

MARYLAND 2008 CRIMINAL LAW UPDATE

Bar Association of Baltimore City

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I. Basic Library for Maryland Criminal Practitioner

LexisNexis (Todd Pegler – 443-468-9103; Todd.Pegler@lexisnexis.com)

Maryland Criminal Law - Premium Library (\$135/month); Essentials (\$66/month)

Case law and statutes, Maryland Criminal Pattern Jury Instructions, Criminal Homicide Law, Criminal Practice and Procedure in the District Court of Maryland, Defending Allegations of Sexual Child Abuse in Maryland, Domestic Violence Cases: Handling Them Effectively in District and Circuit Courts, Handing the Drinking and Driving Case, Maryland's Consolidated Theft Law and Unauthorized Use, Maryland Sentencing Guidelines, Criminal Law Advocacy, Courtroom Criminal Evidence, Defense of Narcotics Cases, Defense of Drunk Driving, Criminal Law – Maryland Essentials of Practice Series, and Traffic Law – Maryland Essentials of Practice Series

Enacted Law

Maryland Criminal Law Code Annotated (two volumes)

Maryland Criminal Procedure Code Annotated (one volume)

Maryland Correctional Services Code Annotated (one volume)

Maryland Courts & Judicial Proceedings Code Annotated (two volumes)

Rules of Court - Maryland Rules of Procedure (two volumes)

Treatises

Substantive Criminal Law - LaFave, Substantive Criminal Law 2d & Supp. 2004 (one volume) & Criminal Law 4th (2003) (three volumes) (West)

Constitutional Criminal Procedure – Whitebread & Slobogin, Criminal Procedure: An Analysis of Cases & Concepts (2008) (Foundation)

Evidence

McLain, Maryland Evidence (State & Federal) 2d & Supp. 2008 (West)

Murphy, Maryland Evidence Handbook & Supp. 2007 (Matthew Bender)

DUI/DWI & Traffic

Handing Drinking & Driving Cases (MICPEL)

Defense of Drunk Driving (MICPEL)
Traffic Law (MICPEL)

CDS - Defense of Narcotics Cases (MICPEL)

Domestic Violence – Domestic Violence Cases: Handling Them Effectively in District & Circuit Courts (MICPEL)

Confessions - Jezic, Molony, & Nolan, Maryland Law of Confessions (2005) (West)

Homicide – Moylan, Criminal Homicide Law (MICPEL)

Theft – Moylan, Maryland’s Consolidated Theft Law and Unauthorized Use (MICPEL)

Sexual Child Abuse – Bernier, Defending Allegations of Sexual Child Abuse in Maryland (MICPEL)

Practice Manuals

Criminal Practice & Procedure in the District Court of Maryland (MICPEL)

Maryland Criminal Pattern Jury Instructions (2007 edition) (MICPEL)

Maryland Sentencing Guidelines Manual (Commission on Criminal Sentencing Policy)

Criminal Trial Manual – William D. Paton, Esq. (Hanford)

II. Supreme Court of the United States 2008 Cases

Wright v. Van Patten, 2008 U.S. LEXIS 200 (Jan. 7, 2008).

Defendant was charged with first degree murder and pleaded no contest to a reduced charge of first degree reckless homicide. Defendant was not present during the plea, but participated via speakerphone. The trial court imposed the maximum term of 25 years. Defendant retained new counsel and moved to withdraw the plea, arguing that the right to counsel had been violated. The state court denied relief, holding that there was no evidence to support ineffective assistance of counsel under Strickland. Defendant filed for habeas corpus relief, which the USDC granted, applying United States v. Cronic and not Strickland v. Washington. The COA affirmed. SCOTUS remanded for a decision under Musladin, and the COA again affirmed. SCOTUS reversed. Although this case presents a novel factual situation, precedent does not instruct the use of Cronic. SCOTUS held that, although counsel was only present via speakerphone, there was no argument that his participation in the plea was tantamount to having no counsel. The applicable standard for ineffective assistance of counsel claims is Strickland v. Washington. In applying Cronic, the USDC stated that Defendant did not have a claim under Strickland. Thus, habeas must fail. There was no evidence that the state court unreasonably applied clearly established federal law when it applied Strickland.

Arave v. Hoffman, 552 U.S. ____ (2008).

