown*, 2018-Ohio-1476**

OVI: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2018/2018-Ohio-1476.pdf

Summary from the Tenth District: "The trial court erred when it analyzed Brown's motion to suppress under the standard of reasonable suspicion rather than probable cause."

***State v. Allen*, 2018-Ohio-1529**

Restitution

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2018/2018-Ohio-1529.pdf

Summary from the Tenth District: "The trial court erred in ordering the defendant to pay restitution to three banks. Although the banks cashed the forged checks, the economic loss was initially suffered by the account holders. The banks were third parties that reimbursed the accounts. As such, the banks were not the victims of the offenses and not entitled to restitution."

***State v. Williams*, 2018-Ohio-1526**

Sentencing

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2018/2018-Ohio-1526.pdf

Summary from the Tenth District: "The trial court did not plainly err in instructing the jury that the verdict must be unanimous as to all charges and specifications, but it did err when it sentenced the defendant to consecutive terms of imprisonment for two one-year gun specifications even though both specifications arose from a single act or transaction."

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

***State v. Mason*, 2018-Ohio-1462**

Sixth Amendment: Death Penalty: Trial By Jury

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-

1462.pdf

Ohio's capital sentencing scheme is not unconstitutional under *Hurst v. Florida*, ____ U.S. ____, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016). It does not violate a defendant's Sixth Amendment right to a trial by jury.

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

***Sessions v. Dimaya*, Slip Opinion No. 15-1498**

Immigration: Aggravated Felony

Full Decision:
https://www.supremecourt.gov/opinions/17pdf/15-1498_1b8e.pdf

Syllabus:

"The Immigration and Nationality Act (INA) virtually guarantees that any alien convicted of an 'aggravated felony' after entering the United States will be deported. See 8 U. S. C. §§1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C). An aggravated felony includes 'a crime of violence (as defined in [18 U. S. C. §16] . . .) for which the term of imprisonment [is] at least one year.' §1101(a)(43)(f). Section 16's definition of a crime of violence is divided into two clauses—often referred to as the elements clause, §16(a), and the residual clause, §16(b). The residual clause, the provision at issue here, defines a 'crime of violence' as 'any other offense that is a felony and 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.' To decide whether a person's conviction falls within the scope of that clause, courts apply the categorical approach. This approach has courts ask not whether 'the particular facts' underlying a conviction created a substantial risk, *Leocal v. Ashcroft*, 543 U. S. 1, 7, nor whether the statutory elements of a crime require the creation of such a risk in each and every case, but whether 'the ordinary case' of an offense poses the requisite risk, *James v. United States*, 550 U. S. 192, 208.

"Respondent James Dimaya is a lawful permanent resident of the United States with two convictions for first-degree burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a 'crime of violence' under §16(b). While Dimaya's appeal was pending in the Ninth Circuit, this

Court held that a similar residual clause in the Armed Career Criminal Act (ACCA)—defining 'violent felony' as any felony that 'otherwise involves conduct that presents a serious potential risk of physical injury to another,' 18 U. S. C. §924(e)(2)(B)—was unconstitutionally 'void for vagueness' under the Fifth Amendment's Due Process Clause. *Johnson v. United States*, 576 U. S. ____, ____. Relying on *Johnson*, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague.

"Held: **The judgment is affirmed.**

"803 F. 3d 1110, affirmed.

"JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, concluding that §16's residual clause is unconstitutionally vague. Pp. 6–11, 16–25.

"(a) A straightforward application of *Johnson* effectively resolves this case. Section 16(b) has the same two features as ACCA's residual clause—an ordinary-case requirement and an ill-defined risk threshold—combined in the same constitutionally problematic way. To begin, ACCA's residual clause created 'grave uncertainty about how to estimate the risk posed by a crime' because it 'tie[d] the judicial assessment of risk' to a speculative hypothesis about the crime's 'ordinary case,' but provided no guidance on how to figure out what that ordinary case was. 576 U. S., at ____. Compounding that uncertainty, ACCA's residual clause layered an imprecise 'serious potential risk' standard on top of the requisite 'ordinary case' inquiry. The combination of 'indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony,' *id.*, at ____, resulted in 'more unpredictability and arbitrariness than the Due Process Clause tolerates,' *id.*, at ____. Section 16(b) suffers from those same two flaws. Like ACCA's residual clause, §16(b) calls for a court to identify a crime's 'ordinary case' in order to measure the crime's risk but 'offers no reliable way' to discern what the ordinary version of any offense looks like. *Id.*, at ____. And its 'substantial risk' threshold is no more determinate than ACCA's 'serious potential risk' standard. Thus, the same '[t]wo features' that 'conspire[d] to make' ACCA's residual clause unconstitutionally vague also exist in §16(b), with the same result. *Id.*, at ____. Pp. 6–11.

"(b) The Government identifies three textual discrepancies between ACCA's residual clause and §16(b) that it claims make §16(b) easier to apply and thus cure the constitutional infirmity. None, however, relates to the pair of features that *Johnson* found to produce impermissible vagueness or otherwise makes the statutory inquiry more determinate. Pp. 16–24.

