Appellate Court Decisions - Week of 5/14/18

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

***State v. Kosto*, 2018-Ohio-1925**

Involuntary Manslaughter: Sufficiency

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2018/2018-Ohio-1925.pdf

Appellant's conviction for involuntary manslaughter based on corrupting another with drugs was based on insufficient evidence. The indictment and bill of particulars specifically stated the drug with which the victim was corrupted was heroin. However, the expert testified the victim had heroin and cocaine in his system, and could not say the victim's death was caused by the heroin alone. Appellant did not provide the cocaine.

Sixth Appellate District of Ohio

Nothing to report.

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

***State v. C.S.*, 2018-Ohio-1841**

Expungement

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-1841.pdf

Summary from the Eighth District: "The defendant was 'finally discharged' for purposes of expungement as set forth in R.C. 2953.32(A). The defendant repaid $45,000, which was a condition of her sentence, and from what can be gleaned from the sparse record, she has continued to repay the Fund. Therefore, we find that the trial court did not err by granting the defendant's application for expungement of criminal record."

***State v. Mallory*, 2018-Ohio-1846**

Aggravated Menacing: Sufficiency

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-1846.pdf

Summary from the Eighth District: "Evidence that defendant yelled at victim in a 'threatening manner,' without the content of what was actually stated, was insufficient to establish that an actual threat of serious physical harm had been made or that the victim, in the moment, believed the defendant to be in earnest and capable of acting. Insufficient evidence to prove the 'serious physical harm' element of vandalism which requires physical harm to property that results in loss to the value of the property of one thousand dollars or more because state failed to show the dollar value of damage caused to the victim's house."

***State v. Tobias*, 2018-Ohio-1851**

Sentencing: Consecutive Sentences: Gun Specifications

Full Decision;
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-1851.pdf

Summary from the Eighth District: "Trial court erred in imposing consecutive sentences for two one-year firearm specifications where the two underlying felonies were committed as part of the same act or

transaction. Sentence vacated with respect to firearm specifications; case remanded for resentencing with respect to firearm specifications only."

Ninth Appellate District of Ohio

Nothing to report.

Tenth Appellate District of Ohio

Nothing to report.

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

***State v. Myers*, 2018-Ohio-1903**

Aggravated Murder: Capital Punishment

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-1903.pdf

The Supreme Court affirmed the convictions and death penalty sentence for Appellant.

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

***Dahda v. United States*, No. 17-43**

Wirtetap: Territorial Jurisdiction

Full Decision:
https://www.supremecourt.gov/opinions/17pdf/17-43_m648.pdf

Syllabus:

"Under federal law, a judge normally may issue a wiretap order permitting the interception of communications only 'within the territorial jurisdiction of the court in which the judge is sitting.' 18 U. S. C. §2518(3). Here, a judge for the District of Kansas authorized nine wiretap Orders as part of a Government investigation of a suspected drug distribution ring in Kansas. For the most part, the Government intercepted communications from a listening post within Kansas. But each Order also contained a sentence purporting to authorize interception outside of Kansas. Based on that authorization, the Government intercepted additional communications from a listening post in Missouri. Following the investigation, petitioners Los and Roosevelt Dahda were indicted for participating in an illegal drug distribution conspiracy. They moved to suppress the evidence derived from all the wiretaps under subparagraph (ii) of the wiretap statute's suppression provision because the language authorizing interception beyond the District Court's territorial jurisdiction rendered each Order 'insufficient on its face.' §2518(10)(a)(ii). The Government agreed not to introduce any evidence arising from its Missouri listening post, and the District Court denied the Dahdas' motion. On appeal, the Tenth Circuit rejected the Dahdas' facial-insufficiency argument on the ground that the challenged language did not implicate Congress' core statutory concerns in enacting the wiretap statute.

"*Held*: Because the Orders were not lacking any information that the statute required them to include and would have been sufficient absent the challenged language authorizing interception outside the court's territorial jurisdiction, the Orders were not facially insufficient. Pp. 6–12.

"(a) The Tenth Circuit applied the 'core concerns' test from *United States v. Giordano*, 416 U. S. 505, and held that subparagraph (ii) applies only where the insufficiency reflects an order's failure to satisfy the "statutory requirements that directly and substantially implement the congressional intention to limit the use of " wiretapping, id., at 527. The court identified two such core concerns and concluded that neither applies to the statute's territorial limitation. But Giordano involved a different suppression provision—subparagraph (i)—which applies only when a 'communication was unlawfully intercepted.' §2518(10)(a)(i). The underlying point of Giordano's limitation was to help distinguish subparagraph (i) of §2518(10)(a) from subparagraphs (ii) and (iii). It makes little sense to extend the 'core concerns' test to subparagraph (ii) as well. Subparagraph (ii) therefore does not include a Giordano-like 'core concerns' requirement. Pp. 6–8.

