2007-08 Supreme Court Updates

Shawn M. Herron, Staff Attorney, DOCJT Legal Section

The Kentucky Department of Criminal Justice Training provides the following case summaries for information purposes only. As always, please consult your agency's legal counsel for the applicability of these cases to specific situations. This summary may be copied, for educational purposes only, with attribution to DOCJT.

A longer summary of each of these cases may be found on the DOCJT Web site at http://docjt.ky.gov/legal. Full text of the cases may be found at http://www.findlaw.com/casecode/supreme.html. Please note, the latest cases in this summary have not yet been assigned official citations.

Danforth v. Minnesota
128 S.Ct. 1029 (2008)

ISSUE: May states make the Crawford rule retroactive in state proceedings, even though it is not retroactive under federal law?

HOLDING: At the outset, the Court noted that the passage of the 14th Amendment, in 1868, applied the provisions of the Bill of Rights to the states. In the years since, the Court has addressed various cases concerning the Sixth Amendment, including the "basic … right of confrontation." With respect to retroactive application, however, the Court found it necessary to determine "whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." The "serial incorporation of the amendments in the Bill of Rights during the 1950s and 1960s imposed more constitutional obligations on the states and created more opportunity for claims that individuals were being convicted without due process and held in violation of the Constitution." Until 1965, however, the Court construed "every constitutional error, including newly announced ones, as entitling state prisoners to relief on federal habeas." In that year, however, the Court ruled that "the retroactive effect of each new rule should be determined on a case-by-case basis by examining the purpose of the rule, the reliance of the states on the prior law, and the effect on the administration of justice of retroactive application of the rule."[1] Finally, in Teague, the Court ruled that retroactivity would not be the general rule, and that new rules would not be applied to "those cases which have become final before the new rules are announced." One of only two exceptions to that general rule would be for "'watershed' rules that 'implicate the fundamental fairness of the trial.'"

This decision, however, did not address whether the states might "provide remedies for a broader range of constitutional violations than are redressable on federal habeas." In some cases following upon this decision, the state courts chose to give retroactive effect to various federal decisions. The Court concluded that its precedent did "not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under Teague."

[1] Linkletter v. Walker, 381 U.S. 618 (1965).

The Court ruled that Minnesota was "free to reinstate its judgment disposing of the petition for state postconviction relief."

<u>Virginia v. Moore</u>
128 S.Ct. 1598 (2008)

ISSUE: Is an arrest made upon probable cause unlawful under federal law if the state in which the arrest is made would not permit the arrest on other grounds?

HOLDING: After reviewing the history of the Fourth Amendment in respect to arrest, the Court noted that:

> In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.

Although the Court said states are "free 'to impose higher standards on searches and seizures than required by the Federal Constitution,'" whether a particular action is valid "within the meaning of the Fourth Amendment" has never been dependent "on the law of the particular state in which the search occurs."

Moore also argued that even if the arrest was lawful, the subsequent search was not. The Court noted, however, that it had "recognized … that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence."[2] The Court agreed that it "equated a lawful arrest with an arrest based upon probable cause" even though state law may define that differently. Since the officers in this case actually placed Moore in physical arrest and custody, they faced the same risks that other officers making an arrest might encounter. As such, the Fourth Amendment does not demand the exclusion of the evidence in this case.

The Virginia Supreme Court decision was reversed, and the case remanded for further proceedings.

NOTE: *To emphasize, this case held that the arrest and subsequent search could not be overturned on Fourth Amendment (federal) grounds. This leaves open the argument that the arrest and subsequent search might be ruled unlawful on state grounds. Logically, if the arrest is overturned on state grounds as an invalid arrest, the arrested party would also not be successful in filing a federal lawsuit under 42 U.S.C. §1983 on the grounds of an unlawful arrest and/or search.*

<u>U.S. v. Williams</u>
128 S.Ct. 1830 (2008)

---

[2] See <u>U.S. v. Robinson</u>, 414 U.S. 218 (1973).

ISSUE: May an officer charge (under federal law) for pandering (offering or requesting) child pornography even when the item may not actually exist?

HOLDING: The Court began its opinion by noting that it had "long held that obscene speech – sexually explicit material that violates fundamental notions of decency – is not protected by the First Amendment."[3] However, the Court agreed that it was also important to "protect explicit material that has social value" and as such, it had "limited the scope of the obscenity exception" and "overturned convictions for the distribution of sexually graphic but nonobscene material."[4] In addition, the Court has addressed the "related and overlapping category of proscribable speech, child pornography."[5] The Court has previously ruled that "a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and that the "government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults."[6]

With respect to the statute at issue, the Court noted that the "broad authority to proscribe child pornography is not, however, unlimited." In Ashcroft v. Free Speech Coalition, the Court had found two provisions of the Child Pornography Protection Act (CPPA) of 1996[7] to be "facially overbroad." First, it reversed the provision that banned the possession and/or distribution of materials that depicted what appears to be minors engaged in sexual activity, even if, in fact, the actors were "only youthful-appearing adults or virtual images of children generated by a computer," since "the child-protection rationale for speech restriction does not apply to materials produced without children." Second, it overturned the provision that "criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that," which meant that someone who was in possession of "unobjectionable material that someone else had pandered" as child pornography could be prosecuted.

