Criminal Procedure

Sex Offenders

Packingham v. N.C., 582 U.S. ___ (June 19, 2017). North Carolina's statute, G.S. 14–202.5, making it a felony for a registered sex offender to gain access to a number of websites, including common social media websites like Facebook and Twitter, violates the First Amendment. After the defendant, a registered sex offender, accessed Facebook, he was charged and convicted under the statute. The Court of Appeals struck down his conviction, finding that the statute violated the First Amendment. The N.C. Supreme Court reversed. The U.S. Supreme Court granted certiorari and reversed North Carolina's high court. Noting the case "is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," the Court noted that it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." The Court found that even assuming that the statute is content neutral and thus subject to intermediate scrutiny, it cannot stand. In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest. Considering the statute at issue, the Court concluded:

> [T]the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."
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> In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. (citations omitted)

The Court went on to hold that the State had not met its burden of showing that "this sweeping law" is necessary or legitimate to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The Court was careful to note that its opinion "should not be interpreted as barring a State from enacting more specific laws than the one at issue." It continued: "Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."

Indigent Defendant's Right to Expert Assistance

McWilliams v. Dunn, 582 U.S. ___ (June 19, 2017). The Court held, in this federal habeas case, that the Alabama courts' refusal to provide a capital murder defendant with expert mental health assistance was contrary to, or involved an unreasonable application of, clearly established federal law. After the jury recommended that the defendant receive the death penalty, the trial court scheduled a judicial

sentencing hearing for about six weeks later. It also granted a defense motion for neurological and neuropsychological exams on the defendant for use in connection with the sentencing hearing. Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined the defendant. He filed his report two days before the judicial sentencing hearing. The report concluded, in part, that the defendant presented "some diagnostic dilemmas." On the one hand, the defendant was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems," including "cortical dysfunction attributable to right cerebral hemisphere dysfunction." The report added that the defendant's "obvious neuropsychological deficit" could be related to his "low frustration tolerance and impulsivity," and suggested a diagnosis of "organic personality syndrome." Right before the hearing, defense counsel received updated records indicating that the defendant was taking an assortment of psychotropic medications. Over a defense objection that assistance from a mental health expert was needed to interpret the report and information, the hearing proceeded. The trial court sentenced the defendant to death. It later issued a written sentencing order, finding that the defendant "was not and is not psychotic," and that "the preponderance of the evidence from these tests and reports show [the defendant] to be feigning, faking, and manipulative." It further found that even if his mental health issues "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." The case came before the U.S. Supreme Court on habeas. The Court began by noting that *Ake v. Oklahoma*, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Here, no one denied that the conditions that trigger application of *Ake* are present: the defendant is and was an indigent defendant, his mental condition was relevant to the punishment he might suffer, and that mental condition--his sanity at the time of the offense--was seriously in question. As a result *Ake,* required the State to provide the defendant with access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. The question before the Court was: whether the Alabama courts' determination that the defendant got all the assistance that *Ake* requires was contrary to, or involved an unreasonable application of, clearly established federal law. The defendant urged the Court to answer this question "yes," asserting that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. The Court however found that it need not decide whether this claim is correct. It explained:

> *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake*'s most basic requirements.

Here, although the defendant was examined by Dr. Goff, neither Goff nor any other expert helped the defense evaluate Goff's report or the defendant's extensive medical records and translate these data into a legal strategy; neither Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that the defendant's purported malingering was not necessarily inconsistent with mental illness; and neither Goff nor any other expert helped the defense

prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself. The Court concluded: “Since Alabama’s provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming [the defendant’s] conviction and sentence was contrary to, or involved an unreasonable application of, clearly established Federal law.”