

Another thrilling episode of

BLOCKBUSTERS

FROM THE BENCH!

The U.S. Supreme Court's 2007-2008 Term

And Coming Attractions in the 2008-2009 Term!

Prepared by **J. Bradley O'Connell**
Assistant Director, First District Appellate Project

jboc@fdap.org

Sept. 2008

CONFRONTATION CLAUSE/*CRAWFORD*

- *Giles v. California* (2008) 128 S.Ct. 2678. U.S. Supreme Court reverses the California Supreme Court's expansive interpretation of the "forfeiture by wrongdoing" exception to the confrontation clause. *People v. Giles* (2007) 40 Cal.4th 833. Giles was tried for the murder of his ex-girlfriend. The California courts had admitted the victim's prior testimonial statements to police accusing Giles of domestic violence on the theory that, by killing her, Giles had made her unavailable to testify, regardless of whether that was the purpose of the homicide. The U.S. Supreme Court "decline[s] to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." At common law, a defendant "forfeited" the right to exclude testimonial hearsay statements by an unavailable declarant only upon a showing that "the defendant intended to prevent a witness from testifying." In addition to its historical survey, the majority points out the anomaly of making a defendant's confrontation clause rights contingent upon "a prior *judicial* assessment" of his guilt or innocence of the charged murder. "[I]t most certainly is *not* the norm that trial rights can be forfeited on the basis of a prior judicial determination of guilt." (Emphasis in original.)

- See also *Danforth v. Minnesota* (2008) 128 S.Ct. 1029, discussed under “HABEAS CORPUS – Retroactivity/State Collateral Review,” *post*, p. 5.

JURY SELECTION/BATSON

- *Snyder v. Louisiana* (2008) 128 S.Ct. 1203. Applying a totality-of-circumstances analysis, the Supreme Court finds that the prosecutor’s reasons for challenging a black juror in the capital trial of a black defendant were pretextual and discriminatory. The Court emphasizes the “implausibility” of the prosecutor’s asserted reason that juror service would interfere with the prospective juror’s student-teaching obligations. As in *Miller-El v. Dretke* (2005) 545 U.S. 231, the majority utilizes juror comparisons and notes that this juror was one of 50 who expressed concern about possible interference with work, school, or family responsibilities. “The implausibility of the explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious” as those of the stricken juror.

SEARCH AND SEIZURE

Relationship Between Fourth Amendment and State Arrest Law

- *Virginia v. Moore* (2008) 128 S.Ct. 1598. Virginia law permitted only issuance of a summons, rather than a custodial arrest, for driving on a suspended license. The Supreme Court, however, finds no Fourth Amendment violation and no ground for suppression of evidence. The Fourth Amendment does not incorporate state law limitations on the circumstances in which police can make custodial arrests. Where the police have probable cause as to the commission of an offense (as they did here), the Fourth Amendment permits an arrest, even if it violates state law restrictions.

Moore does not change anything for California practice, because it is consistent with the California Supreme Court’s decision in *People v. McKay* (2002) 27 Cal.4th 601.

COUNSEL

Self-Representation and Competency

- *Indiana v. Edwards* (2008) 128 S.Ct. 2379. *Edwards* addresses the dilemma posed by self-representation by a “defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial itself.” Supreme Court majority holds that the Constitution permits state courts to set

a somewhat higher standard for mental competency for self-representation than the minimum due process standard for competency to stand trial. “[T]he Constitution permits States to insist upon representation by counsel for those competent to stand trial ..., but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”

Attachment of Right to Counsel

- *Rothgery v. Gillepsie County, Texas* (2008) 128 S.Ct. 2578. The Sixth Amendment right to counsel attaches upon a defendant’s initial appearance before a magistrate, when he is informed of the charges against him and subject to restrictions on his liberty (including release on bail). Such an arraignment or other formal appearance before a judicial officer marks the initiation of adversary judicial proceedings and triggers attachment of the right to counsel, *even if only police, rather than prosecutors, are involved in or aware of the proceeding and there has not yet been a decision to prosecute.* (Note that *Rothgery* has implications beyond its immediate context of a jurisdiction’s delay in providing an arraigned defendant with appointed counsel. The timing of the initiation of adversary judicial proceedings is also crucial to the attachment of Sixth Amendment *Massiah* restrictions on police questioning of a charged defendant, outside the presence of counsel.)

