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Evidence

Court Rules That "Testimonial" Statement Obtained Before Trial Is Admissible Under the Confrontation Clause Only Under Certain Circumstances

Crawford v. Washington, 124 S. Ct. 1354, ___ L. Ed. 2d ___, 74 Crim. L. Rep. 412 (8 March 2004). The alleged victim was stabbed in his apartment. Police arrested the defendant and interrogated him and his wife, Sylvia Crawford (hereafter, Sylvia), who had witnessed the stabbing. Sylvia generally corroborated the defendant's story about the stabbing, but her account was arguably different concerning whether the alleged victim had drawn a weapon before the defendant assaulted him. The defendant asserted self-defense at his trial in a Washington state court. The state could not call Sylvia as a witness based on the state's marital privilege law, but was allowed to introduce her tape-recorded statements to the police as evidence that the stabbing was not in self-defense. The defendant objected to the introduction of Sylvia's statements as violating his right of cross-examination under the Confrontation Clause of the Sixth Amendment. The Washington Supreme Court ruled that the statements were admissible and affirmed his assault conviction. The United States Supreme Court reversed the defendant's conviction.

The Court noted that Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), had ruled that the Confrontation Clause does not bar the admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate indicia of reliability." To meet that test, the statement must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The Court reexamined this ruling by analyzing the historical background of the Confrontation Clause. The Court noted that history supports two inferences about the meaning of the clause. First, the principal evil at which the clause was directed was the civil-law mode of criminal procedure, and particularly its use against a criminal defendant of *ex parte* examinations of witnesses. Thus, the Confrontation Clause applies to "witnesses" against the accused, or in other words, those who "bear testimony." The various forms of "testimonial" statements recognized by the Court include *ex parte* in-court testimony or its functional equivalent—affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, confessions of others, and pretrial statements that declarants would reasonably expect to be used by the prosecution. Also included within what the Court described as "testimonial evidence" are statements taken by law enforcement officers in the course of a interrogation. The Court stated in footnote 4 that the term "interrogation" is used in its colloquial, rather than any technical legal, sense, and Sylvia's recorded statement, knowingly given in response to structured police questioning, qualified as interrogation under any conceivable definition. Near the end of its opinion, the Court stated that it would leave for future cases a comprehensive definition of "testimonial," but stated that whatever the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury or at a former trial, and to police interrogations.

The Court stated that the historical record supports a second proposition, that the framers of the constitution would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had had a prior opportunity for cross-examination. In footnote 6, the court noted one historical deviation from this principle involved testimonial dying declarations, although the court said that it need not decide in this case whether to adopt

that exception. [Author's note: If a dying declaration was made to someone other than a law enforcement officer or other person performing investigative functions on behalf of the state—for example, the dying declaration was made to a family member, it would not be "testimonial evidence" subject to the Confrontation Clause ruling in this case.] The Court noted that most of the hearsay exceptions existing in 1791 (when the Sixth Amendment was ratified) covered statements that were not "testimonial"—for example, business records or statements in furtherance of a conspiracy.

The Court reviewed its cases involving admissibility of prior "testimonial evidence" and the Confrontation Clause and stated that the cases have remained faithful to the historical understanding of the clause: testimonial statements of witnesses absent from trial have been admitted only when the declarant was unavailable, and only when the defendant had had a prior opportunity to cross-examine. The court in footnote 8 noted that one case arguably in tension with this principle is White v. Illinois, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), which involved statements of a child victim to an investigating police officer admitted as spontaneous declarations. The Court found it questionable whether these testimonial statements would ever have been admissible on that ground in 1791. Later in its opinion, the Court stated that although its analysis in this case "casts doubt" on the *White* holding (state need not show unavailability of a witness if declarant's statement falls within a firmly-rooted hearsay exception), it need not definitively resolve whether *White* survives its ruling in this case because Sylvia's statement was clearly testimonial.

