EFFECTIVE ASSISTANCE
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Fall Update

Reversed & Remanded

CHRISTOPHER KNIGHT
ASSISTANT FEDERAL DEFENDER

The opinions cited below were reversed either in whole or in part for the reasons stated. These opinions are contained in the Federal Reporter and Supreme Court Reporter Advance Sheets. They are published opinions, including significant habeas decisions, with official citations. Opinion of the United States Court of Appeals for the Eleventh Circuit are listed in **bold face type** for your convenience. The opinions themselves should be consulted for detailed rationale and supporting authority. The official reporters consulted are 312 F.3d through 315 F.3d. The summary of recent U.S. Supreme Court decisions usually published in this article is published elsewhere in this newsletter under the heading "Recent Significant U.S. Supreme Court Decisions."

United States Courts of Appeals

United States v. Farmer, 312 F.3d 933 (8th Cir. 2002)(insufficient evidence to justify two-level enhancement for obstruction of justice where defendant testified that he did not possess gun that was seized from his vehicle).

United States v. Blueford, 312 F.3d 962 (9th Cir. 2002)(Prosecutor's action in asking jury to infer fabrication of defendant's alibi, when government had no support for inference and evidence contradicted that assertion, required new trial.).

United States v. Franco-Lopez, 312 F.3d 984 (9th Cir. 2002)(Denial of safety valve could not be based on lack of truthful disclosure by defendant given lack of information in the record regarding substance of disclosures.).

Saffold v. Carey, 312 F.3d 1031 (9th Cir. 2002)(State postconviction petition was pending and eligible for tolling during period between denial of relief by state appellate court and filing of new petition before state supreme court.).

Ellis v. Mullin, 312 F.3d 1201 (10th Cir. 2002)(Determination that pretrial psychiatric report which concluded that defendant was competent to stand trial did not bear on sanity at time of offense was an unreasonable determination of the facts, and exclusion of pretrial report violated due process.).

United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002)(Neither churches' acceptance of donations from out of state donors, their purchase of books from out-of-state vendors, their membership in and financial contributions to national church organization, nor fact that they had out-of-state members and occasionally hosted out-of-state guests, had substantial effect on interstate commerce as required to violate Church Arson Prevention Act.).

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Recent Significant U.S. Supreme Court Decisions

CHRISTOPHER KNIGHT
ASSISTANT FEDERAL DEFENDER

Good for the Defense

Clay v. United States, 123 S. Ct. 1072 (2003)

The statute of limitations under 28 U.S.C. § 2255 for filing a petition after the affirmance of a conviction begins to run, where no petition for a writ of certiorari was filed, 90 days from the entry of the judgment by the court of appeals, and not from the date of the issuance of the mandate by the appellate court, as the Seventh Circuit had held. [Ginsburg, J. delivered the opinion of a unanimous court.].

Massaro v. United States, 2003 U.S. LEXIS 3243 (Apr. 23, 2003)

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United States v. Cutter, 313 F.3d 1 (1st Cir. 2002)(causation not established to justify imposition of $20,000 fine under MVRA).

United States v. McCoy, 313 F.3d 561 (D.C. Cir. 2002)(Completion of prison term did not moot issue of proper calculation of sentence, even where no objection was raised until remand for resentencing.).

Johnson v. United States, 313 F.3d 815 (2nd Cir. 2002)(non-barred ineffective assistance claim for failure to object to calculation of base offense level).

United States v. Reyes, 313 F.3d 1152 (9th Cir. 2002)(Trial court could not accept plea agreement under Rule 11(e)(1)(C) and then impose sentence greater or less severe than the agreed-upon sentence.).

Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002)(Failure to request jury instruction based on diminished capacity was ineffective assistance of counsel.).

United States v. Collins, 313 F.3d 1251 (10th Cir. 2002)(Failure of district court to reduce sentence where it failed to properly examine circumstances in determining whether defendant's purpose in possessing weapons was solely lawful for sporting was reversible error.).

United States v. Perrotta, 313 F.3d 33 (2nd Cir. 2002)(insufficient evidence that victim was directly involved in interstate commerce to satisfy Hobbs Act jurisdictional requirement).

United States v. Richardson, 313 F.3d 121 (3rd Cir. 2002)(Categorical approach in determining whether defendant used weapon during commission of juvenile offense resulted in not counting prior juvenile adjudication for ACCA purposes.).

United States v. Jackson, 313 F.3d 231 (5th Cir. 2002)(insufficient evidence to support jury finding that defrauded city received more than $10,000 in federal benefits within one year period during which it was defrauded to justify conviction under 18 U.S.C. § 606).

United States v. Sandlin, 313 F.3d 351 (6th Cir. 2002)(plain error to aggregate drug quantities accumulated over period of three months).

United States v. Wheeldon, 313 F.3d 1070 (8th Cir. 2002)(Intended loss in bankruptcy fraud prosecution was value of assets defendant concealed from bankruptcy court, not total debt sought to be discharged.).

