

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR**

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THE PERILS OF PENDENCY

**A Close Look at Selected Cases
Pending Before the U.S. Supreme Court**

2009 Edition

Jury Instructions!

Search and Seizure!

Confrontation Clause!

Sufficiency-of-Evidence!

Jury Selection/Structural Defects!

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INTRODUCTION AND SCOPE

In contrast to “Pending Cases” materials for prior seminars, these materials are not intended to provide a comprehensive guide to all or even most criminal cases currently pending before the U.S. Supreme Court.

Instead, we have chosen to focus these materials more intensively on just a small handful of the cases pending in the current Term. We have chosen a few cases which appear to have potentially far-ranging implications for criminal appellate practice – either because they involve frequently recurring situations (e.g., *Belton* vehicle searches incident-to-arrest) or because they could result in clarification or modification of the basic frameworks for assessing certain classes of claims (e.g., scope of the confrontation clause).

We have settled on discussing six cases, in the areas of search-and-seizure (2 cases), confrontation, jury instructions, structural defects, and sufficiency-of-evidence claims. We have chosen to include two cases, which fall slightly outside the scope of cases pending on grants of certiorari. The Court decided *Herring v. United States* earlier this month. But we are still discussing *Herring* here because, in light of its constricted view of the value of the exclusionary rule, it may ultimately prove to be the most consequential search-and-seizure opinion of the Term. We have also included a cert. petition on which the Court has not yet acted, *McDaniel v. Brown*, because it is possible that it may be the subject of a dreaded “summary reversal” (i.e., the Court may grant cert. and decide the case on the basis of the cert. petition and opposition, without full merits briefing and argument).

Finally, we emphasize that the selected cases featured here are far from the only “important” cases currently pending. The Court has also granted certiorari on several confession-related issues (e.g., *Corley v. United States*, 07-1044; *Kansas v. Ventris*, 07-1356), as well as cases on speedy trial analysis (*Vermont v. Brillion*, 08-88), ineffective assistance (*Knowles v. Mirzayance*, 07-1315), and a host of other issues.

SEARCH AND SEIZURE

Weapon Searches

Arizona v. Gant, No. 07-542 {argued Oct. 7, 2008}

Lower Court Opinion: *State v. Gant* (Ariz. 2007) 162 P.3d 640.

Question Presented (as reframed by Supreme Court in order granting certiorari):

“Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest to justify a warrantless vehicular search incident to arrest conducted after the vehicle’s recent occupants have been arrested and secured?”

Why It’s Important:

Under the “bright line” rule of *New York v. Belton* (1981) 453 U.S. 454, an arrest of an occupant or “recent occupant” of a vehicle entitles the police to conduct a warrantless search of the passenger compartment. As with the *Chimel* rule allowing a search of the area within the potential reach of a person arrested in the home, the asserted purposes of a *Belton* search are officer safety and preservation of evidence – that is, to prevent the just-arrested suspect from either grabbing a weapon or disposing of evidence. However, because the *Belton* rule is framed so broadly, police commonly conduct such incident-to-arrest vehicle searches under circumstances which pose no such risks of the arrestee grabbing anything – such as where the “recent occupant” has already emerged from or been removed from the vehicle and has been handcuffed and secured in the back of a police car some distance away.

The grant of certiorari in *Gant* and the argument transcript reflect several justices’ apparent recognition that these incident-to-arrest vehicle searches have become divorced from *Belton*’s asserted justifications of officer safety and evidence preservation. However, there are also indications that some justices may be considering whether such incident-to-arrests searches might be considered reasonable under some alternative rationale. As anyone who has litigated search issues arising out of a motorist’s arrest knows, the practical effect of *Belton* has been that an arrest allows a complete search of a passenger compartment, even where there is neither probable cause to believe that the vehicle contains any evidence of a crime nor any particularized grounds for suspecting the presence of a weapon. Consequently, any relaxation or reformulation of *Belton*’s “bright line” rule could have sweeping implications. Indeed, the California Supreme Court has already granted and held two cases, pending the disposition of *Gant*: *People v. Diaz* (2008) 165 Cal.App.4th 732, review gr. Oct. 28, 2008 (S166600); *People v. Leal* (2008) 160 Cal.App.4th 701, review gr. June 11, 2008 (S162271).