The Court rejected the reliability test of *Ohio v. Roberts* concerning testimonial evidence under the Confrontation Clause because it was inconsistent with historical reasons for the adoption of the clause and overruled *Roberts* with respect to testimonial evidence. The Court stated that when nontestimonial hearsay is at issue, it is wholly consistent with the historical design of the Confrontation Clause to allow the states flexibility in their development of hearsay law—as does *Roberts* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

The Court concluded that in this case the trial judge admitted Sylvia's testimonial statement against the defendant despite the fact that he had no opportunity to cross-examine her. That alone was sufficient to violate the Confrontation Clause. The *Roberts* reliability analysis may not be applied to make the statement admissible against the defendant.

[Author's note: The admissibility of a confession or statement of the defendant being tried is not affected by this ruling. This ruling also does not restrict the defendant's introduction of hearsay evidence under the rules of evidence because the Confrontation Clause only restricts a government's introduction of evidence against a defendant.

Based on the Court's statements in footnote 9, this ruling (1) does not prohibit the state's introduction of a testifying witness's out-of-court "testimonial" statement, under either an exception to the hearsay rule or as a prior consistent statement (that is, for corroborative purposes), because the witness is available for cross-examination; and (2) does not prohibit the state's use of "testimonial" statements for purposes other than establishing the truth of the matter asserted, such as for impeachment of a witness.

What cases are affected by this ruling? The ruling applies to all cases in which a conviction has not yet become final. A state conviction becomes final when the availability of direct appeal to state courts has been exhausted and the time for filing a petition for a writ of certiorari to the United States Supreme Court has elapsed or a timely filed petition has been finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n. 6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); Caspari v. Bohlen, 510 U.S. 236, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994). Is this ruling retroactive to cases that have become final? A defendant must satisfy the retroactivity test of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). For *Teague* cases, see, for example, O'Dell v. Netherland, 521 U.S. 151, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997) (applying *Teague* test); State v. Zuniga, 336 N.C. 508, 44 S.E.2d 443 (1994) (applying *Teague* to state postconviction proceeding).]

Arrest, Search, and Confession Issues

Distinguishing *City of Indianapolis v. Edmond*, Court Rules That Brief, Information-Seeking Vehicle Checkpoint Established At Same Time and Location of Unsolved Fatal Hit-and-Run That Occurred About One Week Earlier Did Not Violate Fourth Amendment

Illinois v. Lidster, 124 S. Ct. 885, 157 L. Ed. 2d 843, 74 Crim. L. Rep. 253 (13 January 2004). Just after midnight, Saturday, August 23, 1997, an unknown motorist struck and killed a bicyclist in an Illinois community. About one week later at about the same time of night and at about the same place, law enforcement officers established a highway checkpoint designed to obtain from motorists more information about the unsolved hit-and-run. The checkpoint involved stopping each vehicle for 10 to 15 seconds, asking the occupants whether they had seen anything happen the prior weekend, and handing each driver a flyer describing the case and asking for assistance in identifying the vehicle and driver. When the defendant stopped his vehicle at the checkpoint, an officer smelled alcohol on his breath that eventually led to his conviction for driving under the influence of alcohol. The defendant argued that the checkpoint violated the Fourth Amendment. Distinguishing City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (checkpoint whose primary purpose was to detect illegal drugs violated Fourth Amendment), the Court ruled that the brief, information-seeking vehicle checkpoint did not violate the Fourth Amendment. The Court noted that, unlike in *Edmond*, the primary purpose of the checkpoint in this case was not to determine whether a vehicle's occupants were committing a crime, but to ask them, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The checkpoint was neither presumptively constitutional or unconstitutional. Instead, its reasonableness is to be judged by the individual circumstances in this case, using the Fourth Amendment standard of examining the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. The court then examined these circumstances and ruled that the checkpoint did not violate the Fourth Amendment. (1) The relevant public concern was grave, a fatal hit-and-run. The checkpoint's objective was to find the perpetrator of this specific crime, not of some unknown crimes. (2) The checkpoint significantly advanced this grave public concern. The court approvingly noted the checkpoint's similar time and place with the commission of the crime, and that the officers used the checkpoint to obtain information from drivers, some of whom might well have been in the vicinity of the crime when it occurred. (3) Most importantly, the checkpoint interfered only minimally with Fourth Amendment privacy rights—a few minutes waiting in line at the checkpoint, contact with officers for a few seconds, and the officers' simple request for information and the distribution of a flyer. All vehicles were stopped systematically, and there was no allegation that the officers acted in a discriminatory or otherwise unlawful manner.