"(b) That said, this Court also cannot fully endorse the Dahdas' interpretation of the statute. The Dahdas read subparagraph (ii) as applying to any legal defect that appears within the four corners of an order. Clearly, subparagraph (ii) covers at least an order's failure to include information required by §§2518(4)(a)–(e). But that does not mean that every defect that may conceivably appear in an order results in an insufficiency. Here, the sentence authorizing interception outside Kansas is surplus. Its presence is not connected to any other relevant part of the Orders. Absent the challenged language, every wiretap that produced evidence introduced at the Dahdas' trial was properly

authorized under the statute. While the Orders do not specifically list the territorial area where they could lawfully take effect, they clearly set forth the authorizing judge's territorial jurisdiction—the District of Kansas. And the statute itself presumptively limits every Order's scope to the issuing court's territorial jurisdiction. This interpretation of the term 'insufficient' does not, as the Dahdas contend, produce bizarre results. Rather, it makes sense of the suppression provision as a whole. Pp. 8–12.

"853 F. 3d 1101 (first judgment) and 852 F. 3d 1282 (second judgment), affirmed.

"BREYER, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the cases."

***McCoy v. Louisiana*, No. 16-8255**

Sixth Amendment: Right to Counsel

Full Decision:
https://www.supremecourt.gov/opinions/17pdf/16-8255_i4ek.pdf

***Syllabus*:**

"Petitioner Robert McCoy was charged with murdering his estranged wife's mother, stepfather, and son. McCoy pleaded not guilty to first-degree murder, insisting that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. Although he vociferously insisted on his innocence and adamantly objected to any admission of guilt, the trial court permitted his counsel, Larry English, to tell the jury, during the trial's guilt phase, McCoy "committed [the] three murders." English's strategy was to concede that McCoy committed the murders, but argue that McCoy's mental state prevented him from forming the specific intent necessary for a first-degree murder conviction. Over McCoy's repeated objection, English told the jury McCoy was the killer and that English "took [the] burden off of [the prosecutor]" on that issue. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. The jury found him guilty of all three first-degree murder counts. At the penalty phase, English again conceded McCoy's guilt, but urged mercy in view of McCoy's mental and emotional issues. The jury returned three death verdicts. Represented by new counsel, McCoy unsuccessfully sought a new trial. The Louisiana Supreme Court affirmed the trial court's ruling that English had authority to concede guilt, despite McCoy's opposition.

"Held: The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Pp. 5–13.

"(a) The Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence.' The defendant does not surrender control entirely to counsel, for the Sixth Amendment, in 'grant[ing] to the accused personally the right to make his

defense,' 'speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant.' *Faretta v. California*, 422 U. S. 806, 819– 820. The lawyer's province is trial management, but some decisions are reserved for the client—including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this reserved-for-the-client category. Refusing to plead guilty in the face of overwhelming evidence against her, rejecting the assistance of counsel, and insisting on maintaining her innocence at the guilt phase of a capital trial are not strategic choices; they are decisions about what the defendant's objectives in fact are. *See Weaver v. Massachusetts*, 582 U. S. ___, ___. Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did here. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium attending admission that he killed family members, or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22. Thus, when a client makes it plain that the objective of 'his defence' is to maintain innocence of the charged criminal acts and pursue an acquittal, his lawyer must abide by that objective and may not override it by conceding guilt. Pp. 5–8.

'(b) *Florida v. Nixon*, 543 U. S. 175, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon 'was generally unresponsive' during discussions of trial strategy and 'never verbally approved or protested' counsel's proposed approach. Id., at 181. He complained about counsel's admission of his guilt only after trial. Id., at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. Citing *Nix v. Whiteside*, 475 U. S. 157, the Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by a Louisiana Rule of Professional Conduct that prohibits counsel from suborning perjury. But in *Nix*, the defendant told his lawyer that he intended to commit perjury. Here, there was no avowed perjury. English harbored no doubt that McCoy believed what he was saying; English simply disbelieved that account in view of the prosecution's evidence. Louisiana's ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved, but Louisiana has identified no ethical rule requiring English to admit McCoy's guilt over McCoy's objection. Pp. 8–11.