SEARCH AND SEIZURE

Exclusionary Rule

Herring v. United States, 07-513 {argued Oct. 7, 2007}

Supreme Court Opinion: decided Jan. 14, 2009; 2009 WL 77886

Holding:

Police arrested and searched Herring, because the police database in a neighboring county indicated he had an outstanding warrant. In fact, the warrant had been recalled five months earlier, but the police database had not been updated to reflect its cancellation. The police dispatchers ultimately discovered the error some 10-15 minutes after the initial warrant check. But, by that time, police had already arrested and searched Herring and discovered a gun and drugs.

The Supreme Court accepts that the arrest and search violated the Fourth Amendment, because there was no outstanding warrant. However, in a 5-4 decision authored by Chief Justice Roberts, the Court concludes that the exclusionary rule does not apply to an unlawful arrest attributable to “a negligent bookkeeping error by another police employee.” The Court had previously held that an erroneous reference to an outstanding warrant in a *judicial* database would not trigger the exclusionary rule. *Arizona v. Evans* (1995) 514 U.S. 1. Although the *Evans* opinion had expressly left open “whether the evidence should be suppressed if police personnel were responsible for the error,” the *Herring* majority opinion extends the “good faith” rationale of *Evans* to negligent record-keeping by police employees. Because the error in the police database was “the result of isolated negligence attenuated from the arrest” (*Herring*, 2009 WL 77886 at *2), “rather than systemic error or reckless disregard of constitutional requirements,” the asserted societal costs of exclusion of relevant evidence outweighed any “marginal deterren[t]” benefit (*id.* at *9).

Why It’s Important:

As noted in the Introduction, we are discussing *Herring v. United States* in these materials, even though the Supreme Court issued its opinion earlier this month. We are including *Herring* because it may prove to be one of the most consequential opinions of the current Term. Although *Herring* itself involved the relatively discrete problem of erroneous warrant information in police databases, this closely-divided decision represents a troubling development in the long-running debate over the value and scope of the Fourth Amendment exclusionary rule.

The *Herring* majority opinion takes a decidedly constrained view of the exclusionary rule. The majority emphasizes the societal costs of excluding relevant evidence of guilt, citing Justice Cordozo’s famous lament that “the criminal should not “go free because the constable has blundered.’ [Citation.]” (*Herring* at *9.) The majority emphasizes that “the abuses that gave rise to the exclusionary rule,” in such seminal cases as *Weeks v. United States* and *Mapp v. Ohio*, “featured intentional conduct that was patently unconstitutional.” (*Id.* at *6.) Throughout the opinion, the majority distinguishes “deliberate,” “reckless,” or “systemic”

police misconduct from “negligent” police mistakes:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. ... [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. (*Herring* at *7.)

[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” [Citation.]” (*Herring* at *9.)

As mentioned twice in the opinion, *Herring* itself involve “a negligent bookkeeping error by another police employee,” “*attenuated* from the arrest” (*Herring* at *2, *3, emphasis added), rather than an error on the part of the arresting officers themselves. Counsel should continue to emphasize that distinction in arguments before lower and intermediate courts and should vigorously resist any effort to extend *Herring* to “negligent” constitutional violations by police in the field. Nonetheless, as quoted above, several of the comments in the majority opinion could well prove to be the seeds of a still more far-reaching extension of a *Leon*-type good-faith rationale to warrantless detentions and arrests based upon “negligent” police assessments of reasonable suspicion, probable cause, and the like.

CONFRONTATION CLAUSE

Laboratory and other police forensic reports

Melendez-Diaz v. Massachusetts, No. 07-591 {argued Nov. 10, 2008}

Lower Court Opinion: *Commonwealth v. Melendez-Diaz* (Mass. App. 2007) 870 N.E.2d 876 (unpublished).

Question Presented (as stated in petition for writ of certiorari):

“Whether a state forensic analyst’s laboratory report prepared for use in a criminal prosecution is ‘testimonial’ evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).”

