2007-2008 United States Supreme Court Term: Cases Affecting Criminal Law and Procedure

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Testimonial Statements by Nontestifying Witness May Not Be Introduced Into Evidence Under Forfeiture-by-Wrongdoing Doctrine Unless There Is Evidence That Defendant Engaged in Wrongdoing Intended to Prevent the Witness From Testifying

Giles v. California, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (25 June 2008). The defendant was on trial for the murder of his ex-girlfriend. The state was allowed to introduce statements that the victim had made to a law enforcement officer concerning a domestic violence incident with the defendant that occurred about three weeks before the homicide (for the purpose of this case, it was assumed, without deciding, that the statements were testimonial). A California state appellate court ruled that the statements were admissible under the doctrine of forfeiture by wrongdoing recognized by Crawford v. Washington, 124 S. Ct. 1354 (2004), because the defendant had committed the murder for which he was on trial and his intentional criminal act made the victim unavailable to testify. The United States Supreme Court reversed that ruling. It ruled that the doctrine of forfeiture by wrongdoing requires evidence that the defendant engaged in wrongdoing intended to prevent the witness from testifying. Merely causing the witness to be unavailable to testify is insufficient. The Court commented on domestic violence and the doctrine of forfeiture by wrongdoing: "Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed an intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

Sixth Amendment Right to Counsel Attached (Began) at Proceeding Before Magistrate Who Determined Probable Cause and Set Bail; Prosecutor Need Not Be Aware of or Be Involved in Proceeding for It to Be Considered the Initiation of Adversary Judicial Proceedings Under Sixth Amendment Right to Counsel

Rothgery v. Gillespie County, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (23 June 2008). Local Texas officers arrested Rothgery and brought him before a Texas state magistrate, who found probable cause, formally apprised him of the accusation, and set bail. Rothgery was soon released after posting bond. Based on an unwritten county policy of denying appointed counsel for indigent defendants out on bond until at least the entry of an information or indictment, Rothgery was not appointed counsel for six months. The only issue before the Court was whether the proceeding before the magistrate was the initiation of adversary judicial proceedings under the Sixth Amendment right to counsel so that the right to counsel attached (began) then. The Court, citing Brewer v. Williams, 430 U.S. 387 (1997), Michigan v. Jackson, 475 U.S. 625 (1986), and other cases, ruled that the proceeding was the initiation of adversary judicial proceedings, with the consequent state obligation to appoint counsel within a reasonable time once a defendant's request for assistance was made. A prosecutor need not be aware of or be involved with the proceeding for it to be considered the initiation of adversary judicial proceedings. [Author's note: (1) North Carolina's current statutory law on appointment of counsel for judicial proceedings

does not appear to be inconsistent with *Rothgery*. A defendant, if not released for a felony charge, is entitled under G.S. 15A-601(c) to a first appearance before a district court judge (when appointment of counsel for indigents is made) within 96 hours of being taken into custody or the next district court session, whichever occurs first, or, if released, at the next district court session. Although not decided in this case, it is highly likely that the Court would rule that neither a proceeding before a magistrate nor a first appearance before a district court judge is a critical stage of a prosecution at which a defendant has a Sixth Amendment right to counsel to represent him or her at these proceedings. There is a distinction between when the Sixth Amendment right to counsel attaches (begins) and a critical stage of a prosecution, at which a defendant has a Sixth Amendment right to have counsel represent him or her (the Court in *Rothgery* noted that distinction). A probable cause hearing is a critical stage, Coleman v. Alabama, 399 U.S. 1 (1970), and in any event there is a statutory right to counsel for an indigent defendant under G.S. 7A-451(b)(4) and for a non-indigent defendant under G.S. 15A-606(e). (2) The Court's ruling does affect North Carolina case law on investigative activities, which had ruled that the Sixth Amendment right to counsel does not attach (begin) for a felony until the first appearance in district court or indictment, whichever occurs first. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina (3d ed. 2003) (hereafter, ASI), at pages 206, 210, and 212. Thus, for a typical felony case that begins with an arrest either with or without a warrant and an appearance before a magistrate or other judicial official, the Sixth Amendment right to counsel attaches (begins) with the appearance before a magistrate. That means a critical stage occurring thereafter (for example, an officer's deliberate elicitation of information from the defendant by interrogation or conversation or the defendant's appearance in a lineup) is subject to case law concerning the Sixth Amendment right to counsel. The attachment (beginning) of the Sixth Amendment right to counsel no longer awaits the defendant's first appearance in district court. Based on Patterson v. New York, discussed on page 207 of ASI, it is highly likely that the Court would rule that an officer's interrogation of a defendant at or after the defendant's appearance before a magistrate can be accomplished with *Miranda* warnings and waiver even though the defendant also has a Sixth Amendment right to counsel. North Carolina Supreme Court rulings are in accord. See cases cited in note 116 on page 222 of ASI. Of course, if the defendant requests counsel at or after the appearance before a magistrate, that request prevents interrogation even if the defendant is no longer in custody because the Sixth Amendment right to counsel, unlike *Miranda's* Fifth Amendment right to counsel, applies whether or not the defendant is in custody.]