Defendant was convicted of first degree murder and sentenced to death. Defendant sought habeas corpus relief, alleging ineffective assistance of counsel during the plea bargaining process and the sentencing phase. The USDC granted habeas relief, in part, finding that trial counsel was ineffective during the sentencing phase and ordered a re-sentencing. The COA affirmed as to the sentencing issue, but reversed as to the plea agreement issue, finding that trial counsel was also ineffective in the plea negotiations. The State sought certiorari. Defendant moved to vacate the decision and dismiss the cause as moot because he no longer wished to pursue the plea agreement issue. SCOTUS granted Defendant’s motion.

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

Defendant sought post conviction relief after SCOTUS decided Crawford, arguing that he was entitled to a new trial because the victim's taped interview was admitted in violation of Crawford. Minnesota held that Crawford did not apply retroactively under Teague v. Lane. SCOTUS stated that Teague held that a new constitutional rule could not provide federal habeas relief from a state conviction, but that Teague did not prevent state courts from providing collateral relief. Crawford announced a "new rule" because its result was not dictated by precedent existing at the time Defendant's conviction became final. Under Teague, new constitutional rules of criminal procedure cannot be applied retroactively unless they place conduct beyond the states' power to proscribe, or they are "watershed" rules of criminal procedure. The Teague limitations on retroactivity only apply to federal courts and do not apply to state courts applying state remedies.

Boulware v. United States, 128 S. Ct. 1168 (2008).

Defendant was convicted of tax evasion based on diverting funds from a closely held corporation. Defendant argued that there was no tax deficiency because the corporation had no earnings and profits in the relevant years. Thus, Defendant received distributions that constituted return of capital up to his ownership, which are not taxable. The USDC rejected this argument because Defendant failed to prove that the amounts were intended to be a return of capital when made. SCOTUS reversed, explaining that under Miller, the rule that a return of capital defense requires evidence of a corresponding contemporaneous intent goes against tax law's economic realisms and the wording of the statutes. The Court further explained that tax consequences of distributions depend not on intent, but whether the corporation had earnings and profits. SCOTUS overruled Miller and vacated and remanded.

Snyder v. Louisiana, 128 S. Ct. 1203 (2008).

Defendant was convicted of first degree murder and sentenced to death. He sought certiorari, arguing that the State exercised preemptory challenges based on race, which SCOTUS granted. A total of 85 prospective jurors were questioned, and 36 survived challenges for cause. Five of these 36 were black, and all five were stricken by the State, using preemptory strikes. Defendant made a Batson challenge as to a college student then student teaching. The State argued that (1) the juror appeared nervous, and (2) he would miss his student teaching class. SCOTUS reversed and remanded, holding that the trial court erred in rejecting Defendant's Batson challenge. Under Batson, (1) Defendant must make a prima facie showing that the challenge was based on race; (2) if so, the State must offer a race-neutral basis for striking the juror; and (3) the court must determine whether Defendant has shown purposeful discrimination. SCOTUS explained that the fact that the potential juror was completing student teaching was insufficient because the dean had informed the court that the student could miss up to a week of student teaching with no negative consequences. There was no evidence in the record that the trial court considered the fact that the juror was "nervous," thus, SCOTUS could not presume that the trial court credited this as a race-neutral factor for striking.

Medellin v. Texas, 128 S. Ct. 1346 (2008).

Defendant, a Mexican national, was convicted of rape and murder and sentenced to death. Under Article 36 of the Vienna Convention, consular officers have the right to provide assistance to their nationals detained in foreign countries. Mexican consular officers provide assistance for

those facing the death penalty by providing funds for experts and investigators, speaking with family members, and helping to secure competent and experienced counsel. In Defendant's case, the Mexican government was not notified until after various appeals. Mexico initiated proceedings in the International Court of Justice against the United States for violating the Vienna Convention with respect to Defendant. The ICJ held that the United States breached the Vienna Convention by failing to inform Mexican nationals of their rights under the Convention and by failing to notify Mexican consular officials. The ICJ found that the United States must review and reconsider the sentence. Defendant sought federal habeas relief, but the COA denied relief because he had not raised this below, and that procedural default rules can bar Vienna Convention claims. Two months after SCOTUS granted certiorari, President Bush issued a memorandum stating that the United States would comply with its international obligations by having state courts give effect to the ICJ decision in cases filed by 51 Mexican nationals. SCOTUS dismissed the case, as certiorari improvidently granted, citing the Bush memorandum. In 2006, Texas dismissed Defendant's case, stating that President Bush had exceeded his constitutional authority by invading the independent powers of the judiciary. Defendant appealed. SCOTUS held (5-4) that the President had exceeded his authority, and the Vienna Convention did not suggest that an international tribunal would trump United States courts.

