

Selected Cases Pending in the California Supreme Court

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CERTIFICATES OF PROBABLE CAUSE

People v. Johnson, no. S166894 (rev. gr. Nov. 19, 2008)

Question Presented¹: Is a certificate of probable cause a prerequisite to an appeal claiming ineffective assistance of counsel for failure to assist a client in a motion to withdraw a plea?

Status: opening brief on the merits due Feb. 10, 2009

Opinion Below: 2008 WL 3415460 (no. H031095, filed Aug. 13, 2008). “We view defendant's motion to withdraw his plea as a direct challenge to the validity of plea in the first instance. A certificate of probable cause is required.”

Note: *Johnson* will require the Court to revisit the holding in *Pannizon* that “[n]otwithstanding the broad language of [Penal Code] section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 74.) In requiring a CPC, the Sixth Appellate District distinguished *People v. Osorio* (1987) 194 Cal.App.3d 183, in which the Fifth District held that no CPC was required where no motion to withdraw the plea was ever filed and the appeal “attack[ed] the failure of counsel to file the motion in the first instance. The relief requested does not require that we pass upon the validity of the guilty plea.” (194

¹ The statement of issues is taken from the online docket for each case.

Cal.App.3d at 187.) The Sixth District, in *Johnson*, distinguished *Osorio* on two bases: (1) in *Osorio*, the defendant had not made a motion withdraw the plea and (2) the defendant in *Osorio* was complaining that he was guilty of selling, rather than transporting/furnishing, narcotics and thus it could be said his complaint was with the degree of the crime, therefore fitting into the second category described in *Pannizon*. In contrast, the defendant in *Johnson* had made a motion to withdraw the plea and the court denied it and his complaint was not about the degree of the offense or the penalty.

RIGHT TO COUNSEL AND STANDARDS OF PREJUDICE

People v. Paredes, no. S160953 (rev. gr. Apr. 30, 2008)

Question Presented: "Is the erroneous removal of appointed counsel reversible per se as structural error or is the ensuing conviction reversible only on a showing of prejudice?"

Status: fully briefed.

Opinion Below: 158 Cal.App.4th 1516 (no. E040123, filed Jan. 16, 2008). Division Two of the Fourth Appellate District held that the trial court abused its discretion in disqualifying appointed counsel (the Riverside Public Defender) in violation of the State Constitution and the error was reversible per se.

Note: in finding the error reversible per se, the Court of Appeal relied heavily on *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 in which the U.S. Supreme Court held that the erroneous denial of the right to retained counsel of choice is reversible per se. The court also distinguished violations of the right to effective representation, which require a showing of prejudice. (In finding error, the Court of Appeal explained that an indigent has no federal constitutional right to counsel of choice, but the state constitution provides broader protection where the defendant and counsel have a pre-existing attorney-client relationship.)

In the Supreme Court, the state has argued that there was no federal constitutional error, that the error was not pre se reversible, and that the appellant should have challenged the removal of counsel by pre-trial writ.

People v. Lawrence, no. S160736 (rev gr. Apr. 9, 2008)

Questions Presented: “1) Did the trial court abuse its discretion by denying a self-represented defendant’s requests for appointment of counsel prior to opening argument? (2) Is the erroneous denial of a motion for reappointment of counsel made after the commencement of trial automatically reversible as structural error?”

Status: calendared for argument Feb. 3, 2009

Opinion Below: 158 Cal.App.4th 685 (no. B193831, filed Jan. 2, 2008): appellant initially voluntarily waived his right to counsel, but the trial court abused its discretion in denying the self-represented defendant’s request for counsel made during jury selection. The error was per se reversible.

Notes: Rather than agree to a two-week trial continuance requested by his defense counsel, the defendant asserted, and was granted, his right to represent himself. During jury selection the defendant asked that counsel be appointed to represent him at trial. The trial court denied the request and also denied a second request made at the conclusion of jury selection.