Law Enforcement Officer Had Probable Cause to Arrest Defendant Passenger and Other Occupants of Vehicle After Officer Had Found $763 of Rolled-Up Cash in Glove Compartment and Five Baggies of Cocaine Between Backseat Armrest and Back Seat

Maryland v. Pringle, 124 S. Ct. 795, 157 L. Ed. 2d 769, 74 Crim. L. Rep. 196 (15 December 2003). After a vehicle was stopped for speeding by a law enforcement officer, a consent search revealed $763 of rolled-up cash in the glove compartment and five baggies of cocaine between the backseat armrest and back seat. All three vehicle occupants—the driver; the defendant, a front seat passenger; and a backseat passenger—denied ownership of the cocaine and the money. The Court ruled that the officer had probable cause to arrest the defendant as well as the other occupants. The Court stated that it was a reasonable inference from the facts that any or all three occupants of the vehicle knew and exercised dominion and control over the cocaine. A reasonable officer could conclude there was probable cause to believe the defendant committed the crime of possession of cocaine, either solely or jointly. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him. Distinguishing

United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948), the court noted that no one in the car was singled out as the owner of the cocaine and cash in this case.

Ruling in New York v. Belton, 453 U.S. 454 (1981), Allows Officer to Search Vehicle's Passenger Compartment Incident to Arrest of Recent Occupant of Vehicle

Thornton v. United States, 124 S. Ct. ___, ___ L. Ed. 2d ___, __ Crim. L. Rep. ___ (24 May 2004). An officer became suspicious about a vehicle driving near him and ran a check that revealed its license tags had not been issued to that vehicle. Before the officer had an opportunity to stop the vehicle, the defendant drove into a parking lot and got out of the vehicle. The officer pulled into the parking lot and stopped the defendant near his vehicle. He eventually developed probable cause to arrest him for possessing illegal drugs in one of his pockets. The officer handcuffed him and placed him in the back seat of his patrol car. He then searched the defendant's vehicle and found a handgun under the driver's seat. The Court ruled that its ruling in New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (officer who has made lawful custodial arrest of occupant of vehicle may search entire passenger compartment incident to arrest), allowed the officer to search the vehicle's passenger compartment incident to the arrest of the defendant, who was a recent occupant of the vehicle.

Forcible Entry Into Apartment With Search Warrant for Cocaine After Wait of Fifteen to Twenty Seconds, When Officers Had Previously Knocked on Door and Announced Their Authority, Did Not Violate Fourth Amendment

United States v. Banks, 124 S. Ct. 521, 157 L. Ed. 2d 343, 74 Crim. L. Rep. 160 (2 December 2003). Officers with knowledge that the defendant was selling cocaine at his residence obtained a search warrant to search his two-bedroom apartment. As soon as they arrived there in the afternoon, officers at the front door called out "police search warrant" and rapped hard enough on the door to be heard by officers at the back door. There was no indication whether anyone was at home, and after waiting for 15 to 20 seconds with no answer, they broke open the front door with a battering ram. The Court ruled that the forcible entry into the apartment under these circumstances did not violate the Fourth Amendment. [Author's note: This ruling did not set fifteen to twenty seconds as a Fourth Amendment required minimum waiting time before using force to enter a residence with a search warrant. The Court in its opinion stressed that each case must be decided on the totality of circumstances presented to the officers as they attempt to execute a search warrant.]

(1) Search Warrant Was Invalid Under Fourth Amendment Because It Did Not Describe Things to Be Seized and Did Not Incorporate by Reference Application's Description of Things to Be Seized
(2) Officer Was Not Entitled to Qualified Immunity Because No Reasonable Officer Could Believe That Search Warrant Complied with Fourth Amendment