Because of that earlier opinion, Congress had revisited the issue and produced the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003.[8] 18 U.S.C. §2252A was modified to add a new provision relating to pandering and solicitation. It is under this new section (referred to as 503[9]) that Williams was charged, and has appealed. The Court concluded that it was obvious in the enactment of this provision that "Congress was

---

[3] See Roth v. U.S., 354 U.S. 476 (1957).
[4] Miller v. California, 413 U.S. 15 (1973); Jenkins v. Georgia, 418 U.S. 153 (1974).
[5] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).
[6] Stanley v. Georgia, 394 U.S. 557 (1969).
[7] P.L. 104-208.
[8] P.L. 108-21
[9] The relevant portion of the statute reads:
Any person who –
"(a) knowingly –
"(3)advertises, promotes, presents, distributes or solicits through the mail, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains – an obscene visual depiction of a minor engaging in sexually explicit"(i) conduct; or a visual depiction of an actual minor engaging in sexually explicit "(ii) conduct,
"shall be punished as provided in subsection (b)." §2252A(a)(3)(B).

concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children … would enable many child pornographers to evade conviction."[10] The Court stated that the "emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children" although at the current time the creation of realistic virtual images is "prohibitively expensive."

The Court first looked at the re-enacted provision to analyze if it was constitutionally overbroad. The Court noted that the statute in question "prohibits offers to provide and requests to obtain child pornography," but does not "require the actual existence of child pornography." The statute has a mental state (scienter) of "knowingly." The "string of operative verbs" listed in the statute can be "reasonably read to have a transactional connotation" and "penalizes speech that accompanies or seeks to induce a transfer of child pornography – via reproduction or physical delivery – from one person to another." The Court concluded this would include both commercial and non-commercial (such as trade, barter or gift) transactions. Further, the revised statute requires both a subjective and objective belief that the material is child pornography, based upon how the material is described. Finally, the conduct depicted must be sexually explicit, rather than suggestive, but might include simulated sexual conduct, and must involve "actual children."

In the second part of the analysis, the court examined whether the statute criminalized "a substantial amount of protected expressive activity." The Act does not prohibit the "abstract advocacy of illegality" – child pornography – only the specific "offers to provide or requests to obtain it." The court found that the "pandering and solicitation made unlawful by the Act are sorts of inchoate crimes – acts looking toward the commission of another crime, the delivery of child pornography" and equated to "other inchoate crimes – attempt and conspiracy, for example – [in which the] impossibility of completing the crime because the facts were not as the defendant believed is not a defense." For this statute to apply, the "defendant must believe that the picture contains certain material, and that material in fact … must meet the statutory definition."

The Court further found that the statute was not so vague as to void it. The Court concluded:

> Child pornography harms and debases the most defenseless of our citizens. Both the state and federal governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

The 11th Circuit decision was reversed, and the current version of the PROTECT law was upheld.

<u>Rothgery v. Gillespie County, Tx</u>

---

[10] Emphasis in original.

--- S.Ct. --- (2008)

ISSUE: When does the right to counsel attach in a criminal case?

HOLDING: The Court began its discussion by noting that it had – "for purposes of the right to counsel, pegged commencement to 'the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'"[11] In this case, the Texas trial courts, as a matter of practice, did not assign appointed defense counsel to a defendant until they were indicted, and in this case, this left the defendant, Rothgery, in legal limbo and without counsel, for more than six months between his initial appearance upon his arrest and his indictment. (Once he was indicted and appointed counsel, his attorney quickly was able to prove there was a mistake and the case against him was promptly dismissed.)

The Court found that the lower Texas state courts had "effectively focused not on the start of adversarial judicial proceedings, but on the activities and knowledge of a particular state official who was presumably otherwise occupied." The Court found this to be in error. Instead, the Court looked to its decisions in Brewer v. Williams[12] and Michigan v. Jackson,[13] both of which held that the "right to counsel attaches at the initial appearance before a judicial officer." No matter the actual name for that proceeding, it is "generally the hearing at which 'the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings,' and 'determine[s] the conditions for pretrial release." Clearly, the hearing in question in this case, a 15.17[14] hearing, is an initial appearance.

The Court noted that Rothgery alleges that he was unable to find a job after his arrest because potential employers "knew or learned of the criminal charge pending against him." The Court found it fair to assume "that those potential employers would still have declined to make job offers if advised that the county prosecutor had not [yet] filed the complaint."

The Court concluded that its holding in this case was narrowly focused and "merely reaffirm[ed] what [the Court] ha[d] held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." The case was remanded back to the lower courts for further consideration of whether the delay resulted in prejudice to Rothgery.