As in *Paredes*, the Court of Appeal relied heavily on *United States v. Gonzalez-Lopez* (2006) 548 U.S. 1 in finding the error structural. The state contends that the Watson standard should apply because the defendant had validly waived his right to counsel and the error involved was an abuse of discretion and there was no absolute denial of the right to counsel or counsel of choice.

DISMISSAL IN THE INTERESTS OF JUSTICE (PC § 1385) - INCLUSION OF REASONS IN MINUTES

People v. Bonnetta, no. S159133 (rev. gr. Mar. 12, 2008)

Questions Presented: “Must an appellate court automatically reverse a trial court’s order striking enhancements pursuant to Penal Code section 1385 because the trial court, although it stated its reasons for dismissal on the record, failed to enter the reasons upon the minutes, or can the error be found harmless?”

Status: calendared for argument Feb. 3, 2009

Opinion Below: *People v. Bonnetta* (2008) 156 Cal.App.4th 1315 (A115861, filed Nov. 15, 2007)

Note: The state appealed the striking of enhancements under section 1385. The Court of Appeal reluctantly reversed, holding that section 1385's requirement that the reasons "be set forth in an order entered upon the minutes" is mandatory and reversal is required even though the reporter's transcript contained the judge's reasons. The Court of Appeal recognized the illogic of a reversal just so "that the trial court can put in different form a ruling already intelligible and known to the parties and this court." The court urged the Supreme Court or Legislature to address the problem.

RIGHT TO A JURY TRIAL (JUVENILE ADJUDICATIONS)

People v. Nguyen, no. S154847 (rev. gr. Oct. 10, 2007)

Question Presented: "Can a prior juvenile adjudication of a criminal offense in California constitutionally subject a defendant to the provisions of the three strikes law (Pen. Code, §§ 667, subs. (b)-(i), 1170.12) although there is no right to a jury trial in juvenile wardship proceedings in this state?"

Status: fully briefed

Decision Below: 152 Cal.App.4th 1205 (H028798, filed June 29, 2007)

HOMICIDE LAW

People v. Medina, no. S155823 (rev. gr. Oct. 31, 2007)

Question Presented: "Did the Court of Appeal err in holding the evidence insufficient to support defendants' convictions for murder and attempted murder under the natural and probable consequences doctrine based on the target offenses of assault and battery?"

Status: fully briefed

Decision Below: 153 Cal.App.4th 610 (B189049, filed July 23, 2007)

Note: *Medina* concerns the outer bounds of use of a “natural and probable consequences” theory to hold participants in a gang-related fight liable for a homicide committed by another gang member.

People v. Chun, no. S157601 (rev. gr. Dec. 19, 2007)

Question Presented: “Does the offense of discharging a firearm at an occupied vehicle in violation of Penal Code section 246 merge with a resulting homicide under *People v. Ireland* (1969) 70 Cal.2d 522, if there is no admissible evidence of an independent and collateral criminal purpose other than to commit an assault?”

Status: argued Jan. 9, 2009

Decision Below: 157 Cal.App.4th 580 (B189056, filed Sept. 14, 2007)

Notes: This case presents the Court with several questions regarding second degree felony murder, including the fundamental question of whether this judge-created doctrine violates the separation of powers doctrine. Also before the Court is the question of what test to use in determining whether the underlying felony is assaultive and merges with the homicide such that the felony cannot be used as a predicate to second degree felony murder. In *People v. Robertson* (2004) 34 Cal.4th 156, the Court employed the collateral purpose test in determining whether negligent discharge of a firearm merged with the homicide, holding that second degree felony murder was appropriate when the purpose of the felony was collateral to the intent to cause injury. *Chun* presents the question of whether the collateral purpose test should be used where the predicate felony is discharge of a firearm at an occupied vehicle. *Chun* also presents the question of whether there is a right to a jury trial on the question of whether there was a collateral purpose. Finally, amicus argues that equal protection requires that the collateral purpose rule apply to all inherently dangerous felonies, including the crime of firing at an occupied vehicle.

