Appellate Court Decisions - Week of 6/15/15

First Appellate District of Ohio

***State v. Woodruff*, 2015-Ohio-2417**

Sex Offenses: Joinder: Evidence: Confrontation Clause: Hearsay: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-140256_06192015.pdf

Summary from the First District:

"Where defendant was charged with rape and gross sexual imposition against two child victims, illegal use of a minor in nudity-oriented material and pandering sexually-oriented material, the trial court did not err in refusing to sever the counts, because the evidence of each offense was separate and uncomplicated.

"The trial court did not err in refusing to allow defendant to question the child victims about a purported false allegation of sexual abuse against one of the victim's father where the court concluded that no false allegation had been made.

"The trial court did not err in allowing the victims' interviews with social workers to be played in their entirety. There was no Confrontation Clause violation because both victims testified at trial. Further, the circumstances supported a finding that the statements were admissible under the hearsay exception for statements made for medical diagnosis or treatment.

"The admission of an investigator's report containing multiple sexually-explicit images of women, girls and cartoon figures found on defendant's computer was not error, because the images were relevant to whether defendant knew they were on his computer.

"The trial court erred when it failed to make the required findings before ordering that the sentences be served consecutively and to incorporate those findings in its sentencing entry."

Second Appellate District of Ohio

Nothing new.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

Nothing new.

Fifth Appellate District of Ohio

Nothing new.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

Nothing new.

Eighth Appellate District of Ohio

***State v. Anthony*, 2015-Ohio-2267**

Sentencing: Allied Offenses

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-2267.pdf

The trial court erred in failing to merge Appellant's convictions for involuntary manslaughter and felonious assault. Appellant and the victim were friends who had been drinking and doing drugs on the night of the incident. At some point they started arguing, and Appellant stabbed the victim four times on the "backside." There is nothing in the record to support the state's argument that the stab wounds could be separated into fatal and nonfatal stab wounds. There is also nothing in the record establish the offenses were committed separately or with a separate animus. F

***State v. Thompson*, 2015-Ohio-2261**

Jurisdiction

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-2261.pdf

Summary from the Eighth District:

State of Ohio lacked jurisdiction over 11 counts of identity fraud where the evidence showed no reasonable connection between those charges and the underlying criminal enterprise for which the defendant was prosecuted. The admission of evidence about other subsequent alleged fictitious enterprises did not rise to the level of plain error even if unfairly prejudicial due to the overwhelming evidence of defendant's guilt on the remaining charges. Trial court's order of solitary confinement on Veteran's Day was contrary to law.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

***State v. Newland*, 2015-Ohio-2358**

Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2015/2015-Ohio-2358.pdf

The trial court did not err in granting Newland's motion to suppress the search of his person under the following set of facts: "The evidence indicated that two Columbus Police Officers were on patrol when they saw a group of people outside a public library. The officers parked their cruiser and approached the group.

"One of the officers asked part of the group if they had any weapons. That part of the group denied being armed. The other officer started frisking some members of the group. The officer who initially asked the one part of the group if they were armed then asked Newland if he had any weapons. Newland responded that he did not, but then ran away.

"Despite having no warrant for an arrest and no probable cause to arrest Newland, the two officers chased Newland down and grabbed him. Newland was then handcuffed, frisked and placed in a police cruiser. During the frisking, no weapons were detected."

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Brumfield v. Cain*, Slip Opinion No. 13-1433**

Murder: IQ

Full Decision: http://www.supremecourt.gov/opinions/14pdf/13-1433_bpm1.pdf

Syllabus of the Court:

Petitioner Kevan Brumfield was convicted of murder in a Louisiana court and sentenced to death before this Court held that the Eighth Amendment prohibits execution of the intellectually disabled, *Atkins* v. *Virginia*, 536 U. S. 304. Implementing *Atkins*' mandate, see *id.,* at 317, the Louisiana Supreme Court determined that an evidentiary hearing is required when a defendant "provide[s] objective factors" sufficient to raise a " 'a reasonable ground' " to believe that he has an intellectual disability, which the court defined as "(1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." *State v. Williams,* 2001–1650 (La. 11/1/02), 831 So. 2d 835, 857, 861, 854.

Soon after the *Williams* decision, Brumfield amended his pending state postconviction petition to raise an *Atkins* claim. Seeking an evidentiary hearing, he pointed to evidence introduced at sentencing that he had an IQ of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having a learning disability, and had been placed in special education classes. The trial court dismissed Brumfield's petition without holding a hearing or granting funds to conduct additional investigation. Brumfield subsequently sought federal habeas relief. The District Court found that the state court's rejection of Brumfield's claim was both "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by" this Court and "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§2254(d)(1), (2). The court went on to determine that

Brumfield was intellectually disabled. The Fifth Circuit found that Brumfield's petition failed to satisfy either of §2254(d)'s requirements and reversed.

