2017-2018 UNITED STATES SUPREME COURT CONSTITUTIONAL CRIMINAL PROCEDURE CASES

2019 MACDL ADVANCED POST-CONVICTION LITIGATION SEMINAR

STEPHEN PAUL MAIDMAN, ESQUIRE

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Important 2017-2018 SCOTUS Constitutional Criminal Procedure Cases

- *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) — Can counsel admit the Δ's guilt to the jury after the Defendant explicitly instructs the lawyer not to admit his guilt and instead pursue an alibi defense?
- *Collins v. Virginia*, 138 S. Ct. 1663 (2018) – Does the 4th Amendment's automobile exception for search warrants permit a warrantless entry onto a home's curtilage to search a moveable vehicle that would be subject to a warrantless search (based on probable cause) if it were not within the curtilage?

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Important 2017-2018 SCOTUS Constitutional Criminal Procedure Cases

- *Byrd v. United States*, 138 S. Ct. 1518 (2018) – Does person in otherwise lawful possession and control of a rental car have a reasonable expectation of privacy in rental car even if he is not listed as driver on rental agreement?
- *Carpenter v. United States*, 138 S. Ct. 2206 (2018) – Is Government acquisition of historical cell-site location information from wireless carriers a 4th Amendment search requiring probable cause because the Δ has a reasonable expectation of privacy in those records?

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Important 2017-2018 SCOTUS Constitutional Criminal Procedure Cases

- *Garza v. Idaho*, 139 S. Ct. 738 (2018) – Does the IAC presumption of prejudice apply where Δ repeatedly told counsel to file appeal but counsel decided not to file an appeal because of appeal waiver in Δ's plea agreement?
- *Timbs v. Indiana,* 139 S. Ct. 682 (2019) – Is the excessive fines clause of 8th Amendment incorporated to the states by 14th Amendment's due process clause?

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Δ indicted for murdering estranged wife's son, mother and step-father.
- Δ claims out-of-state at time of murder and framed by police.
- Counsel had Δ examined; found competent to stand trial; no insanity defense proffered.
- Δ fired assigned counsel; Δ represents himself until parents retain private counsel.
- New counsel eventually concludes overwhelming evidence of Δ's guilt and best chance to save Δ's life in bifurcated capital trial was to concede Δ's killed the victims but argue no intent to murder (defense based on mens rea).

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Δ "furious" when counsel tells him two weeks before trial that at trial he would concede Δ's commission of triple murder.
- Δ tells counsel not to make that concession; Δ pressed counsel to pursue acquittal based on alibi.
- Δ tries to fire counsel two days before trial.
- Counsel's motion to withdraw denied; judge tells counsel: "[Y]ou are the attorney; you have to make the trial decision of what you're going to proceed with."

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Counsel's opening: No reasonable way you could reach any conclusion other than Δ was the cause of these deaths.
- Δ protests: counsel is selling him out; judge tells Δ counsel is representing him and no further outbursts.
- Counsel tells jury evidence is unambiguous that Δ committed 3 murders.
- Δ testifies and professes his innocence based on alibi defense
  - RBG: Δ was "pressing an alibi difficult to fathom."
- Counsel's closing: Δ is the killer.
- Jury returns unanimous G verdicts on all three first-degree murder counts.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- In penalty phase counsel again concedes Δ committed these crimes but urges mercy based in Δ's serious mental and emotional issues.
- Counsel's strategy backfires; jury returns three death verdicts.
- Δ's MNT denied and convictions affirmed on state appeal:
  - Counsel's concession permissible because counsel reasonably believed admitting guilt afforded Δ the best chance of avoiding a death sentence.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- At SCOTUS, Δ argues only Δ can make fundamental decisions (plead guilty/not guilty, jury trial/bench trial, testify/not testify, appeal/not appeal).
  - But once Δ says he does not want to admit guilt, Constitution prohibits counsel from going against those instructions, no matter how reasonable counsel's proposed strategy may have seemed.
- At SCOTUS, Louisiana argues only Δ can decide to plead guilty, but once Δ accepts representation, Δ necessarily gives up some autonomy.
  - Counsel can make strategic decision to concede certain elements of crime to focus defense on other elements.
  - If Δ wants complete control over defense strategy, Δ can represent himself.
- SCOTUS oral argument addressed implications for whether lawyer or Δ has the final say on other strategic decisions.
  - Justice Roberts at oral argument: How should courts figure out what kinds of decisions and strategies are sufficiently important to warrant a new trial if lawyer disregards his client's wishes?

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- *Jones v. Barnes*: "Fundamental Decisions" reserved solely to Defendant:
  - Whether to plead guilty or not guilty.
  - Whether jury trial or judge trial.
  - Whether to testify or not testify.
  - Whether to appeal or not appeal.
- *Gonzalez v. United States* (2009): Trial management decisions for Counsel:
  - What arguments to pursue.
  - What evidentiary objections to raise.
  - What agreements to conclude regarding admission of evidence.
- Division of duties formerly known as fundamental v. strategic decisions
  - Based on language in *Estelle v. Williams* (1976).

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- *McCoy* is SCOTUS's clearest expression ever of the allocation of decision-making between the criminal defendant and counsel.
- Recognizes distinction between fundamental decisions v. trial management decisions.
- But to gain the assistance of counsel, Δ need not surrender control entirely to counsel.
  - The right to defend is personal. Counsel is "an assistant and however expert, counsel is still an assistant." *Faretta v. California* (1975) (6th Amendment right to self-representation).
  - The right to appear pro se exists to affirm the dignity and *autonomy* of the accused. *McKaskle v. Wiggins* (1984) (unsolicited participation by standby counsel).