People v. Moye, no. S157980 (rev. gr. Jan. 16, 2008)

Question Presented: "Did the trial court err to defendant's prejudice in failing to instruct the jury on voluntary manslaughter on a theory of provocation and heat of passion as a lesser included offense of second degree murder?"

Status: fully briefed

Decision Below: 2007 WL 2795271 (no. B192331, filed Sept. 27, 2007)

Note: *Moye* concerns whether there was sufficient provocation to support requested instructions on the heat-of-passion theory of voluntary manslaughter and, if so, whether the refusal of that instruction was prejudicial

People v. Perez, no. S167051 (rev. gr. Nov. 19, 2008)

Question Presented: "Were defendant's convictions for attempted murder of seven police officers and a civilian supported by sufficient evidence when only one shot was fired and only one officer was hit?"

Status: opening brief due Feb. 6, 2009

Decision Below: 2008 WL 3865501 (no. B198165, filed Aug. 21, 2008)

Note: Relying on *People v. Smith* (2005) 37 Cal.4th 733, the Court of Appeal held that the jury could find that "in intending to kill any of the officers defendant's shooting endangered the lives of all," such that the multiple convictions could stand.

People v. Stone, no. S162675 (rev. gr. June 25, 2008)

Question Presented: "(1) In a prosecution for a single count of attempted murder, did the trial court err by instructing the jury on the 'kill zone' concept (see *People v. Bland* (2002) 28 Cal.4th 313) when defendant fired a single shot into a crowd although he was ostensibly not shooting at anyone in particular and there was no 'primary' target? (2) Did substantial evidence support defendant's conviction for attempted murder in this case?"

Status: fully briefed

Decision Below: 160 Cal.App.4th 937 (F051812, filed Mar. 4, 2008). The Court of Appeal concluded it was error to give a “kill zone” concurrent-intent instruction because there was no evidence that the defendant had created a zone of danger and had the concurrent intent to kill all people in the zone. (The transferred-intent doctrine does not apply to attempted murder.) The court of appeal also noted that the kill-zone instruction was erroneous because it “equate[d] proof of a specific intent to kill with a showing of the [victim’s] presence within a zone created by appellant.” Examining the prosecutor’s closing argument, the court concluded that the instructions and arguments together show that “appellant was tried on the theory that the jury could find specific intent to kill the named victim on the basis of finding (1) that the named victim was in a kill zone created by appellant and (2) that appellant indiscriminately intended to kill a person-any person-within that zone when he fired his gun.”

AMENDMENTS TO SVP & SEX REGISTRATION LAWS (INCLUDES EX POST FACTO)

In re E.J., S156933; *In re S.P.*, S157631; *In re J.S.*, S157633; *In re K.T.*, S157634 (OSC issued Dec. 12, 2007)

Question Presented: “The court issued an order to show cause why the petitioner is not entitled to relief from the residency restrictions imposed by Penal Code section 3003.5 on persons required to register as sex offenders, on the ground the statute violates the ex post facto clauses of the state and federal Constitutions, has been impermissibly retroactively applied, constitutes an unreasonable parole condition, impinges on the petitioner's substantive due process rights, and is unconstitutionally vague.”

Status: fully briefed

People v. McKee, no. S162823 (rev. gr. July 9, 2008)

Questions Presented: “(1) Was defendant denied due process when he was committed under the Sexually Violent Predator Act, as amended by Proposition 83 in 2006, because the amended Act permits commitments for an indeterminate term and, in hearings subsequent to the initial commitment

hearing, places the burden on the defendant to prove he is no longer a danger to society? (2) Did defendant's commitment under the amended Act violate the prohibition against ex post facto laws? (3) Did the commitment violate defendant's right to equal protection?"

Status: fully briefed

Decision Below: 160 Cal.App.4th 1517 (D050554, filed Mar. 20, 2008)