***Held*:** Because Brumfield satisfied §2254(d)(2)'s requirements, he was entitled to have his *Atkins* claim considered on the merits in federal court. Pp. 6–19.

(a) The two underlying factual determinations on which the state trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he presented no evidence of adaptive impairment—were unreasonable under §2254(d)(2). Because that standard is satisfied, the Court need not address §2254(d)(1). Pp. 6–17.

(1) Expert trial testimony that Brumfield scored a 75 on an IQ test is entirely consistent with intellectual disability. Every IQ score has a margin of error. Accounting for that margin of error, the sources on which the *Williams* court relied in defining subaverage intelligence describe a score of 75 as consistent with an intellectual disability diagnosis. There was no evidence presented to the trial court of any other IQ test that was sufficiently rigorous to preclude the possibility that Brumfield possessed subaverage intelligence. Pp. 8– 11.

(2) The state-court record contains sufficient evidence to suggest that Brumfield would meet the criteria for adaptive impairment. Under the test most favorable to the State, an individual like Brumfield must show a "substantial functional limitation" in three of six "areas of major life activity." *Williams*, 831 So. 2d, at 854. Brumfield—who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level—would seem to be deficient in two of those areas: "[u]nderstanding and use of language" and "[l]earning." *Ibid*. His low birth weight, his commitment to mental health facilities at a young age, and officials' administration of antipsychotic and sedative drugs to him at that time all indicate that he may well have had significant deficits in at least one of the remaining four areas. In light of that evidence, the fact that the record contains some contrary evidence cannot be said to foreclose all reasonable doubt as to his intellectual disability. And given that Brumfield's trial occurred before *Atkins*, the trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. Pp. 11–17.

(b) The State's two additional arguments are rejected. Because the State did not press below the theory that §2254(e)(1) supplies the governing standard when evaluating whether a habeas petitioner has satisfied §2254(d)(2)'s requirements, that issue is not addressed here. And because the state trial court made no finding that Brumfield had failed to produce evidence suggesting he could meet the "manifestations . . . in the developmental stage" requirement for intellectual disability, there is no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied §2254(d).In any event, the state court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood. Pp. 17–18.

744 F. 3d 918, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in all but Part I–C of which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined.

***Davis v. Ayala*, Slip Opinion No. 13-1428**

Batson*: *Ex Parte

Full Decision: http://www.supremecourt.gov/opinions/14pdf/13-1428_n640.pdf

Syllabus of the Court:

During jury selection in respondent Ayala's murder trial, Ayala, who is Hispanic, objected that seven of the prosecution's peremptory challenges were impermissibly race-based under *Batson* v. *Kentucky*, 476 U. S. 79. The judge permitted the prosecution to disclose its reasons for the strikes outside the presence of the defense and concluded that the prosecution had valid, race-neutral reasons for the strikes. Ayala was eventually convicted and sentenced to death. On appeal, the California Supreme Court analyzed Ayala's challenge under both *Batson* and its state-law analogue, concluding that it was error, as a matter of state law, to exclude Ayala from the hearings. The court held, however, that the error was harmless under state law and that, if a federal error occurred, it too was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U. S. 18. Ayala subsequently pressed his claims in federal court. There, the District Court held that even if the *ex parte* proceedings violated federal law, the state court's harmlessness finding could not be overturned because it was not contrary to or an unreasonable application of clearly established federal law under 28 U. S. C. §2254(d). A divided panel of the Ninth Circuit disagreed and granted Ayala habeas relief. The panel majority held that the *ex parte* proceedings violated Ayala's federal constitutional rights and that the error was not harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619, as to at least three of the seven prospective jurors.

***Held*:** Any federal constitutional error that may have occurred by excluding Ayala's attorney from part of the *Batson* hearing was harmless. Pp. 9–29.

(a) Even assuming that Ayala's federal rights were violated, he is entitled to habeas relief only if the prosecution cannot demonstrate harmlessness. *Glebe* v. *Frost*, 574 U. S. ___, ___. Under *Brecht*, federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " 507 U. S., at 637. Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. The *Brecht* standard sub-

sumes the requirements that §2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*. *Fry* v. *Pliler*, 551 U. S. 112, 120. But *Brecht* did not abrogate the limitation on federal habeas relief that the Antiterrorism and Effective Death Penalty Act of 1996 plainly sets out. There is no dispute that the California Supreme Court held that any federal error was harmless under *Chapman*, and this decision was an "adjudication on the merits" of Ayala's claim. Accordingly, a federal court cannot grant Ayala relief unless the state court's rejection of his claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts. Pp. 9–12.