Burgess v. United States, 128 S. Ct. 1572 (2008).

Defendant had previously been convicted in South Carolina of misdemeanor cocaine of possession, subject to a two-year sentence. Defendant later pleaded guilty in federal court to conspiracy to possess with intent to distribute 50 grams or more of cocaine base. Defendant received an enhanced sentence under the Controlled Substances Act, which doubles the mandatory minimum for certain federal drug crimes if Defendant had previously been convicted of a "felony drug offense." The statute defined "felony drug offense" as a drug offense punishable by more than one year. Defendant argued that, although he was previously convicted of a drug offense that carried a maximum sentence of two years, it was not a felony under state law. SCOTUS held that, because the term "felony drug offense" is statutorily defined based on a sentence over one year, Defendant's prior conviction subjects him to the enhanced penalties, even though his previous conviction is a misdemeanor under state law. The term "felony drug offense," is used as a term of art in the statute. In 1994, Congress amended the definition to eliminate disparities caused by differing state classifications, and adopting a uniform standard.

Baze v. Rees, 128 S. Ct. 1520 (2008).

Two death row inmates challenged the "drug cocktail" used for lethal injections as cruel and unusual under the Eighth Amendment because it causes unnecessary pain and suffering. Of the 37 states that permit the death penalty, 36 states use lethal injection. SCOTUS held that lethal injection is only unconstitutional when there is a substantial risk of serious harm and mere pain caused by the execution method is not cruel and unusual punishment.

Begay v. United States, 128 S. Ct. 1581 (2008).

Defendant pleaded guilty to felony firearm possession. Under the Armed Career Criminal Act, a felon who unlawfully possesses a firearm and has three or more prior convictions for certain drug crimes or a "violent felony" receives a mandatory 15-year sentence. Defendant had prior DUI convictions. The sentencing court found that these were "violent felonies" and enhanced Defendant's sentence by 15 years. SCOTUS held that felony DUI under New Mexico law is not a "violent felony" under the Armed Career Criminal Act, which requires having

committed it in a violent manner on that occasion. DUI is not a violent felony.

Virginia v. Moore, 2008 U.S. LEXIS 3674 (Apr. 23, 2008).

Defendant was stopped by officers based on suspicion of driving without a license. Under Virginia law, driving without a license is not an arrestable offense. Nonetheless, officers arrested Defendant. A search incident to the arrest produced cocaine. SCOTUS held that the police did not violate the Fourth Amendment when they arrested Defendant based on probable cause, even though state law prohibited the arrest. Consequently, the search incident to the arrest was lawful. Although Virginia chose to provide more rights than those guaranteed by the Fourth Amendment, it did not also include an exclusionary rule that mirrors the federal constitutional exclusionary rule. The arrest was reasonable. A search or seizure can be reasonable under the Fourth Amendment even if it violates state law or regulations.

Gonzalez v. United States, 2008 U.S. LEXIS 3887 (May 12, 2008).

A magistrate judge conducted jury voir dire, following agreement by the Government and Defendant. Defendant was assisted by a translator and was not personally asked for consent. SCOTUS held (8-1) that a magistrate judge may preside over jury selection when explicitly agreed to by defense counsel. In Peretz v. United States, 501 U.S. 923 (1991), the Court held that the a federal statute that allowed magistrates to conduct voir dire was not unconstitutional provided the parties to the case agreed. This includes defense counsel or Defendant.

United States v. Ressam, 2008 U.S. LEXIS 4316 (May 19, 2008).

The Defendant was convicted of the felony false statement to a federal customs official regarding carrying explosive during committing a felony. The COA reversed Defendant's conviction because it read the word "during" to include a requirement that the explosive be carried "in relation to" the underlying felony. SCOTUS held (8-1) that "during" merely requires a temporal link and reinstated Defendant's conviction. Furthermore, the Court noted that the marked difference in language between the amended explosives statute, which requires explosives be carried "during" the commission of the underlying felony, and the amended § 924(c)(2) firearm statute, which requires that a firearm be carried "during and in relation to the underlying felony," indicated that Congress did not intend to introduce a relational requirement..

United States v. Rodriquez, 2008 U.S. LEXIS 4313 (May 19, 2008).