Why It’s Important:

The core teaching of *Crawford v. Washington* is that the Sixth Amendment confrontation clause entitles a defendant to the opportunity for cross-examination of any “testimonial” evidence introduced against him. *Crawford* itself and the Supreme Court’s subsequent applications of it have involved the statements of percipient witnesses. *Melendez-Diaz* concerns the applicability of *Crawford* to reports prepared by the state’s forensic experts, such as the laboratory reports on a other substance’s chemical composition, fingerprint identification reports, blood analyses, ballistic tests, and the like. Many states currently allow the admission of forensic reports or “certificates” and do not require the state to present the live testimony of the forensic expert who actually conducted the test and prepared the report.

Massachusetts (with the support of the U.S. Solicitor General and many other states) contends that forensic reports present “objective” evidence and do not raise the same concerns of veracity and witness demeanor as the accusations of percipient witnesses to a crime. The states also contend that insistence upon live testimony from lab analysts, criminalists, and other prosecution forensic evidence would be unduly burdensome. Consequently, the stakes in *Melendez-Diaz* are whether this entire class of evidence from forensic analysts affiliated with the prosecution will be subject to or exempt from the constitutional right to confrontation and cross-examination.

STRUCTURAL DEFECTS

Denial of peremptory challenge

Rivera v. Illinois, 07-9995 {to be argued Feb. 23, 2009}

Lower court opinion: *State v. Rivera* (Ill. 2007) 879 N.E.2d 876.

Question Presented:

“Whether the erroneous denial of a criminal defendant’s peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury.”

Why It’s Important:

Rivera involves the effect of what might be called “reverse *Batson* error.” The trial court had disallowed defense counsel’s peremptory challenge to a single juror. Finding that there was no prima facie showing of any discriminatory intent, the Illinois Supreme Court held that the trial court had erred in barring the peremptory challenge and allowing the juror to be seated. Nonetheless, the state supreme court concluded that erroneous disallowance of a peremptory challenge was not a “structural defect,” but a form of trial error subject to harmless error review. The court proceeded to find the error harmless on the ground that “any rational trier of fact would have found defendant guilty of murder on the evidence adduced at trial.”

The specific error in *Rivera* – disallowance of a peremptory challenge – is not an especially common one. But *Rivera* is important, because it will provide the Court with another opportunity to clarify the elusive concept of “structural defect.” On first blush, denial of a peremptory challenge might seem an odd candidate for a “structural defect,” because it may not strike as closely at core constitutional rights, as the few errors the Court has placed in that category in the past, such as a denial of counsel of choice or an erroneous definition of reasonable doubt. However, as reflected in *Arizona v. Fulminante*, *Sullivan v. Louisiana*, and other cases, the “structural defect”/“trial error” distinction does not rest on a ranking of constitutional violations, but on more functional (or “structural”) considerations of whether any assessment of the effect of the error is even possible. As discussed in *Rivera*’s briefing, the Court has not applied harmless error review to errors which affect “the composition of the tribunal.”

JURY INSTRUCTIONS

Waddington v. Sarausad, 07-772 {argued Oct. 15, 2008}

Lower Court Opinion: *Sarausad v. Porter* (9th Cir. 2007) 479 F.3d 671.

Questions Presented (as stated in petition for writ of certiorari; introductory paragraph omitted):

“ ... [¶] 1. In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability?

2. Where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?”

UPDATE – CASE DECIDED

On January 21, 2009, as these materials were going to press, the Supreme Court issued its opinion in *Waddington v. Sarausad*, 2009 WL 129033. By a 6-3 vote, the Supreme Court reversed the Ninth Circuit decision, which had granted habeas relief. The Washington courts had held that the accomplice instructions were correct and unambiguous. Because that determination was not “objectively unreasonable,” the Ninth Circuit contravened the AEDPA standard (28 U.S.C. § 2254(d)(1)) in viewing the instructions as ambiguous. Further, even if the instructions could be considered ambiguous, the state courts’ conclusion that there was no “reasonable likelihood” that jurors misapplied the accomplice instructions was not “objectively unreasonable.” This is just a very brief and superficial synopsis of the just-issued *Sarausad* opinion. The case will be discussed in greater depth at the January 31, 2009, seminar. (Also, please note that the “Why It’s Important” discussion below was prepared before issuance of the opinion and has not been updated.)

