



LEGAL EAGLE

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UNITED STATES SUPREME COURT

No Clearly Established Federal Right to Access to Law Library

Kane v. Espitia, 126 S. Ct. 407 (Decided October 31, 2005)

Garcia Espitia, a criminal defendant who chose to defend himself without the assistance of counsel, was convicted in California state court of carjacking and other offenses. He received no law library access while in jail before the trial despite repeated requests and court orders to allow him access. He was ultimately allowed about four total hours of access to the law library during the trial, just before closing arguments.

He appealed his conviction, but the California courts rejected his argument that his highly restricted library access violated his Sixth Amendment rights. He appealed to Federal District Court for

LEGAL STAFF

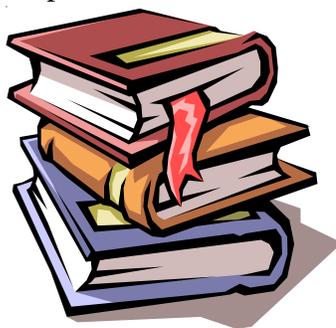
Stacey Morey,
Chief Legal Counsel
Jimmy Bunn Jr.,
Legal Counsel
Betty Gayle Dawes, Legal Secretary



a writ of habeas corpus. In order to be entitled to habeas corpus relief, he had to show the state court's decision to be contrary to clearly established Federal law or constitutional rights. The Federal District Court denied such relief, finding no such violation. The Court of Appeals for the Ninth Circuit, disagreed and reversed. It held that "the lack of any pretrial access to law books violated Espitia's constitutional right to represent himself. The issue was appealed to the United States Supreme Court.

The Supreme Court held that there was no clearly established Federal law or constitutional right requiring law library access for a defendant choosing to represent himself. The Supreme Court noted that the federal appellate courts were split on whether *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975), which established a Sixth Amendment right to self-representation, implied or required a right of the defendant representing himself to have access to a law library. Since there was no such clearly established right, the Supreme Court denied Espitia habeas corpus relief and his conviction was upheld.

With regards to the split of opinion in the federal appellate courts regarding the right of access to a law library for a self-represented individual, the 10th Circuit Court of Appeals previously stated in *U.S. v. Taylor*, 183 F.3d 1199 (1999) that a prisoner who voluntarily, knowingly, and intelligently waives his right to counsel in order to represent himself is not entitled to access to a law library or other legal material. The 10th Circuit held that there was nothing constitutionally offensive about requiring a defendant to choose between appointed counsel and proceeding on his own without access to legal materials because the U.S. Constitution was satisfied by the offer of professional representation alone.



Unusual Punishment Allowed To Stand

Gementera v. U.S., Case No. 05-227, Decided November 28, 2005.

Gementera v. U.S., 379 F.3d 596, Decided August 9, 2004

Shawn Gementera stole letters from several mailboxes in San Francisco. He was observed by police, arrested, and ultimately pled guilty to mail theft. This was not the Defendant's first brush with the law. Though only twenty-four years old at the time, he had a rather long record for someone his age, and it was getting increasingly more serious in nature.

The United States District Court judge hearing Gementera's case sentenced him at the lower end of the possible range of sentence, imposing two months incarceration, and three years supervised release. He also imposed several unusual conditions of supervised release. Gementera was required to spend 4 days of 8 hours each at a postal facility where there was a lost and found window observing customers inquiring about lost or missing mail. He also had to write a personal letter of apology to all identifiable victims of his crime, and give three educational lectures at separate high schools describing his crime, his remorse, and telling the students how his crime and sentence had affected his life.

The final condition of probation was what led the Defendant to appeal the sentencing. The judge sentenced the Defendant to perform 1 day of 8 total hours of community service during which he had to wear a two-sided sandwich board-style sign stating, "I stole mail; this is my punishment," in front of a San Francisco postal facility. The 8 hours was reduced from an original ruling of 100 hours with the sign.

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The Defendant appealed the sentence to the 9th Circuit Court of Appeals alleging that such a requirement constituted cruel and unusual punishment forbidden by the 8th Amendment of the U.S. Constitution. The 9th Circuit disagreed. They held that because the punishment was in lieu of incarceration (which he could choose to serve) and did not exceed the bounds of civilized standard or other evolving standards of decency, it did not constitute cruel and unusual punishment. The 9th Circuit Court of Appeals held that the record clearly established that the condition imposed served a stated and legitimate statutory purpose of rehabilitation, and to a lesser extent, for general deterrence and for the protection of the public. The Court held that the condition was not designed solely to humiliate but was among a comprehensive set of provisions that happened to expose him to social disapproval while giving him an opportunity to repair his relationship with society. Consequently, it was perfectly legitimate.

Gementera attempted to appeal his argument to the U.S. Supreme Court and asked the Court to hear his case. On November 28, the U.S. Supreme Court unanimously declined to hear his case, leaving the original punishment in place, and leaving the Defendant with some sign-toting to do.