"(c) The Court's ineffective-assistance-of-counsel jurisprudence, see *Strickland v. Washington*, 466 U. S. 668, does not apply here, where the client's autonomy, not counsel's competence, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See id., at 692. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked 'structural' error; when present, such an error is not subject to harmless-error review. See, e.g., *McKaskle v. Wiggins*, 465 U. S. 168, 177, n. 8; *United States v. Gonzalez-Lopez*, 548 U. S. 140; *Waller v. Georgia*, 467 U. S. 39. An error is structural if it is not designed to protect defendants from erroneous conviction, but instead protects some other interest, such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper

way to protect his own liberty." *Weaver*, 582 U. S., at ___ (citing *Faretta*, 422 U. S., at 834). Counsel's admission of a client's guilt over the client's express objection is error structural in kind, for it blocks the defendant's right to make a fundamental choice about his own defense. See *Weaver*, 582 U. S., at ____. McCoy must therefore be accorded a new trial without any need first to show prejudice. Pp. 11–12.

"2014–1449 (La. 10/19/16), 218 So. 3d 535, reversed and remanded.

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

***Byrd v. United States*, No. 16-1371**

Search: Right to Privacy: Rental Car

Full Decision:
https://www.supremecourt.gov/opinions/17pdf/16-1371_1bn2.pdf

***Syllabus*:**

"Latasha Reed rented a car in New Jersey while petitioner Terrence Byrd waited outside the rental facility. Her signed agreement warned that permitting an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form, but she gave the keys to Byrd upon leaving the building. He stored personal belongings in the rental car's trunk and then left alone for Pittsburgh, Pennsylvania. After stopping Byrd for a traffic infraction, Pennsylvania State Troopers learned that the car was rented, that Byrd was not listed as an authorized driver, and that Byrd had prior drug and weapons convictions. Byrd also stated he had a marijuana cigarette in the car. The troopers proceeded to search the car, discovering body armor and 49 bricks of heroin in the trunk. The evidence was turned over to federal authorities, who charged Byrd with federal drug and other crimes. The District Court denied Byrd's motion to suppress the evidence as the fruit of an unlawful search, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

"*Held:*

"1. The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. Pp. 6–13.

"(a) Reference to property concepts is instructive in 'determining the presence or absence of the privacy interests protected by [the Fourth] Amendment.' *Rakas v. Illinois*, 439 U. S. 128, 144, n. 12. Pp. 6–7.

"(b) While a person need not always have a recognized common law property interest in

the place searched to be able to claim a reasonable expectation of privacy in it, see, e.g., *Jones v. United States*, 362 U. S. 257, 259, legitimate presence on the premises, standing alone, is insufficient because it 'creates too broad a gauge for measurement of Fourth Amendment rights,' *Rakas*, 439 U. S., at 142. The Court has not set forth a single metric or exhaustive list of relevant considerations, but '[l]egitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' Id., at 144, n. 12. These concepts may be linked. 'One of the main rights attaching to property is the right to exclude others,' and 'one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.' Ibid. This general property-based concept guides resolution of the instant case. Pp. 8–9.

"(c) The Government's contention that drivers who are not listed on rental agreements always lack an expectation of privacy in the car rests on too restrictive a view of the Fourth Amendment's protections. But Byrd's proposal that a rental car's sole occupant always has an expectation of privacy based on mere possession and control would, without qualification, include thieves or others who have no reasonable expectation of privacy. Pp. 9–13.

"(1) The Government bases its claim that an unauthorized driver has no privacy interest in the vehicle on a misreading of *Rakas*. There, the Court disclaimed any intent to hold that passengers cannot have an expectation of privacy in automobiles, but found that the passengers there had not claimed 'any legitimate expectation of privacy in the areas of the car which were searched.' 439 U. S., at 150, n. 17. Byrd, in contrast, was the rental car's driver and sole occupant. His situation is similar to the defendant in Jones, who had a reasonable expectation of privacy in his friend's apartment because he 'had complete dominion and control over the apartment and could exclude others from it." *Rakas,* supra, at 149. The expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it, much as it did not seem to matter whether the defendant's friend in Jones owned or leased the apartment he permitted the defendant to use in his absence. Pp. 9–11.

"(2) The Government also contends that Byrd had no basis for claiming an expectation of privacy in the rental car because his driving of that car was so serious a breach of Reed's rental agreement that the rental company would have considered the agreement 'void' once he took the wheel. But the contract says only that the violation may result in coverage, not the agreement, being void and the renter's being fully responsible for any loss or damage, and the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Pp. 11–12.

"(3) Central, though, to reasonable expectations of privacy in these circumstances is the concept of lawful possession, for a ' 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search,' *Rakas*, supra, at 141, n. 9. Thus, a car thief would not have a reasonable expectation of privacy in a stolen car no matter the degree of possession and control. The Court leaves for remand the

Government's argument that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief. Pp. 12–13.

"2. Also left for remand is the Government's argument that, even if Byrd had a right to object to the search, probable cause justified it in any event. The Third Circuit did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car. That court has discretion as to the order in which the remanded questions are best addressed.

