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The Legal Eagle

RECENT FEDERAL DECISIONS

OSBI LEGAL UNIT

- Jimmy Bunn Jr. Chief Legal Counsel
- Sunne Riedel Day Legal Counsel
- Caro Furr Legal Counsel
- Michal Criddle Administrative Programs Off.
- Tyler Sena Legal Intern

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SKINNER V. SWITZER (U.S. SUPREME COURT)

Skinner was convicted and sentenced to death for murder of his live-in-girlfriend and her two sons. Skinner agreed he was present but said he couldn't have commited the murders due to a large mix of alcohol and codeine in his system, making him physically incapable of doing so. Multiple items at the crime scene were not subjected to DNA testing including knives, an axe, and vaginal swabbings of the victim.

Six years after the conviction ,Texas enacted a new law that allowed post-conviction DNA testing for prisoners in limited circumstances. Skinner moved twice under that law for DNA tests, both times he was denied. The Texas Court of Criminal Appeals affirmed those trial court decisios. Skinner then filed a § 1983 civil rights action against the District Attorney whom had custody of the evidence alleging Texas violated his 14th Amendment Due Process right by refusing the DNA tests. The Trial Magistrate dismissed his suit holding post-conviction requests for DNA testing are Habeas Corpus claims, not § 1983 actions. Habeas Corpus claims have more stringent procedural hurdles to filing and ultimate success than do §1983 actions. The District Court and 5th Circuit affirmed that decision.

The United State Supreme Court, however, reversed the decision and remanded the case for trial. The court held that Skinner's §1983 action was not an attack on an adverse state court decision under review (which would require a habeas corpus action), but rather an attack towards a particular statute or rule governing the decision. It held that there was therefore federal subject matter jurisdiction. It reasoned that Habeas Corpus is the exclusive remedy when a prisoner seeks "immediate or speedier release," but a § 1983 claim may be brought here because success wouldn't necessarily spell speedier release. It stated that precedent did not support Habeas Corpus as the sole remedy when the requested relief wouldn't terminate custody, accelerate release, or reduce the level of custody. Since success in Skinner's claim would only gain him access to DNA evidence that may be exculpatory, inculpatory, or inconclusive, a §1983 action was appropriate.

Though convicted offenders may now seek post-conviction DNA testing through §1983 suits, this avenue is definitely limited. Under the Supreme Court's reasoning, a statute authorizing such requested post-conviction testing will have to be in place and the §1983 suit is limited to whether the statute or the decision based upon the statute adequately protected the prisoner's procedural rights provided by the statute in question. The *Skinner* decision did not establish a substantive due process right to post-conviction testing absent a statute authorizing the same. The Supreme Court had previously held in 2009, by a 5-4 majority, that prisoners do not have a broad substantive constitutional right of access to DNA evidence absent statutory authorization.

SNYDER V. PHELPS (U.S. SUPREME COURT)

The Westboro Baptist Church learned of the military funeral of U.S. Marine Matthew Snyder near the U.S. Naval Academy and alerted authorities of their plans to picket. They complied with law enforcement's instructions, and picketed on public land 1,000 feet away from the funeral for about 30 minutes before the funeral began. They peacefully displayed signs that did not primarily reference Mr. Snyder himself, but rather the nation, the military, and the Catholic Church. ("Fags Doom Nations," "Thank God for Dead Soldiers," "Priests Rape Boys.")

Matthew's father sued the pastor, two of his daughters, and the Westboro church in federal District Court in Baltimore. The jury found violations of Maryland laws against intentional infliction of mental and emotional distress, invasion of privacy by intrusion into a secluded event, and conspiracy to commit those acts, and Mr. Snyder eventually received a total award of $5 million in compensatory and punitive damages. The 4th Circuit Court of Appeals reversed the decision. It held that Westboro's protest was protected by the 1st Amendment which shielded them from state law tort claims concerning such protected speech. Mr. Snyder appealed that decision to the U.S. Supreme Court.