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Held: The *autonomy* to decide that the objective of the defense is to assert innocence belongs to Δ.
  - Just like refusing to plead guilty when facing overwhelming evidence of guilt, despite Δ's inexperience and lack of professional legal qualifications, Δ can insist on maintaining his innocence at the guilt phase of a capital trial.
  - This is not a strategic choice for counsel about how best to *achieve* the Δ's objectives, it is a decision about what the Δ's objective in fact *is*.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Counsel may reasonably assess a concession of guilt as best suited to avoid the death penalty.
- Δ may not share that objective.
  - Δ may with to avoid, above all else, the disgrace of admitting he killed family members.
  - Δ may view life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.
- When Δ expressly asserts that the objective of "his defense" is to maintain innocence, counsel must abide by that objective and may not override is by conceding guilt.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Violation of the Δ's Sixth Amendment-secured autonomy is structural error.
  - Ineffective assistance of counsel jurisprudence inapplicable here; counsel's competence is not at issue; no showing of prejudice required.
  - Error is structural because the right at issue, client autonomy, is not designed to protect the Δ from an erroneous conviction.
  - Error is structural because the right at issue, client autonomy, protects some other interest, the Δ's right to make his own choices about the proper way to protect his own liberty.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Disregarding Client's Wishes on Admitting Guilt
McCoy v. Louisiana

- Future *McCoy* Litigation Opportunities
  - Is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged which the prosecution can easily prove?
    - » Example: possession of firearm by convicted felon where Δ insists on contesting prior convictions on frivolous grounds.
  - Is it permissible for counsel to make the unilateral decision to concede Δ is guilty not of the offense charged but of a lesser included offense?

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

2017-2018 SCOTUS Brief Mentions

- *Collins v. Virginia*, 138 S. Ct. 1663 (2018) – 4th Amendment's automobile exception for search warrants does not permit a warrantless entry onto a home's curtilage to search a moveable vehicle that would be subject to a warrantless search (based on probable cause) if it were not within the curtilage.
  - Police think stolen motorcycle parked under tarp in upper driveway next to house.
  - Privacy interests within curtilage same as the house. Requires search warrant to enter curtilage and search (e.g., examine VIN) motorcycle.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

2017-2018 SCOTUS Brief Mentions

- *Byrd v. United States*, 138 S. Ct. 1518 (2018) – Person in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in rental car even if not listed as driver on rental agreement and may challenge search of car.
  - Δ alone in Budget rental car not listed as authorized driver on rental agreement for car. Car rented by friend who gave Δ keys. Cops tell Δ they do not need his consent to search car including truck where drugs found because not on rental agreement.
  - Government argues only authorized drivers have expectation of privacy in rental car.
  - But lawful possession of item gives person a protectable 4th Amendment interest.
  - Violation of rental agreement did not eliminate any reasonable expectation of privacy Δ had in vehicle.
  - "[C]ountless innocuous reasons why unauthorized driver might get behind the wheel of a rental car."

2017-2018 SCOTUS Brief Mentions

- *Carpenter v. United States*, 138 S. Ct. 2206 (2018) – Government acquisition of historical cell-site location information from wireless carriers is a 4th Amendment search requiring probable cause because the Δ has a reasonable expectation of privacy in those records.
  - Conflict with third party doctrine – person has no legitimate expectation of privacy in information voluntarily turned over to third parties (e.g., bank information, pen register phone numbers dialed, etc.).
  - But CSLI is unique and embodies a legitimate expectation of privacy of the cell phone user even if held by third party.
  - "Reasonable grounds" for cell phone records under Stored Communications Act is inadequate for "deeply revealing" CSLI information.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

2017-2018 SCOTUS Brief Mentions

- *Garza v. Idaho*, 139 S. Ct. 738 (2018) - IAC presumption of prejudice applies where Δ repeatedly told counsel to file appeal but counsel decided not to file an appeal because of appeal waiver in Δ's plea agreement.
  - Appeal waiver is not an absolute bar to all appellate claims. Does not bar claims outside its scope.
  - Language of appeals waivers can vary widely leaving many types of claims unwaived.
  - Government can breach agreement or waive the waiver on claims.
  - Deficient attorney performance and prejudice presumed under *Roe v. Flores-Ortega* (2000).

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

2017-2018 SCOTUS Brief Mentions

- *Timbs v. Indiana,* 139 S. Ct. 682 (2019) - Excessive fines clause of 8th Amendment is incorporated to the states by 14th Amendment's due process clause.
  - Δ's $42k Land Rover used to transport drugs forfeited in civil action following guilty plea in drug case. Value of SUV four times maximum fine for offense.
  - Indiana Solicitor General argued that if driver in a Ferrari was going five miles over the speed limit, that could be grounds to for the police to seize the car.
  - Remanded to determine whether forfeiture was excessive fine.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net

Upcoming SCOTUS Significant Constitutional Criminal Procedure Cases

- Significant SCOTUS Certiorari Grants:
  - *Gamble v. United States* (17-646) – Should SCOTUS overrule separate sovereign exception to double jeopardy.
  - *Ramos v. Louisiana* (18-5924) – Reconsidering *Apodaca v. Oregon* (1972), does the 14th Amendment's due process clause incorporate to the states the 6th Amendment guarantee of a unanimous jury verdict in a state criminal case.
  - *Kahler v. Kansas* (18-6135) – Whether the 8th Amendment ban on cruel and unusual punishment and the 14th Amendment's due process clause permit a state to abolish the insanity defense.

Stephen Paul Maidman, Esquire
1145 Main Street, Suite 417, Springfield, Massachusetts 01103-2123
(413) 731-7300 maidman@att.net