"Pp. 13– 14. 679 Fed. Appx. 146, vacated and remanded.

"KENNEDY, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. ALITO, J., filed a concurring opinion."

***United States v. Sanchez-Gomez et al.*, No. 17-312**

Use of Restraints

Full Decision:
https://www.supremecourt.gov/opinions/17pdf/17-312_i426.pdf

***Syllabus*:**

"The judges of the United States District Court for the Southern District of California adopted a districtwide policy permitting the use of full restraints—handcuffs connected to a waist chain, with legs shackled—on most in-custody defendants produced in court for nonjury proceedings by the United States Marshals Service. Respondents Jasmin Morales, Rene Sanchez-Gomez, Moises Patricio-Guzman, and Mark Ring challenged the use of such restraints in their respective cases and the restraint policy as a whole. The District Court denied their challenges, and respondents appealed to the Court of Appeals for the Ninth Circuit. Before that court could issue a decision, respondents' underlying criminal cases ended. The court—viewing the case as a 'functional class action' involving 'class-like claims' seeking 'class-like relief,' 859 F. 3d 649, 655, 657–658—held that this Court's civil class action precedents saved the case from mootness. On the merits, the Court of Appeals held the policy unconstitutional.

"*Held*: This case is moot. Pp. 3–12.

"(a) The federal judiciary may adjudicate only 'actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.' *Genesis HealthCare Corp. v. Symczyk*, 569 U. S. 66, 71. Such a dispute 'must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U. S. 395, 401. A case that becomes moot at any point during the proceedings is thus outside the jurisdiction of the federal courts. See *Already, LLC v. Nike, Inc.*, 568 U. S. 85, 91. Pp. 3–4.

"(b) In concluding that this case was not moot, the Court of Appeals relied upon this Court's class action precedents, most prominently *Gerstein v. Pugh*, 420 U. S. 103. That reliance was misplaced. Gerstein was a class action respecting pretrial detention brought under Federal Rule of Civil Procedure 23. The named class representatives' individual claims had apparently become moot before class certification. This Court held that the case could nonetheless proceed, explaining that due to the inherently temporary nature of pretrial detention, no named representative might be in custody long enough for a class to be certified. Gerstein does not support a freestanding exception to mootness outside the class action context. It belongs to a line of cases that this Court has described as turning on the particular traits of Rule 23 class actions. See, e.g., *Sosna v. Iowa*, 419 U. S. 393; *United States Parole Comm'n v. Geraghty*, 445 U. S. 388; *Genesis HealthCare*, 569 U. S. 66. The Federal Rules of Criminal Procedure establish for criminal cases no vehicle comparable to the civil class action, and this Court has never permitted criminal defendants to band together to seek prospective relief in their individual cases on behalf of a class. Here, the mere presence of allegations that might, if resolved in respondents' favor, benefit other similarly situated individuals cannot save their case from mootness. See id., at 73. That conclusion is unaffected by the Court of Appeals' decision to recast respondents' appeals as petitions for supervisory mandamus. Pp. 4– 9.

"(c) Respondents do not defend the reasoning of the Court of Appeals, and instead argue that the claims of two respondents— Sanchez-Gomez and Patricio-Guzman—fall within the 'exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review.' *Kingdomware Technologies, Inc. v. United States*, 579 U. S. ___, ___ (internal quotation marks omitted). Respondents claim that the exception applies because Sanchez-Gomez and Patricio-Guzman will again violate the law, be apprehended, and be returned to pretrial custody. But this Court has consistently refused to 'conclude that the case-or-controversy requirement is satisfied by" the possibility that a party 'will be prosecuted for violating valid criminal laws.' *O'Shea v. Littleton*, 414 U. S. 488, 497. Respondents argue that this usual refusal to assume future criminal conduct is unwarranted here given the particular circumstances of Sanchez-Gomez's and Patricio-Guzman's offenses. They cite two civil cases—*Honig v. Doe*, 484 U. S. 305, and *Turner v. Rogers*, 564 U. S. 431—in which this Court concluded that the expectation that a litigant would repeat the misconduct that gave rise to his claims rendered those claims capable of repetition. But *Honig* and *Turner* are inapposite because they concerned litigants unable, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct. Sanchez-Gomez and Patricio-Guzman, in contrast, are 'able—and indeed required by law'—to refrain from further criminal conduct. *Lane v. Williams*, 455 U. S. 624, 633, n. 13. No departure from the settled rule is warranted. Pp. 9–12.

"859 F. 3d 649, vacated and remanded.

"ROBERTS, C. J., delivered the opinion for a unanimous Court."