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2016 CADC Conference Preview

Stanford Law Professor Jeffrey Fisher to Speak:
U.S. Supreme Court Update on Criminal Procedure

by Pat Ford

Last year, the Supreme Court decided *Riley v. California* (2014) 134 S. Ct. 2473, and found the warrantless search of the cell phone of an arrestee violated the Fourth Amendment. It was an important case because it was the court's first look at the reasonableness of warrantless police searches in the digital age. Chief Justice Roberts, writing on behalf of a unanimous court, found that data stored digitally is different than traditional physical items an arrestee might have on his or her person, and that if officers want to search a phone they need to "get a warrant."

Reaction to the decision was unique as it was lauded by both progressives interested in protecting citizens' privacy rights, and conservatives who fear over-involvement by the government. So it was a simple case where everyone agreed, right? Given these facts, an appellate lawyer need only file a cert petition, and once granted, brief and argue the case. No sweat, right? Wrong! There was far less clarity on the issue in the years preceding the opinion in *Riley*. The California Supreme Court had ruled in *People v. Diaz* (2011) 51 Cal.4th 87, that police could conduct a warrantless search of a cell phone under the search incident to arrest exception to the warrant requirement. Several other state supreme courts and federal circuit courts agreed. So

continued on Page 2

Don't miss CADC's 23rd Annual Conference and Seminar at the San Jose Hilton on March 11 and 12, 2016!

Dependency Program

by Alexis Collentine

The dependency program for the 2016 CADC conference is shaping up nicely and we hope it will provide some new knowledge, new tools, and new ideas. There will be presentations on writing persuasive briefs and petitions for review, on the new ICWA Guidelines, and on using federal law in non-ICWA cases. Read on for a little more in-depth information about two of the sessions.

The New ICWA Guidelines

Whether you can spot an Indian Child Welfare Act issue at twenty paces, and actually understand customary tribal adoption, or, like me, still find yourself foundering on the reefs of the ICWA, the updated ICWA Guidelines are a big deal.

As the February 25, 2015, Federal Register stated, "Although there have been significant developments in ICWA jurisprudence, the guidelines have not been updated since they were originally published in 1979." That's right, it's been *36* years since the guidelines have been updated.

In the face of continued noncompliance with the ICWA, both on the state and federal level, and ongoing ICWA violations, the Bureau of Indian Affairs decided that perhaps people could use a little more guidance. And, earlier this year, the BIA finally released an updated version. The updates are meant to provide clarity, and improve implementation, with the hope that better application of the ICWA will provide greater protection to Indian families.

continued on Page 4

CalAppNews * Winter 2015

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IN THIS ISSUE:

2016 Conference Preview 1
First CADC Trial Counsel Outreach Presentation 5
Santa Cruz Chapter of CADC rises again!........5
Felonies or Misdemeanors, Motions for Bail ...6
The "Abuse of Discretion" Standard of Review...8
Justice Sotomayor on AEDPA 10
Interview with Adam Benforado......................10
Hats Off to CADC Superhero Fay Arfa 12
Rocking with the Whitecliff Rangers 14
2015 Innocence Symposium 15

Jeffrey Fisher...*continued from Page 1:*

how did the issue become so clear and result in such a logical unanimous opinion from the U.S. Supreme Court?

The answer is easy — effective appellate advocacy from Jeff Fisher, who was lead counsel in *Riley*. Jeff currently runs the Stanford Supreme Court Litigation Clinic and has argued 28 cases in the court. He's talented, experienced, and has an incredible network of people who help inform him on how best to be effective before the court.

Riley's case is a good example, starting with the cert petition. Many committed appellate lawyers with a worthy issue might spend a weekend drafting a cert petition and hope for the best. But the cert petition in *Riley's* case was a product of hundreds of hours of research and discussion by Jeff, co-counsel, talented law students in the clinic, and Jeff's contacts who have a Supreme Court practice or once clerked for a member of the Court. I know, because Riley was my case in the state courts, and I remained co-counsel in the Supreme Court. The *Riley* team conducted regular workshops discussing every aspect of the case in an effort to make the most persuasive argument possible. Jeff also enlisted the help of technology experts, and the cert petition was supported by three amicus briefs.

