

**FIRST DISTRICT APPELLATE PROJECT  
TRAINING SEMINAR  
January 30, 2010**

**KEY PENDING CASES IN THE  
UNITED STATES SUPREME COURT**

**J. Bradley O'Connell**

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**THE PERILS OF PENDENCY**

**Selected Cases  
Pending Before the U.S. Supreme Court**

**2010 Edition**

**J. Bradley O'Connell  
First District Appellate Project  
Assistant Director  
[jboc@fdap.org](mailto:jboc@fdap.org)**

## INTRODUCTION

These materials briefly note the “Questions Presented” in several of the criminal cases on the Supreme Court’s docket this Term. However, the materials are not comprehensive. For the most part, we have omitted cases concerning federal criminal statutes, which seem unlikely to have implications for state practice.

Most of the “Question Presented” summaries are paraphrased. Those in quotations, however, are taken directly from the respective certiorari petitions. For most of the cases, the implications of the “Questions Presented” are self-evident. However, for a few, we have included additional comments.

## MIRANDA

### Implied Waiver

*Berghuis v. Thompkins*, 08-1470 {set for argument, March 1, 2010}

**Question Presented:** Whether there is an implied waiver of *Miranda* rights, where the defendant acknowledged his understanding the advisements, but neither invoked his rights nor explicitly waived them? The state frames the question as whether *Miranda* bars “an officer from attempting to non-coercively persuade a defendant to cooperate” under those circumstances?

**Comment:** *Berghius v. Thompkins* is one of several Sixth Circuit habeas cases currently before the Court. Consequently, the *Miranda* issue arises in the context of the AEDPA standard of review (28 U.S.C. § 2254(d)(1)), which allows habeas relief only if the state court decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedents.

### Invocation and Prohibition on Re-initiation of Questioning

*Maryland v. Shatzer*, 08-680 {argued Oct. 1, 2009}

**Question Presented:** Where a suspect has invoked his right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), continue to bar any police re-initiation of interrogation, even if there has been an intervening “break in custody or a substantial lapse in time (more than two years and six months)”?

### Content of Advisements

*Florida v. Powell*, 08-1175 {argued Dec. 7, 2009}

**Question Presented:** Does the lack of an explicit advisement on the right to counsel “during” interrogation render the *Miranda* warnings insufficient, where the advisements do explicitly refer to the right to consult a lawyer “before questioning” and the right to “use” that consultation right “at any time”?

## CONFRONTATION

*Briscoe v. Virginia*, 07-11191 {argued Jan. 11, 2010}

**Question Presented:** Whether the confrontation clause allows the prosecution to introduce forensic laboratory results through a certificate, rather than live testimony, if state law also gives the defense the right to call the analyst as a witness?

**Comment:** *Briscoe* is a follow-up to last Term’s 5-4 decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 5257 (2009), which held that forensic laboratory results and other forensic analyses represent “testimonial” evidence subject to the confrontation clause. *Melendez-Diaz* held that, upon objection, the prosecution must present that forensic evidence through live testimony of the analyst, rather than through a certificate or affidavit. *Briscoe* presents the question whether the prosecution may, nonetheless, present that evidence through an affidavit or certificate, if the defense is given the opportunity to call the analyst as a witness.

## COUNSEL; PLEA ADVICE; IMMIGRATION

*Padilla v. Kentucky*, 08-651 {argued Oct. 13, 2009}

**Question Presented:** Does counsel’s failure to advise a defendant of the mandatory deportation consequences of a plea constitute ineffective assistance or otherwise provide grounds for withdrawal of a plea, or is deportation a “collateral consequence” which falls outside counsel’s duty to advise on direct consequences of a plea?

**Comment:** Failure (by either the court or defense counsel) to advise a non-citizen defendant of mandatory immigration consequences is one of the most commonly litigated grounds for seeking withdrawal of a plea or equivalent post-conviction relief. Obviously, any Supreme Court decision deeming such advice outside the scope of counsel’s duties under the Sixth Amendment would have grave consequences for attempts to set aside convictions in order to avoid deportation. (However, California Pen. Code § 1016.5 still requires a *court* to advise a defendant of the immigration consequences of a plea, and a failure to give those advisements may still provide a basis for relief under that statute if the defendant can make the requisite prejudice

showing.)

## **JURY; CROSS-SECTION**

*Berghuis v. Smith*, 08-1402 {argued Jan. 20, 2010}

**Question Presented:** Whether the Sixth Circuit erred in applying a “comparative disparity” test for assessment of a prima facie violation of the jury cross-section requirement under *Duren v. Missouri*, 439 U.S. 362 (1979)?