(b) Any federal constitutional error was harmless with respect to all seven prospective jurors. Pp. 12–28.

(1) The prosecution stated that it struck Olanders D., an African-American man, because it was concerned that he could not impose the death penalty and because of the poor quality of his responses. As the trial court and State Supreme Court found, the record amply supports the prosecution's concerns, and Ayala cannot establish that the *ex parte* hearing prejudiced him. The Ninth Circuit misunderstood the role of a federal court in a habeas case. That role is not to conduct *de novo* review of factual findings and substitute the federal court's own opinions for the determination made on the scene by the trial judge. Pp. 14–18.

(2) The prosecution stated that it struck Gerardo O., a Hispanic man, because he had a poor grasp of English, his answers suggested an unwillingness to impose the death penalty, and he did not appear to get along with other jurors. Each of these reasons was amply supported by the record, and there is no basis for finding that the absence of defense counsel affected the trial judge's evaluation of the strike. Ayala cannot establish that the *ex parte* hearing actually prejudiced him or that no fairminded jurist could agree with the state court's application of *Chapman*. Once again, the Ninth Circuit's decision was based on a misapplication of basic rules regarding harmless error. The inquiry is not whether the federal habeas court could definitively say that the defense could make no winning arguments, but whether the evidence in the record raised "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal* v. *McAninch*, 513 U. S. 432, 436. That standard was not met in this case. Pp. 18–24.

(3) The prosecution stated that it struck Robert M., a Hispanic man, because it was concerned that he could not impose the death penalty and because he had followed a controversial murder trial. Not only was the Ninth Circuit incorrect to suppose that the presence of Ayala's counsel at the hearing would have made a difference in the trial court's evaluation of the strike, but the Ninth Circuit failed to mention that defense counsel specifically addressed the issue during *voir dire* and reminded the judge that Robert M. also made several statements favorable to the death penalty. Thus, the trial judge heard counsel's arguments and concluded that the record supplied a legitimate basis for the prosecution's concern. That defense counsel did not have the opportunity to repeat that argument does not create grave doubt about whether the trial court would have decided the issue differently. Pp. 24–26.

(4) With regard to Ayala's *Batson* objection about the four remaining prospective jurors who were struck, he does not come close to establishing "actual prejudice" under *Brecht* or that no fairminded jurist could agree with the California Supreme Court's decision that excluding counsel was harmless. Pp. 26–28.

756 F. 3d 656, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined.

***Ohio v. Clark*, Slip Opinion No. 13-1352**

Confrontation Clause

Full Decision: http://www.supremecourt.gov/opinions/14pdf/13-1352_ed9l.pdf

Syllabus of the Court:

Respondent Darius Clark sent his girlfriend away to engage in prostitution while he cared for her 3-year-old son L. P. and 18-month-olddaughter A. T. When L. P.'s preschool teachers noticed marks on his body, he identified Clark as his abuser. Clark was subsequently tried on multiple counts related to the abuse of both children. At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. The trial court denied Clark's motion to exclude the statements under the Sixth Amendment's Confrontation Clause. A jury convicted Clark on all but one count. The state appellate court reversed the conviction on Confrontation Clause grounds, and the Supreme Court of Ohio affirmed.
Held: The introduction of L. P.'s statements at trial did not violate the Confrontation Clause. Pp. 4–12.

(a) This Court's decision in *Crawford* v. *Washington*, 541 U. S. 36, 54, held that the Confrontation Clause generally prohibits the introduction of "testimonial" statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U. S. 344, 369. In making that "primary purpose" determination, courts must consider "all of the relevant circumstances." *Ibid.* "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.,* at 359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The Court has recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been

admissible in a criminal case at the time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359; *Crawford*, 541 U. S., at 56, n. 6, 62. Thus, the primary purpose testis a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause. Pp. 4–7.

(b) Considering all the relevant circumstances, L. P.'s statements were not testimonial. L. P.'s statements were not made with the primary purpose of creating evidence for Clark's prosecution. They occurred in the context of an ongoing emergency involving suspected child abuse. L. P.'s teachers asked questions aimed at identifying and ending a threat. They did not inform the child that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation was informal and spontaneous. L. P.'s age further confirms that the statements in question were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. As a historical matter, moreover, there is strong evidence that statements made in circumstances like these were regularly admitted at common law. Finally, although statements to individuals other than law enforcement officers are not categorically outside the Sixth Amendment's reach, the fact that L. P. was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers. Pp. 7–10.