Presence and Assistance of Counsel

- See *Wright v. Van Patten* (2008) 128 S.Ct. 743 (counsel’s participation in plea hearing by speaker phone), discussed under “HABEAS CORPUS – AEDPA Standard of Review,” *post*, p. 6.

CAPITAL PUNISHMENT

For Non-Homicide Offense

- *Kennedy v. Louisiana* (2008) 128 S.Ct. 2641. Supreme Court rejects death penalty for sexual offense against a child (rape of 8-year-old stepdaughter) not involving homicide. “A death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.” (Note: As of this writing, a rehearing petition is pending, based on a previously-overlooked federal law allowing capital punishment for child rape in military court martials. The state’s petition asserts that the military death penalty undermines the majority’s conclusion that a “consensus” has formed against the capital punishment for such non-homicide offenses.)

Lethal Injection Methods

- *Baze v. Rees* (2008) 128 S.Ct. 1520. Supreme Court rejects Eighth Amendment challenge to Kentucky's three-drug protocol for lethal injections. Per the plurality opinion, "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." "[T]o prevail on such a [cruel-and-unusual punishment] claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm'...." The petitioners failed to show that the risk of pain from errors in the administration of the commonly-used three-drug protocol met that standard.

SECOND AMENDMENT

- *District of Columbia v. Heller* (2008) 128 S.Ct. 2783. Supreme Court strikes down a D.C. law which effectively prohibited handgun possession for most persons and further required that any lawfully owned firearms must be stored unloaded and disassembled or disabled by a trigger lock. The majority holds that the Second Amendment confers an *individual* right to possess a firearm, which is not limited to bearing a firearm in connection with service in a militia. That individual right includes use of a firearm for traditionally lawful purposes such as self-defense within the home. The highly restrictive D.C. law violated the Second Amendment by "totally ban[ning] handgun possession in the home." "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelming chosen by American society" for the lawful purpose of self-defense, including in the home "where the need for defense of self, family, and property is most acute." The law's further provision that any other firearms be stored in an inoperable condition (disassembled or disabled by a trigger lock) also violated the Second Amendment by effectively preventing their use in lawful self-defense in the home.

The Court emphasizes, however, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Nor does the Second Amendment "protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." In light of those explicit admonitions, it appears doubtful that *Heller* will affect most California restrictions on firearm possession, such as Pen. Code § 12021 or "assault weapon" statutes (*id.* § 12275 et seq.). It is conceivable, however, that *Heller* may pose issues for prohibitions on carrying concealed or loaded weapons (e.g., §§ 12025, 12031), since such restrictions effectively bar a citizen from carrying a firearm for self-defense purposes on the street. (They do, not, however,

implicate the special concerns of self-defense in the home, emphasized in *Heller*.)

HABEAS CORPUS

Retroactivity/State Collateral Review

- *Danforth v. Minnesota* (2008) 128 S.Ct. 1029. The U.S. Supreme Court has previously held that the confrontation clause holding of *Crawford v. Washington* established a “new rule” under *Teague v. Lane* which was not retroactive on federal habeas review – i.e., a defendant whose conviction became “final” on direct review prior to *Crawford* could not obtain *federal* habeas relief based on *Crawford*. *Whorton v. Bockting* (2007) 127 S.Ct. 1173. However, *Danforth* clarifies that *Teague* simply establishes “minimum requirements” for retroactivity (i.e., defines circumstances under which a decision must be given retroactivity). As a matter of “comity,” **state courts are free, as a matter of state law, to adopt less strict retroactivity standards.** Consequently, a state court may choose to give retroactive effect to a U.S. Supreme Court decision establishing a “new rule,” even when that decision is not retroactively applicable on federal habeas review.

Possible California implications: The California Supreme Court has not addressed state retroactivity standards for many years and has never explicitly resolved whether *Teague* should also apply to state habeas corpus petitions. However, it may have an opportunity to address those questions in *In re Gomez* (2007) 153 Cal.App.4th 1516; review gr., Oct. 24, 2007 (S155425), which concerns the retroactivity of *Cunningham v. California*.

