2002-2003 U.S. SUPREME COURT TERM: CASES AFFECTING CRIMINAL LAW & PROCEDURE

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State Statute Prohibiting Two People of Same Sex to Engage in Consensual Sex Act Violated Privacy Interest in Due Process Clause of Fourteenth Amendment When Consensual Sex Act Occurred Between Two Adults in Private Residence

Lawrence v. Texas, 123 S. Ct. 2472, 156 L. Ed. 2d 508, 73 Crim. L. Rep. 396 (26 June 2003). Responding to a reported weapons disturbance, officers entered a private residence and saw the defendants, both male, engaged in consensual anal intercourse with each other. The defendants were convicted of violating a state statute that prohibited a person from engaging in anal intercourse (as well as other sex acts) with a person of the same sex. The Court, overruling Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), ruled that the statute violated the defendants' liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

[Author's note: G.S. 14-177 (crime against nature) prohibits the commission of certain sex acts (for example, fellatio, cunnilingus, anal intercourse, analingus) between people of the same or opposite sex even if they consent. See generally *North Carolina Crimes: A Guidebook on the Elements of Crime* (5th ed. 2001) at p. 175. The Court's ruling bars the state from prosecuting crime against nature when adults of the same or opposite sex consensually commit one of these sex acts in private. The ruling also effectively overrules State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (1979) (constitutional right to privacy does not bar prosecution of unmarried people for crime against nature, consensual fellatio, done in private), and similar cases.

However, based on statements in the Court's opinion, the ruling does not bar the prosecution of crime against nature when (1) one of the consenting parties is a minor; (2) one of the parties is an adult who is mentally disabled or incapacitated or physically helpless so as to be incapable of properly consenting; (3) one of the parties offers to commit or commits the sex act for money or other valuable consideration; (4) the sex act is not committed in a private residence or other private place; or (5) one of the parties to the sex act is coerced into committing the act.

It is unclear whether the statute (G.S. 14-184) prohibiting fornication and adultery is constitutional after the *Lawrence* ruling.]

Court Sets Out Circumstances When Government May Involuntarily Administer Antipsychotic Drugs to Render Mentally Ill Defendant Competent to Stand Trial

Sell v. United States, 123 S. Ct. 2174, 156 L. Ed. 2d 197, 73 Crim. L. Rep. 317 (16 June 2003). The Court ruled that the government may involuntarily administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests. The Court stated that those instances may be rare.

Officers Arrested Defendant When They Took Him Without Consent From His Home to Law Enforcement Facility, and Confession Obtained Thereafter Is Subject to Suppression As Direct Fruit of Arrest Made Without Probable Cause

Kaupp v. Texas, 123 S. Ct. 1843, 155 L. Ed. 2d 814, 73 Crim. L. Rep. 2042 (5 May 2003). The defendant, seventeen years old, was a murder suspect. Three officers entered his bedroom at 3:00 a.m., awakened him with a flashlight, and one officer said, "we need to go and talk." The defendant said, "Okay." He was handcuffed and taken—shoeless and dressed only in boxer shorts and T-shirt—to the crime scene and then to a law enforcement facility. He was given *Miranda* warnings, waived his rights, and then admitted to his involvement in the murder. The Court ruled, citing Hayes v. Florida, 470 U.S. 811, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985), and other cases, that the officers' conduct in removing the defendant from his home and taking him to the law enforcement facility under these circumstances was a seizure requiring probable cause (which the state conceded did not exist). The Court rejected the state's argument that the defendant had validly consented to being taken to the law enforcement facility; his answer "Okay" was a mere submission to a claim of lawful authority. The Court also ruled, based on the factors set out in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), that unless the state on remand can point to testimony undisclosed in the record, the confession must be suppressed as a direct fruit of the arrest made without probable cause.

(1) Officer's Alleged Coercive Questioning of Plaintiff Did Not Violate Self-Incrimination Clause of Fifth Amendment When Compelled Statements Were Not Introduced Against Plaintiff at Criminal Trial
(2) Court Remands Issue Whether Plaintiff Could Pursue Claim of Liability Against Officer for Substantive Due Process Violation for Coercive Questioning

Chavez v. Martinez, 123 S. Ct. 1994, 155 L. Ed. 2d 984, 73 Crim. L. Rep. 239 (27 May 2003). While the plaintiff was being treated for a gunshot wound received during an altercation with law enforcement officers, an officer—without giving *Miranda* warnings—conducted an allegedly coercive interrogation of the plaintiff. The plaintiff was never charged with a criminal offense and thus his answers during the interrogation were never used against him in a criminal trial. The plaintiff sued the interrogating officer for violating his constitutional rights. (1) The Court ruled (representing a majority of the Justices in several opinions) that the officer's alleged coercive questioning of the plaintiff did not violate the Self-Incrimination Clause of the Fifth Amendment when the compelled statements were not introduced against the plaintiff at a criminal trial. (2) The Court remanded to the federal court of appeals the issue whether the plaintiff could pursue a claim of liability against the officer for a substantive due process violation based on the alleged coercive questioning.