"(1) First, the Government argues that §16(b)'s express requirement (absent from ACCA) that the risk arise from acts taken 'in the course of committing

the offense,' serves as a 'temporal restriction'— in other words, a court applying §16(b) may not 'consider risks arising after' the offense's commission is over. Brief for Petitioner 31. But this is not a meaningful limitation: In the ordinary case of any offense, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without the temporal language, a court applying the ordinary case approach, whether in §16's or ACCA's residual clause, would do the same thing—ask what usually happens when a crime is committed. The phrase 'in the course of' makes no difference as to either outcome or clarity and cannot cure the statutory indeterminacy *Johnson* described.

"Second, the Government says that the §16(b) inquiry, which focuses on the risk of 'physical force,' 'trains solely' on the conduct typically involved in a crime. Brief for Petitioner 36. In contrast, ACCA's residual clause asked about the risk of 'physical injury,' requiring a second inquiry into a speculative 'chain of causation that could possibly result in a victim's injury.' *Ibid.* However, this Court has made clear that 'physical force' means 'force capable of causing physical pain or injury.' *Johnson v. United States*, 559 U. S. 133, 140. So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Thus, the force/injury distinction does not clarify a court's analysis of whether a crime qualifies as violent.

"Third, the Government notes that §16(b) avoids the vagueness of ACCA's residual clause because it is not preceded by a 'confusing list of exemplar crimes.' Brief for Petitioner 38. Those enumerated crimes were in fact too varied to assist this Court in giving ACCA's residual clause meaning. But to say that they failed to resolve the clause's vagueness is hardly to say they caused the problem. Pp. 16– 21.

"(2) The Government also relies on judicial experience with §16(b), arguing that because it has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But in fact, a host of issues respecting §16(b)'s application to specific crimes divide the federal appellate courts. And while this Court has only heard oral arguments in two §16(b) cases, this Court vacated the judgments in a number of other §16(b) cases, remanding them for further consideration in light of ACCA decisions. Pp. 21–24.

"JUSTICE KAGAN, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded in Parts II and IV–A:

"(a) The Government argues that a more permissive form of the void-for-vagueness doctrine applies than the one *Johnson* employed because the removal of an alien is a civil matter rather than a criminal case. This Court's precedent forecloses that argument. In *Jordan v. De George*, 341 U. S. 223, the Court considered what vagueness standard applied in removal cases

and concluded that, 'in view of the grave nature of deportation,' the most exacting vagueness standard must apply. *Id.*, at 231. Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than "any potential jail sentence.' *Jae Lee v. United States*, 582 U. S. ____, ____. Pp. 4–6.

"(b) Section 16(b) demands a categorical, ordinary-case approach. For reasons expressed in *Johnson*, that approach cannot be abandoned in favor of a conduct-based approach, which asks about the specific way in which a defendant committed a crime. To begin, the Government once again 'has not asked [the Court] to abandon the categorical approach in residual-clause cases,' suggesting the factbased approach is an untenable interpretation of §16(b). 576 U. S., at ____. Moreover, a fact-based approach would generate constitutional questions. In any event, §16(b)'s text demands a categorical approach. This Court's decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.' *Taylor v. United States*, 495 U. S. 575, 601. And the words 'by its nature' in §16(b) even more clearly compel an inquiry into an offense's normal and characteristic quality—that is, what the offense ordinarily entails. Finally, given the daunting difficulties of accurately 'reconstruct[ing],' often many years later, 'the conduct underlying [a] conviction,' the conduct-based approach's 'utter impracticability'— and associated inequities—is as great in §16(b) as in ACCA. *Johnson*, 576 U. S., at ____. Pp. 12–15.

"JUSTICE GORSUCH, agreeing that the Immigration and Nationality Act provision at hand is unconstitutionally vague for the reasons identified in *Johnson v. United States*, 576 U. S. ____, concluded that the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution. The Government's argument that a less-than-fair notice standard should apply where (as here) a person faces only civil, not criminal, consequences from a statute's operation is unavailing. In the criminal context, the law generally must afford 'ordinary people . . . fair notice of the conduct it punishes,' *id.*, at ____, and it is hard to see how the Due Process Clause might often require any less than that in the civil context. Nor is there any good reason to single out civil deportation for assessment under the fair notice standard because of the special gravity of its penalty when so many civil laws impose so many similarly severe sanctions. Alternative approaches that do not concede the propriety of the categorical ordinary case analysis are more properly addressed in another case, involving either the Immigration and Nationality Act or another statute, where the parties have a chance to be heard. Pp. 1–19.

"KAGAN, J., announced the judgment of the Court and delivered the

opinion of the Court with respect to Parts I, III, IV–B, and V, in which GINSBURG, BREYER, SOTOMAYOR, and GORSUCH, JJ., joined, and an opinion with respect to Parts II and IV–A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined as to Parts I–C–2, II–A–1, and II–B."