OKLAHOMA COURT OF CRIMINAL APPEALS

Attorney Conflict of Interest Leads to New Trial

Harmon v. Oklahoma, 2005 OK CR 19, Decided October 18, 2005

Defendant Sonny Lauren Harmon was jointly tried and convicted of three counts of Second Degree Burglary and Felonious Carry of a Weapon, all after two or more former convictions. He was ultimately convicted of all counts and sentence to a total of forty two years imprisonment.

Harmon's defense counsel represented Harmon's, daughter Sunny Dawn Harmon, in plea negotiations and plea proceedings when she was charged and pled guilty to charges arising out of the same acts for which the Defendant was being prosecuted. Sunny Dawn ultimately testified against her father during the trial, and was cross-examined by the Defendant's attorney. The Oklahoma Court of Criminal Appeals characterized her as "the most damaging witness" against the Defendant during the trial.

On appeal, Harmon claimed that his defense counsel had an actual conflict of interest that deprived him of effective assistance of counsel, because his attorney could not fully cross-examine the witness about her plea or role in the burglaries because of his previous representation of her.

Though defense counsel cross examined the witness extensively, the Court of Criminal Appeals noted that counsel did not cross-examine her on possible bias towards the Defendant relating to her previous plea and facts in this particular case.

The Court of Criminal Appeals consequently held that the Defendant had received ineffective assistance of counsel and reversed all four convictions and remanded all of them for a new trial.



Court Establishes Standard for Finding Prejudice By Violation of Vienna Convention Rights

Torres v. State, 2005 OK CR 17, Decided September 6, 2005

Osbaldo Torres was tried by a jury, convicted of two counts of first degree murder and other charges, and received two sentences of death. Torres, a foreign citizen, alleged that his rights under the Vienna Convention were violated when he was not allowed to contact the Mexican Consulate when he was arrested. The Vienna Convention is an international treaty signed by the United States that requires that an arresting agency that holds a foreign national advise the individual of his right to contact his home government consulate for assistance.

The Court of Criminal Appeals held that in order for a Defendant to establish that he was prejudiced by a violation of the Vienna Convention and therefore entitled to relief from his conviction, he must show: 1) the defendant did not know he had a right to contact his consulate for assistance; 2) he would have used that right to contact his consulate if he had known of it; and 3) it was likely that the consulate would have assisted the defendant. The common thread in each of the three requirements is that the Defendant must make some

showing of how his consulate would have assisted him.

The Court of Criminal Appeals reviewed the evidence presented in an evidentiary hearing in the trial court regarding the alleged prejudice to Defendant as a result of the violations of the Vienna Convention by the arresting agency. The Court held that Torres established that he did not know he had a right to contact his consulate for assistance, that he would have used that right if had been advised of it, and that the Mexican consulate would have provided substantial assistance in obtaining a sentence of less than death during the punishment phase. It held that the evidence did not specifically show that consular assistance would have been provided in the guilt phase of the trial.

Despite seemingly meeting all three requirements, the Court of Criminal Appeals found that under the unusual circumstances of his case, with regards to his convictions for first degree murder, he had not been prejudiced by the failure to inform him of his rights under the Vienna Convention.

The Court stated that the Defendant clearly established that the Mexican government would have expended considerable resources on the capital penalty phase of his case. The Court reasoned, however, that because the Oklahoma Governor's grant of clemency from the death penalty ensured he was not subject to the death penalty that any assistance Mexico would have given in that regard had become moot. The Court held that because Torres had not presented any evidence that the Mexican government would have assisted him during the guilt/innocence stage of his trial, he was not prejudiced by the Vienna Convention violation in that part of his trial. They held that he was not entitled to relief from his convictions, but would have been entitled to relief from his capital sentences had it not already been granted by the Governor's clemency action.



OKLAHOMA SUPREME CT.

Guth 2100 Breath Alcohol Tests Upheld Despite Error in Rule Text

Charlson v. State ex rel. Dept of Public Safety, 2005
OK 83, Decided November 15, 2005

On September 26, 2004, a Blanchard, Oklahoma police officer stopped Marland D. Charlson after the officer noticed that the pickup Marland was driving twice swerved from side to side within his lane and crossed into the oncoming traffic lane. After the stop, the officer approached the vehicle, smelled the odor of an intoxicating beverage coming from the vehicle and observed an open container of beer sitting in the console next to the driver.

The officer asked Charlson to exit the pickup. The officer could smell alcohol on Charlson's breath. Charlson had red, watery eyes, slurred speech, and admitted he had been drinking. He was arrested and driven to the Newcastle Police Station where Charlson took a breath test on an Intoxilyzer 5000D machine with an attached simulator designated as a Guth 2100. The test results showed an alcohol concentration sufficient for the arresting officer to seize the driver's license of Charlson. Charlson's license was revoked in a hearing before the Department of Public Safety and he appealed the revocation to the District Court of Grady County.