(1) Virginia Law Enforcement Officers Who Had Probable Cause to Arrest Defendant For a Misdemeanor Did Not Violate Fourth Amendment When They Arrested Him and Conducted a Search Incident to Arrest, Although State Law Did Not Authorize an Arrest

(2) Search Incident to Arrest for an Arrest That Was Valid Under Fourth Amendment, Although Arrest Was Not Valid Under State Law, Did Not Violate Fourth Amendment

Virginia v. Moore, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (23 April 2008). Virginia law enforcement officers learned that the defendant's driver's license was suspended, stopped his vehicle, arrested him, and later conducted a search incident to arrest. However, although the violation was a misdemeanor, Virginia law did not authorize an arrest under these circumstances. The officers were only authorized to issue a summons. (1) The Court ruled that the arrest did not violate the Fourth Amendment. The Court noted that in prior cases it had said that when an officer has probable cause to believe a person committed even a minor crime in the officer's presence, the arrest is constitutionally reasonable under the Fourth Amendment. None of the Court's prior cases have ruled that violations of state arrest law are also violations of the Fourth Amendment. When states exceed the Fourth Amendment minimum, the amendment's protections concerning search and seizure remain the same. The Court concluded that warrantless arrests for

crimes committed in the presence of an arresting officer are reasonable under the Fourth Amendment, and while states are free to regulate such arrests however they desire, state restrictions do not alter Fourth Amendment protections. (2) The Court ruled that the search incident to the arrest for an arrest that was valid under the Fourth Amendment, although the arrest was not valid under state law, did not violate the Fourth Amendment. The Court noted that the arrest rules that the officers violated were those of state law alone, and it is not the province of the Fourth Amendment to enforce state law.

[Author's note: This ruling does not expand the authority of a North Carolina law enforcement officer to make an arrest or to conduct a search incident to arrest for a misdemeanor. To the extent that state law may restrict an officer's exercise of authority beyond the restrictions imposed by the Fourth Amendment, officers must follow state law. (1) Before this ruling, officers under G.S. 15A-401(b)(1) already had the authority to make an arrest for any misdemeanor committed in the officer's presence. Thus, North Carolina statutory law was already consistent with this Fourth Amendment ruling. (2) This ruling does not affect state law that does not authorize an officer to arrest a person who has committed an infraction, which is a noncriminal violation of law. (3) It does not affect state law restrictions on making a warrantless arrest for a misdemeanor not committed in the officer's presence, as set out in G.S. 15A-401(b)(2). (4) It does not affect the ruling in Knowles v. Iowa, 525 U.S. 113 (1998), when the Court ruled that an officer who issues a citation to a defendant is not authorized under the Fourth Amendment to conduct a search incident to arrest, even if the officer could have made an arrest for that offense. (5) When an officer's conduct violates a statute under Chapter 15A but the conduct is not a constitutional violation, G.S. 15A-974(2) governs whether evidence must be suppressed.]

United States Constitution Does Not Prohibit States from Requiring Counsel to Represent Defendants Competent to Stand Trial But Who Suffer from Severe Mental Illness to Extent That They Are Not Competent to Represent Themselves at Trial

Indiana v. Edwards, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (19 June 2008). The defendant in state court was found competent to stand trial. Based on the defendant's mental health condition, the trial judge concluded that, although the defendant was competent to stand trial, he was not competent to represent himself at trial. The judge rejected the defendant's request to represent himself and appointed counsel to represent him. Distinguishing Faretta v. California, 422 U.S. 806 (1975), and other cases, the Court ruled that the United States Constitution does not prohibit states from requiring counsel to represent defendants competent to stand trial but who suffer from severe mental illness to extent that they are not competent to represent themselves at trial. The Court declined, however, to overrule the *Faretta* ruling.

