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# FROM *BRADY* TO THE CONFRONTATION CLAUSE

***Continuing our roundup of Supreme Court criminal cases in a very busy term***

*By Julius (Jay) Wachtel.* If you're reading this, crime and justice are your bag. And if so, the Supreme Court's current term, chock-full as it is of important criminal cases, should be of great interest.

Two months ago, in "From Eyewitnesses to GPS," we prognosticated about five cases. One, *Perry v. New Hampshire*, was recently decided. Perry, a convicted thief, argued that eyewitness testimony is so unreliable that he should have been entitled to a pretrial hearing on its admissibility. As we predicted (well, not just us) the Supremes disagreed. Unless police purposefully bias the ID process – and in *Perry* there was no such evidence – it rightfully falls on the jury, not a judge, to determine how much weight an identification deserves.

So far we're batting a thousand. Dizzy with success,[1] we'll offer predictions on two more pending cases. But first let's review a new decision on a case that wasn't on our radar.

## Withholding evidence from the defense

Every law enforcement professional knows of *Brady*, a landmark Supreme Court case that says prosecutors must disclose potentially exculpatory evidence to the defense. In *Smith v. Cain* (decided 1/10/12) the Supremes reaffirmed the rule, striking down a murder conviction where the only evidence was testimony by a single eyewitness that the accused shot and killed five persons during a home invasion. Their reason wasn't that evidence was lacking: it was because prosecutors withheld a detective's notes quoting the witness as saying that he could not identify any of the intruders and "would not know them if [he] saw them."

In their defense, prosecutors argued that that the witness's well-founded fear of retaliation would have nullified the contradictory statement had it come to light. No sale. In a brief and pointed 8-1 opinion, the justices held that the state trampled the defendant's due process rights as clearly articulated in *Brady*.

Now let's turn to two cases still on the burner.

**Police immunity to Federal lawsuits**

*Malley v. Briggs* (1986) established the doctrine that police officers are only entitled to qualified immunity, not the absolute immunity that prosecutors and judges enjoy. When cops are sued in Federal court it's up to the judge to examine the record and decide whether their actions were consistent with what reasonably well-trained officers would do. If the answer is "yes," immunity is granted and the lawsuit is dismissed; if "no," the case proceeds to trial.

Just how courts evaluate "reasonableness" is the central issue in *Messerschmidt v. Millender*. Officers protecting a woman who was moving out of a residence were called away on an emergency. While they were gone the woman's boyfriend allegedly chased and shot at her with an illegal pistol-grip shotgun. Detectives obtained a search warrant for all firearms and firearms-related materials and all indicia of gang membership (the subject was reportedly a hardcore gangster.)

SWAT then hit the house – hard. It was occupied by ten persons. An extensive, highly intrusive search turned up nothing other than a legal shotgun belonging to the owner of the residence, the boyfriend's elderly foster mother. She and the others sued for search and seizure and due process violations. A Federal judge denied the police qualified immunity and the Ninth Circuit concurred. In its opinion, the warrant's objective was overbroad, as there was no evidence that the boyfriend possessed anything of evidentiary value other than a single illegal firearm. Justices faulted the issuing judge for signing a warrant that was invalid on its face, and the officers for not using "their own reasonable professional judgment" when seeking permission to search.

In their appeal, the cops insisted that they acted appropriately, as both the judge and their superiors had approved the warrant.

What's our call? To portray the officers' actions as wildly inappropriate seems a stretch. We're going with the two dissenters, who pointed out that it wasn't unlike past situations in which police goofed but were still granted immunity. One suspects that the Supremes are likely to agree, that is, to overrule the Ninth, as what the cops did doesn't seem to warrant crafting a possibly confusing cure that might be worse than the disease.

**Right to confront one's accusers**

Just when we thought that the Supreme Court had made its feelings about the confrontation clause clear here comes *Williams v. Illinois*.

In this case, on appeal from the Illinois Supreme Court, a private laboratory (Cellmark) typed DNA from a rape kit while a state police laboratory typed the suspect's blood. At trial a state police analyst testified that she compared the profile generated by Cellmark to the one generated by her lab and concluded they matched to a high certainty. Cellmark's report was not introduced as evidence and no Cellmark employee testified. Williams protested that his sixth amendment rights had been violated because he didn't have an opportunity to confront Cellmark about their methods and findings. But Illinois courts said there was no breach as Cellmark's report was not offered "for the truth of the matter asserted" but only served as a basis for the analyst's opinion.

Whew. That's some awfully fine hair-splitting. What are the precedents? In *Crawford v. Washington* (2004) the Supreme Court ruled that the recorded statement of a wife who asserted the marital privilege was improperly introduced at trial. Whether or not they seem reliable, "testimonial statements" – those made with the understanding that they can be used in court – cannot be admitted unless defendants are afforded an opportunity to cross-examine their makers.

Exactly what is "testimonial" is a matter of controversy. Massachusetts prosecutors had taken to introducing laboratory reports instead of analyst testimony in drug cases. Not so fast, said the Supreme Court. In *Melendez-Diaz v. Massachusetts* (2009) justices ruled that such reports met the definition of "testimonial," thus requiring that their authors be made available at trial.

And wait, there's more! In-between *Crawford* and *Melendez-Diaz* there was *Bullcoming v. New Mexico*. A lab analyst took the stand to introduce a blood-alcohol report that had been prepared by an absent colleague. Somewhat weakly, prosecutors asserted that the real examiner was only a "scrivener" who did little other than write down what a machine spat out. But the Supremes didn't buy it. No examiner – no case.

Back to *Williams*. Tom Goldstein, publisher of the SCOTUS Blog, is skeptical about Illinois' position. "As a practical matter," he writes, "it is hard to say that the underlying DNA report is not being used for its truth." That end-run is exactly what worried Justice Scalia. Here's what he said during oral arguments:

> Mr. Dreeben [*amicus* appearance for Illinois] that seems to me -- I mean, we have a Confrontation Clause which requires that the witnesses against the defendant appear and testify personally. And -- and the crucial evidence here is the testing of the semen found on the swab. That is -- that's the crux of this evidence. And you're telling me that this Confrontation Clause allows you to simply say, well, we're not going to bring in the person who did the test; we're

> simply going to say this is a reliable lab. I don't know how that complies with the Confrontation Clause.

Still, a lot of DNA is being typed by commercial firms. Bringing in analysts is expensive and disruptive. So Mr. Goldstein may be on to something when he says that *Williams* may "pass the end of the line to which five Justices are willing to extend the Confrontation Clause."

But we're of a different mind. Having come this far in support of the Clause, the Supreme Court is unlikely to pivot on such thin grounds. *Williams* really does feel like a distinction without a difference. So our money is on it being overturned.

Incidentally, two fascinating cases on the limits of punishment are also on the agenda. *Miller v. Alabama* and *Jackson v. Hobbs*, both set for oral argument on March 20, will decide whether sentencing 14-year old murderers to life without parole is cruel and unusual. Stay tuned!

[1] First reader to accurately attribute the "dizzy" comment gets an "attaboy" in the blog. For a hint, check out the title of your blogger's forthcoming novel in the "About" section.