The U.S. Supreme Court upheld the decision of the 4th Circuit overturning the original jury award. The Court held that the 1st Amendment can serve as a defense to state tort suits. The decision primarily turned on whether Westboro's speech was of public or private concern, which is determined by all the circumstances of the case. Public issue speech gets the highest 1st Amendment consideration and special treatment. Although there isn't a specific test, speech is of public concern when it relates to any matter of political, social, or other concern to the community, or when it is a subject of general interest and of value and concern to the public. The content, form, and context of the speech as shown by the whole record must be looked at. Here, the content was considered public since it dealt with the political and moral conduct of the nation, its military, and scandals in the Catholic Church. The context of the funeral didn't transform the speech into a personal attack, nor was the content aimed directly at a single individual.

The Supreme Court acknowledged that reasonable time, place, and manner restrictions could be imposed by state law, but noted that no specific restrictions were imposed by Maryland law at the time and that the protestors did notify the police in advance, complied with their instructions to a use a specific spot of public land, and were 1,000 ft away from the funeral.

Westboro will likely continue their funeral protests, but do have a strong history of complying with local law enforcement and regulations. It is likely that state laws restricting time, place, and manner of the protests (i.e. 1000 feet, not w/ in 1 hr of a service) will be challenged in the future, but seem likely to stand. Actual interference with a funeral service, or a common theme of a protest directed at a specific person rather than matters of public concern may not have the same 1st Amendment protections.

MICHIGAN V. BRYANT (U.S. SUPRME COURT)

Police responded to a call that a man had been shot. Upon arrival, they didn't know why, where, or when shooting happened, the shooter's location, or other details about the incident. The victim told police he was shot by Bryant at Bryant's house then driven to the gas station where police found him. The victim talked to police for 5-10 minutes, asked when medical assistance would come, was taken to the hospital, and died. Police testified at trial to what the victim had said.

Bryant was convicted of 2nd degree murder, being a felon in possession of a firearm, and possession of a firearm during commission of a felony. The Michigan Court of Appeals affirmed, but the Michigan Supreme Court reversed based on *Crawford* (decided after the trial court's initial decision) because the statements were inadmissible testimonial hearsay under the 6th

Amendment. In *Crawford* (previously analyzed in a prior issue of the *Legal Eagle*) the U.S. Supreme Court held that the 6th Amendment required that before "testimonial evidence" could be admitted in the criminal trial of an accused, there must be unavailability of the witness and a prior opportunity for cross examination of the witness by the accused. What exactly constituted "testimonial evidence" wasn't defined in *Crawford, but* it was given more explanation and discussion in later court decisions. Bryant argued that the statements of the victim were "testimonial" in nature, and should not have been admitted in his trial because he had no opportunity to cross-examine the witness prior to his death. The Michigan Supreme Court agreed and reversed his conviction. That decision was appealed to the U.S. Supreme Court.

The U.S. Supreme Court vacated the decision of the Michigan Supreme Court which had over-turned the conviction, effectively reinstating the conviction. In its decision, it held that statements are non-testimonial even if in a police interrogation if the circumstances objectively indicate the interrogation's primary purpose is to enable police assistance to meet an ongoing emergency. It held that the statements would be testimonial if circumstances objectively indicate that there is no ongoing emergency and the primary purpose is instead to establish or prove past events potentially relevant to later criminal prosecution. That determination is to be made objectively upon the totality of the circumstances. "Ongoing emergency" statements are considered reliable because there is a diminished chance of fabrication in statements primarily given to resolve an emergency. An ongoing emergency doesn't just focus on the victim since first responders and the public may be in danger. The Supreme Court concluded in this particular case that because there was an armed shooter, police didn't know his location or motive, and the incident was only a few blocks from the victim, the purpose was for an ongoing emergency, It concluded, therefore, that the statements were non-testimonial and admissible at the trial of the accused. Depending upon the particular circumstances, information gathered by first responders may be used, subject to other hearsay evidentiary rules of the particular court, in trials without violating the 6th Amendment because it is not testimonial.