United States v. Charles, 313 F.3d 1278 (11th Cir. 2002)(insufficient evidence to convict for conspiracy where defendant only drove co-conspirators to crime scene).

United States v. Pace, 314 F.3d 344 (9th Cir. 2002)(Government failed to establish that defendant began, continued or completed wire fraud in Arizona so as to justify venue there.).

United States v. San Juan-Cruz, 314 F.3d 384 (9th Cir. 2002)(Invalid Miranda warning was not harmless error.)

United States v. Rosacker, 314 F.3d 422 (9th Cir. 2002)(forensic lab report not sufficiently reliable to support quantity approximation).

United States v. Colin, 314 F.3d 439 (9th cir. 2002)(no reasonable suspicion to stop vehicle under California statute prohibiting lane straddling).

United States v. Gallegos, 314 F.3d 456 (10th Cir. 2002)(failure to comply with knock-and-announce statute– 5 or 10 second wait after announcing, no exigent circumstances shown).

York v. Galetka, 314 F.3d 522 (10th Cir. 2003)(AEDPA limitations period tolled during pendency of state motion to set aside guilty plea; equitable tolling warranted during period in which prior petition was pending until it was dismissed for failure to exhaust state remedies).

United States v. Williams, 314 F.3d 552 (11th Cir. 2002)(period of continuance not excludable under Speedy Trial Act because insufficient evidence that continuance served ends of justice; dismissal without prejudice appropriate).

Rouse v. Lee, 314 F.3d 698 (4th Cir. 2003)(equitable tolling applied to death-sentenced petitioner who missed filing deadline by one day).

United States v. Helton, 314 F.3d 812 (6th Cir. 2003)(Allegations in affidavit, considered in their totality, did not provide probable cause for search; reasonable officer would not have believed anonymous tipster's statements were trustworthy and reliable.).

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002)(Secretary/treasurer of asbestos remediation contractor hired by federal government was not in position of public trust.).

United States v. Gorman, 314 F.3d 1105 (9th Cir. 2002)(Under Payton and 9th Circuit's Underwood case, officer must have "reason to believe" defendant is on premises plus an arrest warrant to justify entry without a search warrant; court construed "reason to believe" to be tantamount to probable cause, apparently addressing an issue of first impression.).

United States v. Pena, 314 F.3d 1152 (9th Cir. 2003)(District court failed to comply with plea colloquy requirement that defendant be fully informed of the nature of the offense to which the plea was offered and failed to inform defendant of waiver of appellate rights, thus abrogating waiver in plea agreement.).

Hooper v. Mullin, 314 F.3d 1162 (10th Cir. 2002)(Counsel's failure to speak with psychologists who supported theory of defense of brain damage was prejudicial.).

United States v. Romano, 314 F.3d 1279 (11th Cir. 2002)(In 18 U.S.C. § 922(g)(1) prosecution, inclusion in sentence of base offense level increases based on conductinvolved in count which was to be dismissed pursuant to plea agreement was plain error.).

United States v. Thomas, 315 F.3d 190 (3rd Cir. 2002)(Defendant's conduct did not support bank fraud conviction because she intended to defraud bank's customer, not bank.).

Supreme Court Decisions continued

Second Circuit had rule that unless claim of ineffective assistance was raised on direct appeal, defendant, who had new counsel on appeal, could not raise claim in a collateral proceeding under 28 U.S.C. § 2255. Petitioner was denied relief. Supreme Court reversed, holding that regardless of whether ineffective assistance claim was raised on direct appeal, petitioner may raise it in collateral proceeding. [Kennedy, J. delivered the opinion of a unanimous court.].

Kaupp v. Texas, 123 S. Ct. (2003)

Police lacked probable cause to arrest defendant without an arrest warrant after receiving information that he was implicated in murder of a teenage girl. They took him into custody without an arrest warrant and brought him to the police station for questioning. After requisite warnings under Miranda were given, Kaupp implicated himself in the murder. The Supreme Court held that the statement was tainted by the illegal arrest and remanded to determine if there is any undisclosed testimony that is "weighty enough" to override the clear force shown by the appellate record, otherwise "the suppression must be suppressed." (Per Curiam).

Lawrence v. Texas, 123 S. Ct. 661 (2003)

Texas statute prohibiting consensual acts of sexual intimacy in the home by homosexuals violates the liberty and privacy interests of the defendants under the due process clause of the Fourteenth Amendment. [Opinion by Kennedy, J., joined by Stevens, Souter, Ginsberg, and Breyer, JJ.; concurrence by O'Connor, J., who would declare the statute unconstitutional under the Equal Protection clause; dissents by Scalia, J., joined by Rehnquist and Thomas, JJ.; separate dissent by Thomas, J.].

Miller-El v. Cockrell, 123 S. Ct. 1029 (2003)

Court of Appeals which decides merits of Batson issue without justifying its denial of COA is in essence deciding an appeal without jurisdiction. In ruling on motion for COA, "[T]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." [Opinion by Kennedy, joined by Rehnquist, CJ., and Stevens, O'Connor, Scalia, Souter, Ginsburg, and Breyer, JJ.; concurrence by Scalia, J.; dissent by Thomas, J.].