Trial Judge Committed Clear Error in Overruling Defendant's *Batson* Objection to Prosecutor's Exercise of Peremptory Challenge of Prospective Black Juror

Snyder v. Louisiana, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (19 March 2008). The Court ruled that the trial judge committed clear error in overruling the defendant's *Batson* objection to the prosecutor's exercise of a peremptory challenge of a prospective black juror. The Court determined that the prosecutor proffered a pretextual explanation for exercising the peremptory challenge that gave rise to an inference of discriminatory intent.

Teague v. Lane, 489 U.S. 288 (1989), Does Not Bar State Courts From Giving Broader Retroactive Effect to New Rules of Criminal Procedure Than Is Required By *Teague*

Danforth v. Minnesota, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (20 February 2008). The Court ruled that the ruling in Teague v. Lane, 489 U.S. 288 (1989) (setting out the rules for retroactive

application of rulings of the United States Supreme Court), does not bar state courts from giving a broader effect to new rules of criminal procedure than is required by *Teague*. The defendant was convicted and given direct appellate review. The later ruling in Crawford v. Washington, 541 U.S. 36 (2004), did not apply retroactively to his conviction under *Teague*. He later filed a state postconviction petition in which he argued that he was entitled to a new trial because the admission of a taped interview violated the *Crawford* ruling. The state appellate court ruled that state courts are not free to give a United States Supreme Court ruling broader retroactive application than given by the United States Supreme Court. The United States Supreme Court reversed the state appellate court ruling. The Court first noted that its ruling in Whorton v. Bockting, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (28 February 2007) (*Crawford* is not retroactive), does not require state courts to apply the *Crawford* ruling to cases that were final when that case was decided. However, the Court ruled that neither *Teague* nor any other federal rule prohibits state courts from doing so. [Author's note: North Carolina appellate courts have not yet ruled on the retroactivity of the *Crawford* ruling in state proceedings.]

Neither International Court of Justice Ruling Nor Presidential Directive on Alleged Vienna Convention Violations During Arrest of Foreign Nationals Constitutes Directly Enforceable Federal Law That Preempts State's Limitations on Filing of Successive Habeas Petitions

Medellin v. Texas, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (25 March 2008). The Court ruled that neither an International Court of Justice ruling nor a Presidential directive on alleged Vienna Convention violations during the arrest of foreign nationals constitutes a directly enforceable federal law that preempts a state's limitations on the filing of successive habeas petitions. [Author's note: For a discussion of an officer's duty under the Vienna Convention when arresting a foreign national, see page 44 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

Second Amendment Guarantees an Individual's Right to Possess a Firearm Unconnected to Service in Militia and To Use a Firearm for Traditionally Lawful Purposes, Such as Self-Defense in Home

District of Columbia v. Heller, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (26 June 2008). The Court ruled that the Second Amendment guarantees an individual's right to possess a firearm unconnected to service in a militia and to use a firearm for traditionally lawful purposes, such as self-defense in a home. The Court ruled unconstitutional the District of Columbia's ban on handgun possession in a home as well as its prohibition against rendering operable for immediate self-defense any lawful firearm in a home. The court indicated that the Second Amendment does not protect possession of short-barreled shotguns and other "dangerous and unusual weapons;" carrying a concealed weapon; possession of a firearm by a felon or the mentally ill; possession of a firearm in sensitive places such as schools and government buildings; and does not bar imposing conditions and qualifications on the commercial sale of firearms. The Court noted in footnote 26 that this list did not purport to be exhaustive. [Author's note: The Court did not decide in this case whether the Second Amendment applies to the states. See footnote 23.]

Kentucky's Method of Lethal Injection for Defendants Sentenced to Death Does Not Violate Eighth Amendment's Ban on Cruel and Unusual Punishment

Baze v. Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (16 April 2008). The Court ruled that Kentucky's method of lethal injection for defendants sentenced to death does not violate the Eighth Amendment's ban on cruel and unusual punishment.

Eighth Amendment Bars State From Imposing Death Penalty for Rape of Child When Rape Did Not Result, and Was Not Intended to Result, in Victim's Death

Kennedy v. Louisiana, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (25 June 2008), *modified*, ___ S. Ct. ___, ___ L. Ed. 2d ___ (1 October 2008). The Court ruled that the Eighth Amendment barred Louisiana from imposing the death penalty for a rape of a child when the rape did not result, and was not intended to result, in the victim's death.