(c) Clark's arguments to the contrary are unpersuasive. Mandatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. And this Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial. Pp. 11–12.

137 Ohio St. 3d 346, 2013–Ohio–4731, 999 N. E. 2d 592, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. THOMAS, J., filed an opinion concurring in the judgment.

***McFadden v. United States*, Slip Opinion No. 14-378**

Analogue Controlled Substances

Full Decision: http://www.supremecourt.gov/opinions/14pdf/14-378_k537.pdf

Syllabus of the Court:

Petitioner McFadden was arrested and charged with distributing controlled substance analogues in violation of the federal Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which identifies a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U. S. C. §802(32)(A), and instructs courts to treat those analogues as schedule I controlled substances if they are intended for human consumption,§813. Arguing that he did not know the "bath salts" he was distributing were regulated as controlled substance analogues, McFadden sought an instruction that would have prevented the jury from finding him guilty unless it found that he knew the substances he distributed had chemical structures and effects on the central nervous system substantially similar to those of controlled substances. Instead, the District Court instructed the jury that it need only find that McFadden knowingly and intentionally distributed a substance with substantially similar effects on the central nervous system as a controlled substance and that he intended that substance to be consumed by humans. McFadden was convicted. The Fourth Circuit affirmed, holding that the Analogue Act's intent element required only proof that McFadden intended the substance to be consumed by humans.

***Held*:** When a controlled substance is an analogue, §841(a)(1) requires the Government to establish that the defendant knew he was dealing with a substance regulated under the Controlled Substances Act or Analogue Act. Pp. 4–11.

(a) In addressing the treatment of controlled substance analogues under federal law, one must look to the CSA, which, as relevant here, makes it "unlawful for any person knowingly . . . to distribute . . . a controlled substance." §841(a)(1). The ordinary meaning of that provision requires a defendant to know only that the substance he is distributing is some unspecified substance listed on the federal drug schedules. Thus, the Government must show either that the defendant knew he was distributing a substance listed on the schedules, even if he did not know which substance it was, or that the defendant knew the identity of the substance he was distributing, even if he did not know it was listed on the schedules.
Because the Analogue Act extends that framework to analogous substances, the CSA's mental-state requirement applies when the controlled substance is, in fact, an analogue. It follows that the Government must prove that a defendant knew that the substance he was distributing was "a controlled substance," even in prosecutions dealing with analogues. That knowledge requirement can be established in two ways: by evidence that a defendant knew that the substance he was distributing is controlled under the CSA or Analogue Act, regardless of whether he knew the substance's identity; or by evidence that the defendant knew the specific analogue he was distributing, even if he did not know its legal status as a controlled substance analogue. A defendant with knowledge of the features defining a substance as a controlled substance analogue, §802(32)(A),knows all of the facts that make his conduct illegal. Pp. 4–8.

(b) The Fourth Circuit did not adhere to §813's command to treat a controlled substance analogue as a controlled substance listed in schedule I by applying §841(a)(1)'s mental-state requirement. Instead, it concluded that the only mental-state requirement for ana-

logue prosecutions is the one in §813—that an analogue be "intended for human consumption." That conclusion is inconsistent with the text and structure of the statutes.

Neither the Government's nor McFadden's interpretation fares any better. The Government's contention that §841(a)(1)'s knowledge requirement as applied to analogues is satisfied if the defendant knew he was dealing with a substance regulated under some law ignores §841(a)(1)'s requirement that a defendant know he was dealing with "a controlled substance." That term includes only drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act; it is not broad enough to include all substances regulated by any law. McFadden contends that a defendant must also know the substance's features that cause it to fall within the scope of the Analogue Act. But the key fact that brings a substance within the scope of the Analogue Act is that the substance is "controlled," and that fact can be established in the two ways previously identified. *Staples* v. *United States*, 511 U. S. 600, distinguished. Contrary to McFadden's submission, the canon of constitutional avoidance "has no application" in the interpretation of an unambiguous statute such as this one. *Warger* v. *Shauers*, 574 U. S. ___, ___. But even if the statute were ambiguous, the scienter requirement adopted here "alleviate[s] vagueness concerns" under this Court's precedents. *Gonzales* v. *Carhart*, 550 U. S. 124, 149. Pp. 8–10.

(c) The Government argues that no rational jury could have concluded that McFadden was unaware that the substances he was distributing were controlled under the CSA or Analogue Act and that any error in the jury instruction was therefore harmless. The Fourth Circuit, which did not conduct a harmless-error analysis, is to consider that issue in the first instance. Pp. 10–11.

753 F. 3d 432, vacated and remanded.

THOMAS, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and concurring in the judgment.