Groh v. Ramirez, 124 S. Ct. 1284, 157 L. Ed. 2d 1068, 74 Crim. L. Rep. 355 (24 February 2004). An officer with the Bureau of Alcohol, Tobacco and Firearms prepared and signed an application for a search warrant to search a ranch for specified weapons, explosives, and records. The application was accompanied by a detailed affidavit setting out the basis for believing that the items were on the ranch and was accompanied by a warrant form that he completed. The magistrate signed the warrant form even though it did not describe the things to be seized; instead, the space on the warrant for listing those items merely described the house on the ranch. The warrant did not incorporate by reference the application's list of the items to be seized. (1) The Court ruled that the search warrant was invalid under the Fourth Amendment because it did not describe the things to be seized and did not incorporate by reference the application's description of the things to be seized. [Author's note: This ruling does not affect the validity of AOC-CR-119, Rev. 9/02 (Search Warrant), because the warrant language specifically incorporates by

reference the items to be seized that are described on the accompanying application.] (2) The Court ruled that the officer was not entitled to qualified immunity because no reasonable officer could believe that the search warrant complied with the Fourth Amendment.

Government's Authority to Conduct Inspections Without Reasonable Suspicion or Other Justification at International Border Includes Authority to Remove, Disassemble, and Reassemble Vehicle's Fuel Tank

United States v. Flores-Montano, 124 S. Ct. 1582, ___ L. Ed. 2d ___, 74 Crim. L. Rep. 479 (30 March 2004). The Court ruled that the government's authority to conduct inspections without reasonable suspicion or other justification under the Fourth Amendment at an international border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank.

Law Enforcement Officers Deliberately Elicited Statements from Defendant in Violation of His Sixth Amendment Right to Counsel

Fellers v. United States, 124 S. Ct. 1019, 157 L. Ed. 2d 1016, 74 Crim. L. Rep. 287 (26 January 2004). A grand jury indicted the defendant for conspiracy to distribute methamphetamine. Law enforcement officers went to the defendant's home to arrest him. They knocked on the door, the defendant answered the door, and they identified themselves and asked if they could come in. The defendant invited them in. The officers advised him that they wanted to discuss his involvement in methamphetamine distribution. They informed him that they had a federal warrant for his arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine. They then told him that the indictment referred to his involvement with certain people, four of whom they named. The defendant then told the officers that he knew the four people and had used methamphetamine during his association with them. After spending 15 minutes in the defendant's home, the officers took the defendant to a county jail. There they advised the defendant for the first time of his *Miranda* rights. He waived those rights and reiterated the incriminating statements that he had made in his home. The Court ruled, relying on Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and other cases, that the officers deliberately elicited the statements that the defendant made in his home in violation of his Sixth Amendment right to counsel. The discussion at home occurred after the defendant had been indicted, outside the presence of counsel, and in the absence of any waiver of the defendant's Sixth Amendment rights. Responding to the argument that the defendant's statements were not the product of interrogation by the officers, the Court noted that standard of deliberating eliciting statements under the Sixth Amendment is different from the Fifth Amendment custodial interrogation. [Author's note: If the officers had advised the defendant of his *Miranda* rights and had obtained a valid waiver of those rights at his home, then under Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), the statements likely would have been properly obtained. For a discussion of the distinction between Fifth and Sixth Amendment rights to counsel, the Sixth Amendment right to counsel, and waiver of the Sixth Amendment right to counsel, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 206-10 (3d. ed. 2003).] The Court remanded the case to the federal court of appeals to determine whether the defendant's statements at the county jail were admissible—that is, whether the rationale of Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), applies to the Sixth Amendment violation in this case. [Author's note: For a summary of *Elstad*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 466 (3d. ed. 2003).]

Miscellaneous

Due Process Clause Did Not Require Dismissal of Drug Charge Under *Arizona v. Youngblood* When Defendant Did Not Show That Police Had Acted in Bad Faith in Destroying Alleged Cocaine

Illinois v. Fisher, 124 S. Ct. 1200, 157 L. Ed. 2d 1060, 74 Crim. L. Rep. 2170 (23 February 2004). Chicago police arrested the defendant for possession of cocaine. Four tests conducted by crime laboratories confirmed that the white powdery substance seized from the defendant by the police was cocaine. When the defendant was charged in 1988, he filed a discovery motion requesting all physical evidence that the state intended to use at trial. The state responded that all evidence would be made available at a reasonable time and date on request. The defendant was released on bond, later failed to appear in court, and remained a fugitive until his arrest in 1999. Before trial, the state informed the defendant that the police, acting in accordance with established procedures, had destroyed the alleged cocaine earlier in 1999. The Court ruled that the Due Process Clause did not require the dismissal of the drug charge under Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (unless defendant can show bad faith by law enforcement, failure to preserve potentially useful evidence does not constitute due process violation), when defendant did not show that the police had acted in bad faith in destroying the alleged cocaine. The Court noted that the police testing of the chemical makeup of the substance inculpated, not exculpated, the defendant—at most, it was potentially useful evidence to the defendant. The Court stated that the existence of a pending discovery request did not eliminate the defendant's duty to show bad faith by the police in destroying the substance.