Good for the Prosecution

Early v. Packer, 123 S. Ct. 362 (2002)

Juror requested dismissal from the jury. The jury foreman complained to the trial judge about the juror and sent the judge a note, which he read aloud to the jury and asked what the vote count was. The juror was the only dissenter. The judge instructed the jury to continue deliberating. The juror talked to the judge again, but the jury continued to deliberate until it returned a guilty verdict. The Supreme Court determined that it was reasonable for the court to instruct the jury as it did, and its action was not coercive. The state court's determination to the same effect was not an unreasonable interpretation of federal criminal law. [Per curiam, reversing Ninth Circuit decision].

Sattazahn v. Pennsylvania, 123 S. Ct. 732 (2003)

Petitioner challenged imposition of death penalty on double jeopardy grounds after first trial resulted in life sentence but was reversed on appeal. Since first jury did not make any findings with regard to aggravating factor asserted by the state, and thus did not determine that petitioner was legally entitled to a life sentence, double jeopardy did not bar imposition of the death penalty on retrial. Nor did the trial court make any findings after the first jury was unable to agree on the death penalty and was statutorily required to enter life sentence. Further, the aggravating circumstance which made petitioner eligible for the death penalty operated as a functional equivalent of an element of the greater offense of murder with an aggravating circumstance, of which petitioner was not acquitted. [Opinion by Scalia, J., joined in part by Rehnquist, C.J., O'Connor, Kennedy and Thomas, JJ.; concurrence in part and in the judgment by O'Connor, J.; dissent by Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ.].

United States v. Jimenez-Recio, 123 S. Ct. 819 (2003)

The Ninth Circuit had held that a conspiracy terminates when there is "affirmative evidence. . . of defeat of the object of the conspiracy." United States v. Cruz, 127 F.3d 791, 795. The Supreme Court reversed. In this case, the police intercepted a shipment of drugs. The trial court granted a new trial after the defendant's conviction, holding under Cruz that they could

not convict the defendant unless they found from the evidence that the defendant joined the conspiracy before the police intervened. Upon retrial, the defendant was convicted, but the Ninth Circuit reversed, relying on Cruz. The Supreme Court held that where the police have frustrated a conspiracy's objectives, but conspirators (unknowing of that fact) have neither abandoned the conspiracy nor withdrawn, the special dangers related to the crime of conspiracy, i.e. the agreement to commit the crime, still remain. [Opinion by Breyer, J., joined by Rehnquist, C.J., and O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsberg, JJ.; Stevens, J. filed opinion concurring in part and dissenting in part].

Ewing v. California, 123 S. Ct. 1179 (2003)

Theft of $1,200 in jewelry. Imposition of sentence of 25 years to life under California three-strike law was not grossly disproportionate and did not violate Eighth Amendment proscription of cruel and unusual punishment. [Opinion by O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.; concurrence by Scalia, J. joined by Thomas, J.; dissent by Stevens, J., joined by Souter, Ginsburg and Breyer, JJ].

Woodford v. Garceau, 123 S. Ct. 1398 (2003)

Petitioner filed petition for habeas corpus after the AEDPA's enactment. However, he had sought appointment of counsel and stays of execution prior to the enactment. Resolving a split among the circuits, the Court held that whether the AEDPA applied is determined by what was before the Court on the date of its enactment. Since the petition itself was filed after the enactment of the AEDPA, then AEDPA applied to petitioner. [Opinion by Thomas, J., joined by Rehnquist, CJ, Stevens, Scalia, and Kennedy, JJ; concurrence by O'Connor, J.; dissent by Souter, J., joined by Breyer and Ginsburg, JJ.].

Sell v. United States, 123 S. Ct. 512 (2003)

The Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if (1) the treatment is medically appropriate, (2) the treatment is substantially unlikely to have side effects which may undermine the trial's fairness, and (3) taking into account less intrusive alternatives, the treatment is necessary to further important government trial-related interests.

Lockyer v. Andrade, 123 S. Ct. 1166 (2003)

Application of California's three-strike law and imposition of two consecutive 25-year sentences for theft of $84.70 and $68.84 in videotapes was not "unreasonable application" of Supreme Court law governing grossly disproportionate penalties under the Eighth Amendment. [Opinion by O'Connor, J., joined by Rehnquist, CJ., and Scalia, J., Kennedy, J. and Thomas, J.; Dissent by Souter, J., joined by Stevens, J., Ginsberg, J., and Breyer, J.].

EFFECTIVE ASSISTANCE

published by:
Carlos A. Williams
Executive Director

edited by:
K. Lyn Hillman Campbell
Assistant Federal Defender

Southern District of Alabama
Federal Defenders Organization
2 South Water Street, 2nd Floor
Mobile, Alabama 36602
(251) 433-0910 / 433-0686 Fax
E-mail: info@federaldefender.org
Web site: **www.federaldefender.org**