Why It’s Important (prepared prior to issuance of Supreme Court opinion):

In *Sarausad*, the Ninth Circuit granted habeas relief and set aside a Washington murder conviction on the grounds that the accomplice liability instructions, together with the prosecutor’s arguments and the trial court’s failure to respond to multiple juror queries, posed a “reasonable likelihood” that the jurors misunderstood a state law requirement that an accomplice must intend to aid in the specific crime charged (murder). The Circuit concluded that the jurors could well have believed that an intent to assist in some other criminal conduct, such as a gang confrontation, would also render the accomplice liable for any ensuing murder.

Because Washington and California appear to differ significantly in their definitions of the scope of accomplice liability for murder, the precise instructional issue in *Sarausad* is not directly relevant to California appellate practice. However, *Sarausad* could potentially have broader implications for the basic framework for review of instructional claims. Under *Boyde v. California* (1990) 494 U.S. 370, and subsequent cases, the test for review of an assertedly

“ambiguous” instruction is “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” *Sarausad* raises question whether a facially-adequate pattern instructions may, nonetheless, pose a “reasonable likelihood” of juror misapplication, when considered in conjunction with a prosecutor’s misleading arguments and juror questions indicating confusion over those instructions. As such, *Sarausad* could prove relevant to issues over jurors’ likely construction of CALJIC or CALCRIM instructions, especially where other aspects of the record, beyond the instructions themselves, appear to enhance the danger that the jurors misunderstood or misapplied those instructions. The matter is further complicated by the fact that *Sarausad* itself arises on federal habeas review and is subject to the AEDPA standard (28 U.S.C. § 2254(d)(1)). As reflected in the Questions Presented, the state contends that a federal habeas court must defer, not only to a state court’s explication of substantive state law, but also to the state court’s conclusion that an instruction is constitutionally adequate to communicate those requirements to the jurors.

SUFFICIENCY OF EVIDENCE

McDaniel v. Brown, 08-559 {cert. pet. pending; possible summary reversal?}

Lower Court Opinion: *Brown v. Farwell* (9th Cir. 2008) 525 F.3d 787.

Questions Presented (as stated in petition for writ of certiorari):

“1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?”

Why It’s Important:

Strictly speaking, *Brown* is beyond the scope of these materials, because the Supreme Court has not yet acted on the pending cert. petition. However, as of this writing, *Brown* has been before the Court at two successive conferences (Jan. 9 & 16, 2008), with no action being taken. Although the Court may yet grant full review or simply deny certiorari at a future conference, its failure to act on the petition so far raises another possibility – that the Court is considering summary reversal (i.e., deciding the case on the cert. petition and cert. opposition, without full merits briefing and oral argument). (After all, it would hardly be a contemporary Supreme Court term without at least one summary reversal of a Ninth Circuit decision granting habeas relief.)

The Ninth Circuit found the facts constitutionally insufficient to sustain a conviction under *Jackson v. Virginia*. The crux of that holding was the Circuit’s determination that the prosecution’s DNA evidence was so unreliable and misleading as to present a due process violation. For example, the prosecution expert’s assertion of a 99.99667 % probability that blood found on the victim’s clothing came from the defendant dramatically overstated that probability “as it improperly conflated random match probability with source probability” and “inaccurately minimized the likelihood that [the defendant’s] DNA would match” that of one of his four brothers.

The potential significance of *Brown* has less to do with DNA evidence than with the scope of sufficiency-of-evidence review under *Jackson*. As reflected in the “Questions Presented” (quoted above), the unusual feature of the Ninth Circuit’s analysis was that its critique of the prosecution DNA testimony rested, in part, upon a new expert report presented in the habeas proceedings, discrediting the state expert’s analysis. The Ninth Circuit found this “supplementation” of the record appropriate, because the new report “merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts.” Thus, among other issues, the *Brown* petition questions whether a reviewing court (especially a federal habeas court) can ever consider evidence outside the *trial* record in deciding a *Jackson v. Virginia* sufficiency-of-evidence claim.