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Litigating with an Eye Towards the Supreme Court

-- Federal Criminal Practice Seminar, Fall 2017 --

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My background.

- Founded D.C. office of MacArthur Justice Center
 - National public interest firm that focuses on reform of criminal justice system through litigation.
- Lecturer at Harvard Law School and Georgetown. Direct a Criminal Justice Appellate Clinic in partnership with Harvard Law School
- Previously member of BigLaw Supreme Court practice
- Litigated many criminal cases before U.S. Supreme Court
 - Ex. Argued *Welch v. United States* (retroactivity of *Johnson*)
Litigated *Brumfield v. Cain* (LA death penalty case)
This term: Summary relief in *Lacaze v. Louisiana* (juror/judicial bias)

What I focus on.

- Tracking criminal justice issues in the lower courts
- Direct representation / co-counsel with federal defenders, state defenders, private attorneys, big law firms
- The issues we track are broader than criminal defense:
 - Civil rights suits under 1983 – prisoners' rights, police misconduct
 - Federal and state postconviction/habeas
 - Criminal law / procedure issues

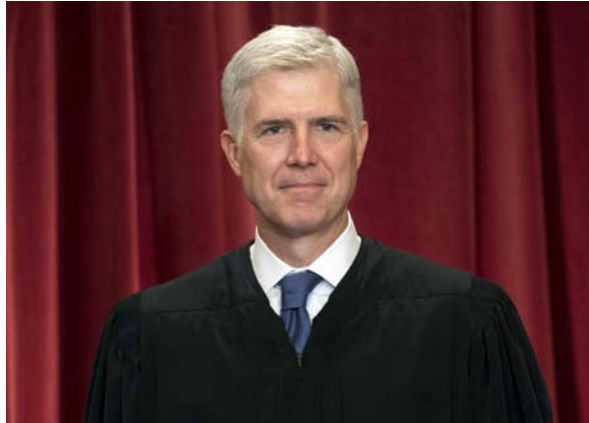
Two opening anecdotes.

It is a mistake to assume Supreme Court review is impossible.

Things we'll talk about.

1. Some observations about the present Court.
2. The petition for certiorari.
3. Extrapolations from (1) and (2) for every day practice.
4. Questions.

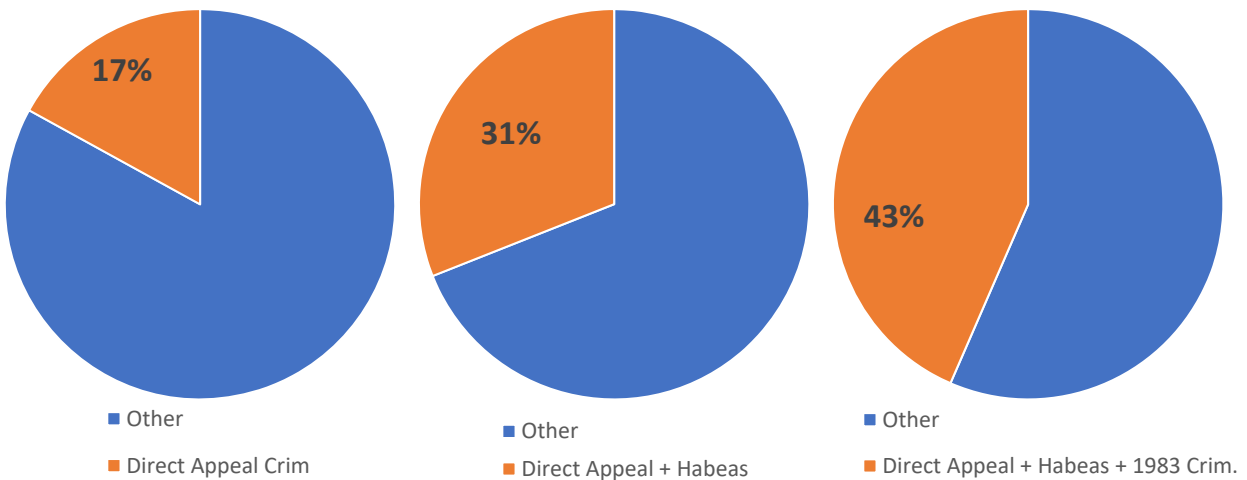
1. Some observations about the present Court.



When you can have *some* confidence with this Court.

1. Plain text is with you.
2. History is with you.
3. Racial bias (*Foster, Buck, Pena-Rodriguez*).
4. Property (intrusive searches, forfeiture, restitution).
5. Confrontation Clause? Rule of lenity?

Make up of the Court's docket (2016)



Recurring issues in criminal law.

1. Statutory questions.
2. Criminal procedure:
 1. Fourth Amendment (already 3 this term).
 2. Double Jeopardy
 3. Brady
3. Property and privacy issues.
4. Blatant racial bias.
5. Capital cases with egregious wrongs.

Statutory interpretation issues.