Giles v. California
--- S.Ct. --- (2008)

---

[11] U.S. v. Gouveia, 467 U.S. 180 (1984); Kirby v. Illinois, 406 U.S. 682 (1972)
[12] 430 U.S. 387 (1977)
[13] 475 U.S. 625 (1986)
[14] This is the number of the court rule in Texas that applies to this type of hearing.

ISSUE: May testimonial statements made by deceased subjects, some time prior to their murder, be admitted against the suspect in their murder, when there is no evidence the murder was committed to prevent them from testifying against the suspect?

HOLDING: First, the Court accepted, as did California, that Avie's statements to the officer were testimonial. To decide the case, however, the Court asked "whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right."

The Court had previously accepted "two forms of testimonial statements" as admissible – one being those "declarations made by a speaker who was both on the brink of death and aware that he was dying" and the other being the statements made by a witness "who was 'detained' or 'kept away' by the 'means or procurement of the defendant.'"[15] The Court engaged in a lengthy discussion of the meaning of various terms used in such cases, with the intended purpose to determine whether an intentional murder of the witness was "conduct *designed* to prevent the witness from testifying." From that series of cases, the Court concluded that "[i]n cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying – as in the typical murder case involving accusatorial statements by the victim – the testimony was excluded unless it was confronted or fell within the dying-declaration exception."

The Court concluded that to permit the admission of the statement would, in effect, overrule Crawford and would lead back to the adoption of "an approach not much different from that in Ohio v. Roberts.[16] It noted that the "common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe and kill the witnesses against them …."

Because the California trial courts did not consider Giles's intent in killing Avie, the Court declined to rule on that aspect of the case. Giles's conviction was vacated, and the case remanded back for further proceedings, including the possibility that his intent in killing Avie was to prevent her from testifying against him.

Kennedy v. Louisiana
--- S.Ct. --- (2008)

ISSUE: May an individual convicted of child rape be subjected to the death penalty?

HOLDING: The Court reviewed the history of the Eighth Amendment with respect, particularly, to capital punishment. In 1972, in Furman v. Georgia, the Court invalidated most state statutes that had existed prior to that year which authorized the death penalty for rape and other nonhomicide crimes. Following that year, several states, including Louisiana, reenacted its law authorizing capital punishment for all rape, but that was modified to only applying to child rape. (Specifically, six states that authorized the death penalty at all had the death penalty for child rape, and 30 did not) In precedent, the Court had ruled that the death penalty must "be

[15] The Court cited to a series of old English common law cases dating as far back as 1666.
[16] 448 U.S. 56 (1980)

limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[17] Further, in Coker v. Georgia, the Court had ruled that the death penalty was unavailable for the rape of an adult woman.[18]

The Court also recognized that there are "serious systemic concerns in prosecuting the crime of child rape that are relevant" – specifically the "problem of unreliable, induced and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." The Court mentioned the studies that concluded that "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery and selective reinforcement" – "even on abuse-related questions." Also, the fact that child rape and sexual abuse are believed to be dramatically underreported means that the availability of the death penalty for the crime "may not result in more deterrence or more effective enforcement."

Finally, "by in effect making the punishment for child rape and murder equivalent, the state that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim." Although "[e]ach of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape," that "[t]aken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense."

The Court ruled that:

> Based both on consensus and our own independent judgment, our holding is that 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 14th amendments.

District of Columbia v. Heller
--- S.Ct. --- (2008)

ISSUE: Is there an individual constitutional right to possess a firearm in one's home?

HOLDING: Yes

DISCUSSION: The U.S. Supreme Court reviewed the history of the Second Amendment, and the history of ownership of firearms, including handguns, in the United States. The Court also used amicus[19] briefs provided by historical linguistic experts in reaching its decision, to determine the usage of language at the time of the Second Amendment. After extensive examination, the Court concluded that the Second Amendment guarantees "the individual right

---

[17] Roper v Simmons, 543 U.S. 551 (2005), regarding juveniles; Atkins v. Virginia (536 U.S. 304 (2002) regarding the mentally retarded.
[18] 433 U.S. 584 (1977)
[19] Amicus curiae - "friend of the court" - are those briefs submitted by non-parties to a case to assist the court by offering specialized information about a particular point in a case.

to possess and carry weapons in case of confrontation" – separate and apart from any membership in a militia. The court noted:

> … history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents.

Turning to the specific issue presented in this case, the Court found that "the inherent right of self-defense has been central to the Second Amendment right." The D.C. ban prohibited the precise type of weapon "overwhelmingly chosen by American society for that lawful purpose."

The Court concluded:

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our nation, where well-trained police forces provide personal security and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of [the] Court to pronounce the Second Amendment extinct.

The Court found the D.C. law to be unconstitutional, and ordered that the District "permit [Heller] to register his handgun and … issue him a license to carry it in the home." The Court agreed, however, that the right to keep and bear arms was not unlimited, and upheld "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 law-imposing conditions and qualifications on the commercial sale of arms."