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FROM EYEWITNESSES TO GPS

An unusually rich set of criminal cases land on the Supreme Court's agenda

By Julius (Jay) Wachtel. Beginning last month, and continuing through April 2012, the Supreme Court is hearing oral arguments on cases accepted for the 2011-12 term. In this posting we'll look at cases where arguments have already taken place, involving eyewitness identification, strip searches, ineffective assistance of counsel and warrantless GPS surveillance.

Witness identification. In Perry v. New Hampshire (Supreme Court, no. 10-8974) the Court will address growing concerns about witness misidentification, a leading cause of wrongful convictions. In this case a physically distant eyewitness to a vehicle burglary identified a man who was being questioned by officers as being the perpetrator. She couldn't pick him out later from a photographic lineup or at trial. Her original identification was nonetheless admitted and the accused was convicted.

Defense lawyers appealed on due process grounds, arguing that the ID had been tainted since the man was observably in police custody. But the New Hampshire Supreme Court ruled there was no Constitutional violation because police didn't purposely orchestrate what took place.

Perry's lawyer disagreed. In arguments before the Supreme Court he insisted that eyewitness ID is so prone to error that defendants should be able challenge suggestive identifications before they are admitted as evidence whether police are to blame or not. That didn't sit well with Justice Kagan, who said that the Court has only excluded eyewitness evidence that was tainted by the authorities. Broadening the net of what is excludable worried Justice Kennedy, who thought it would infringe on the province of the jury, whose job it is to weigh competing explanations. But Perry's lawyer insisted that normal procedures didn't suffice for eyewitness testimony because it is unusually resistant to cross-examination.

Our call: Considering their reluctance to create new rules, the Justices are unlikely to let Perry off the hook.

Jail strip searches. In Florence v. Board of Freeholders (Supreme Court, no. 10-945) the Supreme Court will decide if a rule requiring that everyone booked into a jail be strip searched violates the Fourth Amendment.

It's a nuanced issue. Florence was arrested on a bench warrant for not paying a fine, a trivial matter for which the State conceded he shouldn't have been jailed in the first place. He was strip-searched twice, once when booked into city jail and again when transferred to the county. Florence claims that such intrusions require reasonable suspicion, and that the minor nature of his offense and lack of evidence that he might harbor contraband made the strip search unreasonable.

Florence sued for deprivation of his civil rights, and a Federal district court allowed his case to proceed. But by a vote of 2-1 the Third Circuit reversed. The prevailing justices were reluctant to dictate how jails should be run. They also fretted that letting jailers decide whom to strip search would open up a Pandora's box of discrimination claims.

Their reasoning was echoed in the comments made by Supreme Court Justices during oral arguments. While the Justices were troubled by the fact that strip searches seldom uncover contraband, they considered Florence's proposed "reasonable suspicion" standard impractical. If, as Florence's lawyer argued, reasonable suspicion was implicit for those arrested for serious crimes, exactly where would one draw the line? Justice Sotomayor, who took on the practical aspects of building reasonable suspicion, noted that key facts about an arrestee's criminal past might not be known for days. And like the Circuit court, Justice Kennedy was troubled by the discriminatory potential of having jail employees select who would be strip-searched.

Our call: Mandatory strip-search will survive.

Ineffective assistance of counsel in plea bargaining. There are two cases. Lafler v. Cooper (Supreme Court, no. 10-209) concerns a Michigan man (Cooper) who went to trial on attempted murder, felon with a firearm and other charges because his lawyer advised that repeatedly shooting a woman below the waist would not sustain an attempted murder conviction. In so choosing Cooper turned down a plea deal (he says, reluctantly) that would have resulted in a minimum sentence of four to seven years. As one might expect, he was convicted of everything and got fifteen to thirty.

Cooper hired a new lawyer. His appeal was brushed off by the Michigan courts. But a Federal judge held that the attorney's abysmally poor advice violated Cooper's Sixth Amendment rights, and that he should either be offered the original deal or let go. The Sixth Circuit affirmed. Michigan appealed.

In the other case, Missouri v. Frye (Supreme Court, no. 10-444) a repeat drunk driver (Frye) pled guilty and drew a three-year prison term. What he didn't know was that his lawyer let a plea offer expire that would have reduced the charge to a misdemeanor and

the penalty to ninety days in jail. Fry's conviction was reversed on Sixth Amendment grounds by the state Court of Appeals. Missouri appealed.

In both cases the key issue is straightforward: does the right to counsel attach to the plea-bargaining phase? Lawyers representing Michigan and Missouri argued that it didn't. That didn't sit well with the Justices. During oral arguments in *Lafler* several tried to get Michigan's lawyer to concede that plea bargaining is a critical phase of the adjudicative process. Recognizing the trap, the lawyer switched his assault to the defendant's proposed remedy. That was essentially the tack his counterpart took in *Frye*. In effect, both said there *was* no remedy.

Our call: Not communicating a plea offer is an incredible blunder. What the remedy may be we'll soon find out.

Warrantless surveillance. In "A Day Late, a Warrant Short" we examined the case of Antoine Jones, a D.C. nightclub owner who is serving a Federal life term for drug trafficking. A key item of evidence was a month's worth of location data recorded by a GPS device that DEA agents surreptitiously attached to Jones's vehicle (they had a warrant but it had expired, rendering it invalid.) At times DEA physically tailed Jones, and at other times not. In his appeal to the D.C. Circuit Jones argued that planting the device for such a long duration, without a valid warrant, violated the Fourth Amendment.

The justices agreed, finding that Jones had a reasonable expectation of privacy as to the intimate "mosaic" that was formed by secretly recording a month's worth of movements. The Government appealed (U.S. v. Jones, Supreme Court, no. 10-1259).

In our post we suggested that the Supreme Court was likely to reverse, as the Circuit's decision (it upheld the warrantless installation of the device, but not its use) would require judges to speculate about the relative intrusiveness of surveillance techniques. But the Supreme Court threw us a curve. In oral arguments several Justices agreed that GPS devices posed far greater risks to privacy than old-fashioned beepers, which according to precedent can be planted without a warrant. Here's how Chief Justice Roberts compared the two:

> That's a lot of work to follow the car [with a beeper]. They've got to listen to the beeper; when they lose it they have got to call in the helicopter. Here they just sit back in the station and they -- they push a button whenever they want to find out where the car is. They look at data from a month and find out everywhere it's been in the past month. That -- that seems to me dramatically different.

On the other hand, the Justices seemed unimpressed with the argument by Jones's lawyer that the mere act of planting a device was an impermissible trespass. And that's where things rest.

Our call: We'll gamble and say that the Justices will find a way to require search warrants when using GPS.

In the next weeks, as more oral arguments take place, we'll review Supreme Court cases that address other pressing criminal justice issues. Does the Confrontation clause requires that DNA analysts be made available for cross-examination? Is life without parole a permissible sentence for teens convicted of murder? Do prisoners have a right to replace their State-furnished Habeas counsel? Stay tuned!