Once the court granted cert, the process was much the same through briefing and oral argument preparation. That process included lengthy moot court arguments at Stanford, UCLA and Georgetown before accomplished faculty members who were highly regarded academics, former justice department officials, and a conservative former circuit court judge who was fairly recently on the short list at the Supreme Court. And 13 organizations filed amicus briefs at this stage.

While Jeff was prepared for the oral argument, it was clear that the justices were conflicted, as several asked questions as to why digital data was entitled to special Fourth Amendment protection. If police can search photos in an arrestee's wallet, why can't they look for the same photos on the arrestee's phone? But Jeff fielded the questions beautifully, and anyone looking to listen to an effective argument should check Jeff's presentation in *Riley's* case — you can

continued on Page 7

Jeffrey Fisher...*continued from Page 2:*

listen to the arguments at the Oyez Project, at <https://www.oyez.org/cases/2013/13-132>.

The result — a beautiful and unanimous opinion explaining the importance of privacy in the digital age.

While *Riley* was a big case, that kind of success wasn't new to Jeff Fisher. Many of us heard his name for the first time after reading *Crawford v. Washington* (2004) 541 U.S. 36. In *Crawford*, the court rejected the Confrontation Clause analysis it had used for years that focused on the reliability of a hearsay statement. Justice Scalia, writing for the majority (consistent with his originalist philosophy), found that the right of confrontation actually means that an accused has a right to confront his/her accuser, and the testimonial statements of an unavailable witness are only admissible if the defendant had an opportunity to cross-examine the declarant.

Once again, *Crawford* seems straightforward and logical, but one can only imagine the effort and talent required to get the court to reverse its course and adopt the "testimonial" approach to the right of confrontation.

Crawford was Jeff's idea, but at the time he didn't have the Stanford machine to support his effort. He was a young lawyer from Kansas City working for a civil law firm in Seattle, Washington (and married to a public defender). He was accomplished, having gone to great schools and clerked for Judge Reinhardt on the Ninth Circuit, and then Justice Stevens on the Supreme Court. But he handled this case with far less support. He had been doing some work for the NACDL amicus committee, and called Crawford's lawyer to see if he would be filing a cert petition. When the lawyer said "No," Jeff offered to become counsel of record.

Crawford signaled a sea change in Confrontation Clause analysis, and Jeff followed with *Davis v. Washington* (2006) 547 U.S. 813, clarifying the meaning of "testimonial" statements for purposes of *Crawford*, and later (while working at the clinic) with *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 307, where the court found that crime lab results are inadmissible unless the analyst testifies.

While working on the Confrontation Clause cases, Jeff also presented the defendant's case in *Blakely v. Washington* (2004) 542 U.S. 296, where the court expanded the Sixth Amendment right to a jury trial — finding any facts (other than a prior conviction) that increase the penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt. *Blakely* was another game changer.

Jeff's work in these cases, and several others, made him an obvious choice to run Stanford's Supreme Court clinic. He had been working at Stanford as an associate professor since 2006 and became a full professor of law in 2012. The clinic is now at the forefront of Supreme Court litigation, and Jeff frequently appears before the court arguing cases prepared by his Stanford team — with Jeff always leading the effort.

Jeff is at the top of our profession. He's a humble guy who remains true to his Midwest roots. Despite a hectic schedule, he makes time to talk to various groups about the law. Jeff has agreed to speak at CADC's 2016 Annual Conference and Seminar, Friday, March 11, 2016, at the San Jose Hilton. He will address criminal procedure cases pending in the Supreme Court, and will focus on confrontation and digital privacy.

This will be a rich experience for those of us who have an active appellate criminal defense practice and for criminal defense trial lawyers as well. And who knows — one day your phone might ring, like mine did (in Riley's case), and the voice on the other end might say — "Hi, this is Jeff Fisher from Stanford. We'd like to help get your case to the Supreme Court." That would be a good time to say "Yes!"

Pat Ford is a long-time CADC member who has an active appellate practice. He works in the state and federal courts, and represents appellants in capital cases as well as non-capital cases. In addition to his practice, he writes regular articles, and occasionally lectures for various criminal defense organizations. He has also written and published the California Criminal Law Reporter — a case law digest service used by judges and lawyers throughout the state — since 1983.

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