Defendant was convicted for violation of 18 U.S.C.S. § 922(g)(1), possession of a firearm by a convicted felon. The Government contended that the Defendant should be sentenced under the Armed Career Criminal Statute (ACCA), which requires a 15-year minimum sentence when Defendant has three previous convictions for violent felonies or "serious drug offenses." ACCA provides that a drug trafficking conviction qualifies as a serious criminal offense if the maximum sentence is ten years. At the time of the Defendant's § 922(g)(1) conviction, he had previously been convicted of three drug trafficking offenses under Washington law and two burglary offenses, which are violent felonies under California law. USDC refused to sentence under ACCA, holding that the "maximum term of imprisonment" is determined without reference to recidivist enhancements. Thus, because Defendant had only been convicted of two ACCA qualifying offenses (burglaries), ACCA sentencing was not triggered. The COA affirmed. SCOTUS reversed (6-3), holding that the plain meaning of "maximum term of imprisonment prescribed by law" includes any applicable recidivist enhancements. Because Defendant could have been sentenced to ten years for two of his drug trafficking convictions, under the recidivist

provision, those offenses qualify as “serious drug offenses” under ACCA.

Boumediene v. Bush, 76 U.S.L.W. 4406 (Jun. 12, 2008).

SCOTUS held (5-4) that enemy combatants have the constitutional privilege of habeas corpus. The Court ruled that habeas corpus may only be suspended in conformance with the Suspension Clause (art. I, § 9, cl. 2). Detainee Treatment Act of 2005 (DTA), which provides for Combatant Status Review Tribunals (CSRT’s) to review enemy combatant status instead of habeas corpus proceedings, is a constitutionally inadequate substitute for the protection of habeas corpus. Furthermore, section 7 of the Military Commissions Act of 2006 (MCA), which suspends habeas corpus protection to enemy combatants, is unconstitutional. Defendants were declared enemy combatants by the CSRT, denied al Qaeda membership, and sought habeas corpus in the USDC, which dismissed the claims for lack of jurisdiction. The COA held that enemy combatants are not entitled to the protections provided by Suspension Clause and, thus, section 7 of MCA is not unconstitutional. SCOTUS agreed that, if constitutional, section 7 and DTA would prevent courts from considering habeas corpus relief. Legislative history framed the Court’s analysis. Following *Rasal v. Bush*, 543 U.S. 466 (2004), in which SCOTUS held that 28 USC § 2241 extended statutory habeas jurisdiction to Guantanamo, Congress enacted DTA amending 18 USC § 2241 to deny any court jurisdiction over Guantanamo detainees. However, because Congress did not indicate whether DTA stripped federal courts of jurisdiction over pending habeas cases, SCOTUS, in *Hamdan v. Rumsfeld*, reasoned that DTA did not affect pending habeas cases. In response, Congress enacted section 7 of MCA, once again amending section 2241, stripping federal courts of jurisdiction over pending habeas corpus applications. SCOTUS considered whether the physical location of Guantanamo excused the denial of writ of habeas corpus. The Court noted that, although Guantanamo is under the formal sovereignty of Cuba, it is under United States’ control. SCOTUS rejected the Government’s “formal sovereignty” argument that, because Guantanamo belongs to Cuba, the Constitution was not controlling. A violation of the Suspension Clause could not be excused by physical location, and was a usurpation of judicial power, upsetting the balance of power. The Court also rejected the Government’s concerns that providing habeas relief to enemy combatants would compromise the military’s mission and interfere with security efforts, reasoning that security concerns were not compelling given that enemy combatants are housed in the entirely secure Guantanamo facility. Finding that enemy combatants were entitled to habeas corpus, SCOTUS considered whether CSRT’s were constitutionally adequate substitutes. Given the significant deficiencies present in the CSRT process, including severe restrictions on the ability to challenge the factual basis for detention and the admissibility of hearsay, and that Congress gave COA’s the exclusive limited power to review CRST proceedings. SCOTUS held that CSRT’s did not satisfy constitutional habeas requirements.

Irizarry v. United States, 2008 U.S. LEXIS 4886 (Jun. 12, 2008).

Defendant pleaded guilty to making a threatening interstate communication to his wife in violation of federal law. Although the presentence report recommended a Federal Sentencing Guideline range of 41 to 51 months, the trial court, without notice, imposed the statutory maximum of 60 months, followed by three years supervised release. The trial court rejected Defendant’s argument that Fed. R. Crim. P. 32(h) entitled him to notice that the court was considering an upward departure. The COA affirmed Defendant, refusing to extend Rule 32(h) notice requirement for Guideline departures, noting that post Booker, Sentencing Guidelines are merely advisory. SCOTUS affirmed (5-4). Because Booker made Sentencing Guidelines