Pepper v. U.S. (U.S. Supreme Court)

Pepper pled guilty to drug charges, and was sentenced under the Federal Sentencing Guidelines (FSGs) to 24 months prison and 5 years suspended release. This was 75% below the low end of the FSGs, because of substantial assistance provided by Pepper. That sentencing was ultimately overruled on appeal by the State. On remand for resentencing, the trial court considered post-sentencing rehabilitation that Pepper demonstrated at that hearing to again decrease his sentence under the FSGs. Using that evidence his rehearing, the trial court again sentenced him to only 24 months in prison. That decision was again successfully appealed, and the case was remanded for a third sentencing hearing. A new district court judge holding Pepper's third sentencing hearing, again considered post-sentencing rehabilitation and gave him a 20% reduction in his sentence resulting in 65 months in prison and 12 months supervised release.

The State again appealed the sentence, arguing that when a defendant's sentence has been set aside on appeal, a district court at resentencing was not entitled to consider evidence of the defendant's post-sentencing rehabilitation in its rehearing decision. The State argued that the rehearing court must follow the sentencing findings issued by the original sentencing judge and was not entitled to consider new post-conviction rehabilitation evidence. The United States Supreme Court disagreed. In doing so, it reasoned that such new evidence is consistent with the public policy of the applicable statutes for judges to use wide sources of evidence to find out the fullest information about defendant's life and characteristics so the punishment fits the defender and not the crime, particularly since prior Supreme Court decision had made the Federal Sentencing Guidelines effective advisory guidelines for sentencing rather than setting mandatory minimum and maximum sentences.

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OKLAHOMA STATE BUREAU OF INVESTIGATION

OSBI Legal Unit
6600 N. Harvey
Oklahoma City, OK. 73116

Phone: 405-879-2605
Fax: 405-879-2600
E-mail: jimmy.bunn@osbi.ok.gov

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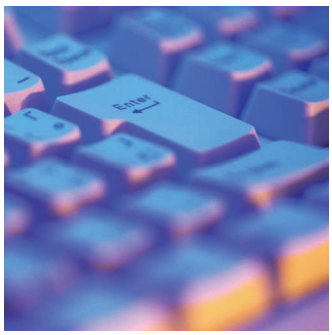
U.S. V. DOBBS (10TH CIRCUIT COURT OF APPEALS)

Dobbs' computer was seized for an unrelated fraud investigation, child porn was discovered, and a new search warrant was executed. Over 150 images of child porn was found in the cache/temporary internet files of his computer. The government relied on a forensic specialist that testified Dobbs visited child porn websites and used related search terms, the pictures were automatically and exclusively in the cache, users can manipulate pictures in the cache but it wasn't done here, and Dobbs may not have even known about the cache. Initially, 17 images were admitted, but only 2 were submitted because the others couldn't be proven to have traveled interstate. The government couldn't show Dobbs had actually visited a child porn website or used suggestive terms prior to the automatic caching of the submitted pictures, which could have been cached even without a user seeing them on his screen.

The U.S. District Court for Northern District of Oklahoma convicted Dobbs of knowingly receiving and attempting to receive child pornography. Dobbs appealed to the 10th Circuit.

The 10th Circuit held that the government offered insufficient evidence to prove that defendant's receipt of two images of child pornography was knowing, and that the government offered insufficient evidence to prove that defendant took a substantial step toward receiving two images of child pornography. The 2 images were received, but the evidence did not establish it was knowingly or that Dobbs took a substantial step towards knowingly receiving child porn because the images were stored in the cache and no evidence showed that Dobbs knew about his computer's automatic caching function. There was no evidence he actually saw the images or exercised control over them by clicking on them or enlarging them. The pattern of search and creation applied only to the 15 excluded images, thus was irrelevant to the remaining 2 images. Seeking images isn't enough alone to convict based on knowingly receiving. For attempted receipt, there was no evidence of suggestive searches or visitation of child porn websites prior to creation of the 2 images submitted to the jury, thus a substantial step towards completion was lacking. Images stored in cache proves receipt or presence, but the government needs to show that the defendant either knew images were present through the automatic caching process or otherwise. Demonstrating that the images were sought through suggestive search terms or visiting known child porn websites is also necessary. Use of digital software for 'cleaning' computers or manipulating images could also show knowing receipt of child porn.