State's Withholding of Materially Favorable Evidence from Defendant and Knowingly Allowing State's Witness to Offer False Testimony Entitled Defendant to Habeas Corpus Review and Relief

Banks v. Dretke, 124 S. Ct. 1256, 157 L. Ed. 2d 1166, 74 Crim. L. Rep. 364 (24 February 2004). The petitioner (criminal defendant in state court) was convicted in state court of first-degree murder and sentenced to death. He filed a federal habeas petition, alleging that the state withheld materially favorable evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and other cases, and knowingly allowed a state's witness to offer false testimony in violation of Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and other cases. He sought a reversal of his conviction and death sentence. The Court ruled that the petitioner was entitled to a reversal of his death sentence based on the effect of the state's suppression of materially exculpatory evidence on the fairness of the death penalty phase of the trial (suppression of evidence that a key state's witness was a informant paid for information in this case). The Court also ruled that the petitioner was entitled to a certificate of appealability from the federal district court's denial of his petition for a new trial, based on the state's suppression of materially favorable evidence (the pretrial coaching by prosecutors and law enforcement of a key state's witness) and knowingly allowing a state's witness to offer false testimony (the witness's denying that he had talked with anyone about his trial testimony). [Author's note: This case also contains rulings concerning various procedural aspects of federal habeas law, which are not summarized here.]

Court Rules That Sixth Amendment Does Not Mandate That Two Particular Warnings Must Be Given By Judge To Unrepresented Defendant Before Defendant Enters Guilty Plea

Iowa v. Tovar, 124 S. Ct. 1379, ___ L. Ed. 2d ___, 74 Crim. L. Rep. 424 (8 March 2004). A defendant who wished to represent himself appeared before a judge to plead guilty to the Iowa offense of operating a motor vehicle under the influence of alcohol. The Court ruled that the Sixth Amendment did not mandate that the following two warnings (required by the Iowa Supreme Court) must be given by a judge to an unrepresented defendant before the defendant enters a guilty plea: (1) there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked, and (2) by waiving the right to an attorney the defendant will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.

Plaintiff, Criminal Defendant Sentenced to Death, May Sue Under 42 U.S.C. § 1983 to Contest Method of Execution

Nelson v. Campbell, 124 S. Ct. ___, ___ L. Ed. 2d ___, __ Crim. L. Rep. ___ (24 May 2004). The Court ruled that the plaintiff, a criminal defendant sentenced to death, may sue under 42 U.S.C. § 1983 to contest a method of execution involving an incision an into arm or leg to access his severely compromised veins. (See also the Court's discussion of the issuance of a stay in connection with this lawsuit.)

State Appellate Court's Ruling That Defense Counsel Was Not Incompetent Was Not Objectively Unreasonable Under Federal Habeas Corpus Standard of Review of State Court Judgment

Yarborough v. Gentry, 124 S. Ct. 1, 157 L. Ed. 2d 1, 74 Crim. L. Rep. 2047 (20 October 2003). The Court ruled that a state appellate court's ruling that defense counsel was not incompetent was not objectively unreasonable under the federal habeas corpus standard of review of a state court judgment. The Court reversed a federal appellate court ruling that had reversed the defendant's state court conviction.

State Appellate Court's Ruling That Alleged Indictment and Jury Instruction Errors Were Harmless Was Not Objectively Unreasonable Under Federal Habeas Corpus Standard of Review of State Court Judgment

Mitchell v. Esparza, 124 S. Ct. 7, 157 L. Ed. 2d 263, 74 Crim. L. Rep. 2063 (3 November 2003). The Court ruled that a state appellate court's ruling that alleged indictment and jury instruction errors were harmless were not objectively unreasonable under the federal habeas corpus standard of review of state court judgment.