AEDPA Statute of Limitations

- *Allen v. Siebert* (2007) 128 S.Ct. 2 (per curiam). The Court summarily reverses an Eleventh Circuit decision which had found a habeas petition timely, based on tolling of the limitations period during the pendency of a state post-conviction petition. Only a “properly filed” state post-conviction petition tolls the AEDPA statute of limitations (i.e., a “properly filed” petition stops the clock on the one-year limitations period for as long as it remains “pending”). However, per *Pace v. DiGuglielmo* (2005) 544 U.S. 408, a state post-conviction petition which is deemed “untimely” is not “properly filed,” and the AEDPA clock continues to run while the petition is pending. An untimely petition is not “properly filed” and does not toll AEDPA, even if the state timeliness rule is non-jurisdictional and operates as an affirmative defense, rather than as a prerequisite to filing.

Lesson for California practice: A state habeas petition which is denied with a cite to *Clark* and/or *Robbins* (or with some other reference to timeliness or laches) will not toll AEDPA. If there are reasons for fearing that the state courts may invoke a timeliness bar, counsel (or a pro se petitioner) should consider filing a “mixed” (i.e., partially exhausted) habeas petition in federal district court and asking the district court to “stay and abey” the federal petition pending the completion of the state exhaustion process. Cf. *Rhines v. Weber* (2004) 544 U.S. 269.

AEDPA Standard of Review.

- *Wright v. Van Patten* (2008) 128 S.Ct. 743 (per curiam). Summary reversal of Seventh Circuit decision granting habeas relief. Defense counsel was not physically present during the hearing in which Van Patten pled guilty to a homicide offense, but participated in the hearing by speaker phone. (During hearing, Van Patten confirmed that he had thoroughly discussed plea with his attorney and declined opportunity to speak privately with the attorney by phone.) The Seventh Circuit declared that counsel’s physical absence from the plea hearing represented a constructive denial of counsel under *Cronic* and therefore did not require the usual *Strickland* showings of deficient performance and prejudice. But the Supreme Court declares that question too unsettled to support habeas relief under the AEDPA standard, 28 U.S.C. § 2254(d)(1). Because no Supreme Court decision “squarely addresses the issue in this case ... or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context,” the state court decision upholding the judgment under *Strickland* was neither “contrary to,” nor an “unreasonable application,” of clearly established Supreme Court precedent.

COMING ATTRACTIONS – THE 2008-2009 TERM

JURY INSTRUCTIONS & HABEAS REVIEW

- *Waddington v. Sarausad*, No. 07-772 {9th Cir. opn: *Sarausad v. Waddington* (9th Cir. 2007) 479 F.3d 671}. Application of *Boyde-Estelle* “reasonable likelihood” standard to assertedly defective instructions on accomplice liability for murder. Based on the totality of circumstances, including several mid-deliberations juror questions, the Ninth Circuit found a reasonable likelihood that the jury relied on a mistaken understanding of the mens rea requirement for accomplice liability. Because the case arises on federal habeas review, the state is claiming that the federal courts must defer to the Washington appellate court’s decision which found the instructions adequate.

- *Hedgpeth v. Pulido*, No. 07-544 {9th Cir. opn: *Pulido v. Chrones* (9th Cir. 2007) 487 F.3d 669; prior Cal. Supreme Court opinion finding harmless error, *People v. Pulido* (1997) 15 Cal.4th 713}. Current status of the “*Stromberg* rule” requiring reversal where a reviewing court cannot tell whether a jury’s general verdict rests on a legally unauthorized theory or on a valid alternative ground. *Stromberg v. California* (1931) 283 U.S. 359. (*Stromberg* is the federal counterpart to California’s *Green-Guiton* standard.) *Pulido* concerns the relationship of the *Stromberg* rule to contemporary harmless error analysis. As it had in prior cases, the Ninth Circuit held that submission of an unauthorized theory is a form of structural defect which can only be harmless if the reviewing court is absolutely certain that the jury relied on the valid alternative ground. The state contends that *Rose v. Clark*, *Neder v. U.S.*, and other authorities have effectively superseded *Stromberg* and that submission of an invalid theory should be subject to conventional harmless error analysis. *Pulido* contends that the *Stromberg* rule is consistent with current harmless error jurisprudence, because uncertainty whether a verdict rests on an invalid ground necessarily represents both a “reasonable doubt” (*Chapman*) and a “grave doubt” (*Brecht*) as to the error’s effect. {Disclosure: The author of these materials is representing *Pulido* before the Supreme Court.}