- Is this or is this not encompassed/permitted by a federal statute?
- Definition (elements) of federal offenses / sentencing statutes
 - *Dean v. US (2016)*: interaction of 924(c) mand. min. with ordinary sentencing.
 - *Shaw v. US (2016)*: Whether bank fraud requires specific intent to cheat a bank
 - *Marinello v. US (2017)*: obstructing administration of the tax laws
 - *Johnson v. US, Mathis v. US*: Armed Career Criminal Act
 - Host of cases pending raising issues regarding generic offenses/elements clause
- 2255 – Same issues above, plus any sticky procedural questions

Fourth Amendment

- This term alone:
 - ***Carpenter v. United States***: Whether the acquisition of “Cell Site Location Information” violates the Fourth Amendment
 - 6th Cir: No reasonable expectation of privacy. (4th held the same, en banc, in *Graham*, 824 F.3d 421)
 - Follows recent cases re cell phone searches (*Riley*, 2014) and GPS location tracking (*Jones*, 2012)
 - ***Collins v. Virginia***: Whether automobile exception permits officer to enter private property and search a vehicle next to a home.
 - ***DC v. Wesby***: Whether there was PC to arrest parties in a vacant home.

Double Jeopardy

- *Currier v. US* (2017): Effect of acquittal where a defendant consented to sever multiple charges
- *Bravo-Fernandez v. US* (2016): Do inconsistent verdicts give rise to issue preclusion?
- *Sanchez-Vaile v. PR* (2016): "Dual sovereignty" (PR is not a separate sovereign).

Brady violations.

- Last term, the Court took two very "fact-intensive" *Brady* cases just to decide whether the evidence was material. (*Overton; Turner*).
- The term prior it summarily reversed a conviction under *Brady* (*Wearry*).

Issues the Justices generally avoid.

1. The sentencing guidelines.
2. Sufficiency of the evidence / reasonableness of sentence.
3. Burden issues.
4. Anything where harmlessness is a possibility.

So win them in the Fourth Circuit!

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2. The petition for certiorari.

Supreme Court Rule 10:

“Review on a writ of certiorari is not a matter of right, but of judicial discretion.”

The Petition for Certiorari

Rule 10. Considerations Governing Review on Certiorari

“A petition for a writ of certiorari will be granted only for compelling reasons,” including:

“A United States court of appeals

(1) has entered a decision in conflict with the decision of another United States court of appeals on the same important matter

(2) has decided an important federal question in a way that conflicts with a decision by a state court of last resort

(3) has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court’s supervisory power.”

The most common hallmarks of a case reviewed by the Supreme Court.

1. In Conflict (the “circuit split”)
2. Important Federal Question
3. That The Court Will Be Able To Reach It (“good vehicle”)

The most common hallmarks of a case reviewed by the Supreme Court.

Reasons For Granting The Petition.....	8
I. The Question Presented Is The Subject Of An Acknowledged Split Among Twenty-Five Federal Circuits And State High Courts.....	8
A. Seven Federal Circuits, Nine State High Courts, And The Supreme Court Of Puerto Rico Hold That Justice Kennedy’s Opinion Governs.....	12
B. One Federal Circuit, Six State Courts Of Last Resort, And The D.C. Court of Appeals Apply The Four-Judge Plurality’s Test.....	14
II. This Case Is Worthy Of This Court’s Review.....	17
A. This Issue Is Fundamental, Recurs Frequently, And The Arguments On Each Side Have Been Fully Aired.....	17
B. This Case Is The Perfect Vehicle.....	23
III. The Decision Below Is Wrong.....	25
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1. In Conflict (the “circuit split”)

1. Square conflict on the question presented in other circuits
2. “Circuit split” is a misnomer – also state high courts, DC and PR!

- That’s 63 other jurisdictions. And you might just need it!

ex. Los Angeles v. Patel: To resolve a split between the Ninth Circuit and the Massachusetts Supreme Court, does a hotel have an expectation of privacy under the Fourth Amendment in

3. Ideally, this research happens earlier (more on this later)

2. Important Federal Question

Examples:

- Recurs frequently.
- Concerns important interests:
 - Life, liberty, property
 - Separation of powers / judicial overreach
 - Constitutional, important federal statute
- Will affect a lot of people.
- Otherwise has important consequences.

3. Good “vehicle”

- **Preservation is essential.**

- Plain error review = merits of issue not squarely presented.
- Must have been preserved even if it is expressly foreclosed!

(and otherwise no alternative bases that would prevent the Court from reaching the question)

The relevance of the merits.

If you have the ingredients above, you may not need to convince the Court that you are right to get review.

- In fact, you may not want to!
- You need 4 votes for cert, and you don't care where they come from.
 - Deep dive into the merits may invite unnecessary squabbles on facts/collateral issues

The Court takes some cases each year that based on a sense of injustice / egregious errors. *Duane Buck, Foster v. Chatman*.

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1. Some observations about the present Court.
2. The petition for certiorari.
3. Takeaways.
4. Questions.

3. Takeaways.

Takeaways.

The obvious: Preserve.

Don't assume it can't be your case

Takeaways.

- Always think beyond the Fourth Circuit.
 - When Fourth Circuit is against you, don't give up the issue—ask whether it is wrong.
 - Take the time to see how other circuits (and even state courts!) are resolving questions that arise.
 - Preserve the issue even if foreclosed!

Takeaways.

- If you come across an issue that you think is an egregious wrong or implicates a circuit split, consider reaching out to others:
 - There are people interested in helping! Be in touch with your appellate colleagues (or feel free to reach out to me)
 - Can help assess the best strategy for preserving and presenting the circuit split.
 - Even if the issue isn't squarely presented on your case, it will help raise the profile of the issue.

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4. Questions?