**Comment:** *Berghius v. Smith* is another Sixth Circuit habeas case, and the state has framed the cross-section issue in terms of the AEDPA standard of review.

## **DUE PROCESS**

### Notice; Vagueness

*Skilling v. United States*, 08-1394 {set for argument, March 1, 2010}

**Question Presented:** Whether a federal fraud statute criminalizing deprivation of “honest services” (18 U.S.C. § 1346) is unconstitutionally vague and fails to provide “fair notice” of the conduct prohibited?

**Comment:** *Skilling* concerns a corporate defendant convicted of fraud in the Enron scandal. It is one of several cert-granted cases concerning the “honest services” fraud statute. Although that statute is primarily used in federal white collar crime prosecutions, the due process notice issues could potentially have implications for defendants convicted under various California statutes which arguably suffer from similar problems of vagueness and uncertain breadth.

### Pre-trial Publicity and Juror Prejudice

*Skilling v. United States*, 08-1394 {set for argument, March 1, 2010}

**Question Presented:** *Skilling* also poses a distinct jury prejudice question arising out of the Enron executive’s trial in Houston: “When a presumption of jury prejudice arises because of the widespread community impact of the defendant’s alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.”

## CRUEL AND UNUSUAL PUNISHMENT; MINORS

*Graham v. Florida*, 08-7412

*Sullivan v. Florida*, 08-7621 {each argued Nov. 9, 2009}

**Questions Presented:** Whether life-without-possibility-of-parole sentences for non-homicide crimes committed by minors violate the Eighth Amendment bar on cruel and unusual punishment?

**Comments:** Graham was convicted of attempted armed robbery at age 16, and Sullivan was convicted of sexual battery at age 13. In *Sullivan*, however, review of the merits of the Eighth Amendment claim may be complicated by state procedural default issues.

## EX POST FACTO; SEX OFFENDER REGISTRATION

*Carr v. United States*, 08-1341 {set for argument, Feb. 24, 2010}

**Question Presented:** Whether the ex post facto clause bars prosecution under a federal sex offender registration statute, where both the underlying offense triggering the registration duty and the requisite travel in “interstate commerce” occurred prior to the enactment of the registration law?

## SECOND AMENDMENT; RIGHT TO BEAR ARMS

*McDonald v. City of Chicago*, 08-1521 {set for argument, March 2, 2010}

**Question Presented:** Is the Second Amendment right to keep and bear arms applicable to the states via “incorporation” through the Fourteenth Amendment?

**Comment:** *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), held that the Second Amendment confers an individual right to bear arms (repudiating the long-held view that the Amendment simply recognized the right to bear arms in a state militia, such as the contemporary National Guard). *McDonald* presents a crucial question left open in *Heller* – whether the Second Amendment restricts only the federal government’s authority to limit that right or also applies against the states via the Fourteenth Amendment. Past Supreme Court precedents have treated the Second Amendment as one of the few provisions of the Bill of Rights, which is *not*

“incorporated” through the Fourteenth Amendment and, therefore, is not binding on the states. (Of course, even if the Supreme Court rules otherwise in *McDonald* and finds the Second Amendment applicable to the states, that holding would probably not imperil California’s leading gun possession laws, such as Pen. Code § 12021. The *Heller* opinion explicitly recognized that the Second Amendment does not bar restrictions on possession of firearms by felons or mentally ill persons, or prohibitions on certain “dangerous and unusual” weapons (a category which presumably includes machine guns and the like).

## FEDERAL HABEAS CORPUS PROCEDURE

### AEDPA Statute of Limitations

*Holland v. Florida*, 09-5327 {set for argument March 1, 2010}

**Question Presented:** Whether “gross negligence” by counsel in the late filing of a federal habeas petition may qualify as an “exceptional circumstance” warranting equitable tolling of AEDPA statute of limitations?

### AEDPA Standard of Review

See *Berghuis v. Thompkins*, 08-1470 {discussed under “MIRANDA”}

See *Berghuis v. Smith*, 08-1402 {discussed under “JURY; CROSS-SECTION”}

**Comment:** As discussed in the previous entries, both these cases arising from the Sixth Circuit involve the 28 U.S.C. § 2254(d)(1) standard, allowing habeas relief only if the state decision was “contrary to” or represented an “unreasonable application” of “clearly established” U.S. Supreme Court precedents.

### Successive Petitions

*Magwood v. Culliver*, 09-158 {set for argument March 24, 2010}

**Question Presented:** “When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a ‘second or successive’ claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?”