JURY TRIAL/APPRENDI

- *Oregon v. Ice*, No. 07-901. Applicability of *Apprendi* jury trial right to factual finding for consecutive sentencing, where state law makes availability of consecutive sentencing dependent upon a specific factual finding. Oregon law only allows consecutive terms for offenses during a continuous course of conduct where a court makes “certain legislatively required findings” (either “that the second crime is not merely incidental to the first but indicates a willingness to commit more than one criminal act” or that it caused a risk of greater injury or of injury to a different victim). Consequently, even if *Ice* is decided favorably, it is doubtful that it will have any effect upon the constitutionality of California’s discretionary consecutive sentencing regimen (Pen. Code § 669), which the California Supreme Court upheld in *Black I* and *Black II*. However, *Ice* could potentially prove relevant to the factual determinations incident to imposition of consecutive terms for closely related offenses under Pen. Code § 654.

SEARCH AND SEIZURE

Weapon Searches

- *Arizona v. Gant*, No. 07-542. Legality of a weapon search of car incident to arrest,

under “bright-line” rule of *New York v. Belton*, even where the arrestee has already been handcuffed and secured in back of police car.

- *Arizona v. Johnson*, No. 07-1122. Pat-down search of passenger during traffic infraction stop, where officer believes passenger may be armed but does not suspect him of any criminal conduct.

Consent Rationale

- *Pearson v. Callahan*, No. 07-751. Whether police may enter home without a warrant on the theory that the owner consented by previously allowing entry of an undercover informant. (Some courts have termed this the “consent once removed” exception to the warrant requirement.)

Exclusionary Rule

- *Herring v. United States*, No. 07-513. Applicability of exclusionary rule “when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent.”

CONFRONTATION/CRAWFORD

- *Melendez-Diaz v. Massachusetts*, No. 07-591. Whether a state forensic laboratory report, prepared for a criminal trial, represents “testimonial” evidence under *Crawford*.

COUNSEL

- *Knowles v. Mirzayance*, No. 07-1315. Whether counsel’s advice to withdraw insanity plea represented ineffective assistance where that was only available defense. This case too arises on federal habeas review and consequently implicates the AEDPA/28 U.S.C. § 2254(d) standard.

HABEAS CORPUS PROCEDURE

AEDPA Standard of Review

- *Bell v. Kelly*, 07-1223. Whether the deferential AEDPA standard of review, 28 U.S.C. § 2254(d), applies to an ineffective assistance claim based on evidence not considered by the state court, which was presented at an federal habeas evidentiary

hearing.

- See also *Waddington v. Sarausad*, No. 07-772, discussed under “JURY INSTRUCTIONS AND HABEAS REVIEW,” *ante*, p. 6.
- See also *Knowles v. Mirzayance*, No. 07-1315, discussed under “COUNSEL,” *ante*, p. 8.

AEDPA Statute of Limitations

- *Jiminez v. Quarterman*, 07-6984. Effect of state court’s reinstatement of a defaulted appeal on the running of the AEDPA limitations statute. Does state court’s grant of relief from default and allowance of a late direct appeal re-set the limitations clock, so that it only begins to run upon the finality of that appeal? (This is one of those rare grants of cert. on an inmate’s pro se petition.) *Jiminez* could potentially affect calculation of the AEDPA limitations period in California cases in which the state appellate court allowed a late notice of appeal under the “constructive filing” doctrine.

Procedural Default

- *Cone v. Bell*, 07-1114. Authority of federal habeas court to consider propriety of state court’s reliance on a “procedural default.” (This is the third trip to the Supreme Court for this capital case. The Supreme Court reversed two prior Sixth Circuit decisions granting habeas relief on different claims. *Bell v. Cone*, 535 U.S. 685 (2002) (ineffective assistance); *Bell v. Cone*, 543 U.S. 447 (2005) (vagueness of capital aggravating factor). This time the defendant is seeking Supreme Court review of the Sixth Circuit’s refusal to consider a *Brady* claim which the state courts had deemed procedurally defaulted.)