During that trial, the Department of Public Safety presented evidence that the Board of Tests for Alcohol and Drug Influence adopted the Guth 2100 as an approved breath simulator, and

promulgated an administrative rule approving its use. The DPS further established during the hearing that a typographical error caused the model number for the Guth 2100 to be omitted when entered into the Oklahoma Registry. The Oklahoma Registry is an official state publication giving public notice of changes to of the addition of new administrative rules adopted by State Agencies.

After the hearing, the trial court stated that there was sufficient evidence that the Board of Tests for Alcohol and Drug Influence had properly approved the use of the Guth 2100, but that a typographical error was solely responsible the absence of that model number from the rule that was ultimately published in the Oklahoma Register. Thus, the trial court was left with the legal question of the effect of the error on the appeal of license revocations arising from the use of the Guth 2100.

The trial court held that it did not have the authority to correct the scrivener's error. It held that because the Guth 2100 was not named as one of the approved simulators in the Oklahoma Register (even though the Board of Tests for Alcohol and Drug Influence had otherwise properly approved it), the revocation of the license had to be overturned. The court finally held that the agency itself must go through the administrative rulemaking process to correct the typographical error published in the Oklahoma Registry.

The Oklahoma Supreme Court disagreed and reinstated Charlson's license revocation. It held that the court had the authority to utilize the administrative rule as actually approved and correct the typographical error of the Oklahoma Registry. It held that it could not be contested that the rule adopted by the agency and approved by the Legislature and Governor included the Guth 2100 as an approved device. It was also not contested that a typographical error caused the Guth 2100 to be removed from the list of approved devices in the Oklahoma Register. The Oklahoma Supreme Court held that a typographical error cannot change an otherwise properly adopted administrative rule. The Court stated that to hold otherwise would allow copyists employed by publishers to change the law merely by publishing something other than the rule

passed, the statute enacted by the Legislature, or an opinion of the Court.

Accordingly, the Oklahoma Supreme Court held that the Guth 2100 was properly approved for use and that the Oklahoma Administrative Code be corrected to reflect the order of the Court regarding that rule. The judgment of the District Court was reversed and Charlson's driver's license revocation was reinstated.

10TH CIR. CT. OF APPEALS

Mistaken Identity Leads to Conviction of Internet Predator

United States v. Sims, Nos. 03-2151, 03-2177,
Decided November 9, 2005

Stanley Sims communicated on the internet in a highly sexual manner with what he believed was two minor girls. He sent them sexual pictures of himself other children, and eventually scheduled a meeting place and time with the girls. In fact, he had been communicating with an adult male and the FBI the whole time. He was arrested at the planned meeting place and was charged with: 1) attempting to coerce and entice a minor to engage in sexual acts, 2) traveling in interstate commerce for the purpose of engaging in sexual acts with a minor, 3) transporting by interactive computer system visual depictions of minors engaging in sexually explicit conduct, and 4) receiving visual depictions of minors engaging in sexually explicit conduct. He was convicted of counts 1 through 3 and acquitted of count 4 by the Court directly. He appealed to the 10th Circuit.

In his appeal, he argued that he could not be convicted of transporting visual depictions of minors engaging in sexually explicit conduct because the Government failed to prove that the images in question depicted real children. The U.S. Supreme Court had previously held that the Government could not prohibit the production of virtual child pornography, which doesn't depict actual children, but instead uses youthful-looking adult actors or computer-generated images. In order to prohibit such material, the Government had to show actual children were used in the production process.

The Defendant argued that in order to show beyond a reasonable doubt that such a burden had been met, the Government necessarily must either: 1) identify the actual child victim in the depiction or 2) prove through expert testimony that the images were not computer generated. The 10th Circuit Court of Appeals disagreed. It held that juries can review the images themselves and are capable of determining whether real children are depicted. The Court held that content of an image in most cases can speak for itself and suffice to prove that real children are depicted as determined by the jury.

With regards to his convictions for attempting to coerce and entice a minor to engage in sexual acts and traveling in interstate commerce for the purpose of engaging in sexual acts with a minor, Sims argued that he could not be convicted of what amounted to a physical impossibility because he had never, in fact, been speaking with a minor. He argued that he could not be convicted because there was never any minor child to coerce, entice or engage in sexual acts. These claims were also rejected.

The Court found nothing impossible about traveling with a specific purpose (engaging in sexual acts with a minor) even if the specific purpose ultimately is not and cannot be accomplished. Furthermore, the Court noted that with regards to the crime of attempting to coerce or entice a minor into a sex act, that factual impossibility is not a defense to criminal attempt because success is not an essential element of attempt crimes.