A Conspiracy Under Federal Law Does Not Automatically Terminate Simply Because the Government Has Defeated Its Objective

United States v. Recio, 123 S. Ct. 819, 154 L. Ed. 2d 744, 72 Crim. L. Rep. 325 (21 January 2003). The Court ruled that a conspiracy under federal law does not automatically terminate simply because the government has defeated its objective. In this case, officers stopped a truck carrying illegal drugs, seized the drugs, and with the assistance of the truck's drivers, set up a sting. The defendant and another person later appeared and drove the truck away. The defendant may be convicted of conspiracy because, for example, he did not know that the government had intervened and did not know the conspiracy was bound to fail. [Author's note: This ruling involved federal conspiracy law and is not binding on state courts. However, a state court may decide to rule in a similar manner if it finds the Court's reasoning persuasive.]

Legislation That Extended Statute of Limitations for Certain Kinds of Criminal Offenses Violated Ex Post Facto Clause When It Revived Prosecution of Criminal Offenses That Had Already Been Barred by Prior Version of Statute of Limitations For Those Offenses

Stogner v. California, 123 S. Ct. 2446, 156 L. Ed. 2d 544, 73 Crim. L. Rep. 382 (26 June 2003). The Court ruled that legislation that extended the statute of limitations for certain kinds of sex offenses violated the Ex Post Facto Clause when it revived the prosecution of offenses that had already been barred by the prior version of the statute of limitations for those offenses.

Alaska's Sex Offender Registration Law Is Not Punitive and Thus Retroactive Application to Person Convicted Before Its Enactment Does Not Violate Ex Post Facto Clause

Smith v. Doe, 123 S. Ct. 1140, 155 L. Ed. 2d 164, 72 Crim. L. Rep. 533 (5 March 2003). The Court ruled that Alaska's sex offender registration law is not punitive and thus its retroactive application to a person convicted before its enactment does not violate the Ex Post Facto Clause. (See the Court's analysis of the factors used to determine that the law was not punitive.)

Because Connecticut's Sex Offender Registration Law Requires Registration Based Solely on a Conviction, Procedural Due Process Does Not Require a Hearing to Prove a Fact (Whether Offender Is Currently Dangerous) That Is Not Material to State's Registration Law

Connecticut Dept. of Public Safety v. Doe, 123 S. Ct. 1160, 155 L. Ed. 2d 98, 72 Crim. L. Rep. 531 (5 March 2003). A federal court of appeals enjoined the public disclosure of Connecticut's sex offender registry because state officials did not provide registrants with a predeprivation hearing under the Due Process Clause to determine whether they are likely to be currently dangerous. The Court ruled that because Connecticut's sex offender registration law requires registration based solely on a conviction, procedural due process does not require a hearing to prove a fact (whether an offender is currently dangerous) that is not material to the state's registration law. The Court noted that the sex offender did not assert a substantive due process claim in this case.

Sentence of Minimum of 25 Years Imprisonment and Maximum of Life Imprisonment for Felony Grand Theft Under California's Three Strikes Law Did Not Violate Eighth Amendment

Ewing v. California, 123 S. Ct. 1179, 155 L. Ed. 2d 108, 72 Crim. L. Rep. 509 (5 March 2003). The defendant was convicted of felony grand theft (theft of three golf clubs each priced at $399) and was sentenced under California's three strikes law to a minimum of 25 years imprisonment and a maximum of life imprisonment. The defendant's prior conviction history met the statute's criteria of two or more prior serious or violent felony convictions. The Court's opinion, representing the views of three Justices, ruled that the sentence was not grossly disproportionate under the Eighth Amendment. Two other Justices, in separate concurring opinions, concluded on other grounds that the sentence did not violate the Eighth Amendment.

State Appellate Court's Ruling on Whether Sentence Violated Eighth Amendment Was Not Contrary To, or Involve an Unreasonable Application of, Clearly Established Federal Law As Determined by United States Supreme Court

Lockyer v. Andrade, 123 S. Ct. 1166, 155 L. Ed. 2d 144, 72 Crim. L. Rep. 525 (5 March 2003). The defendant was convicted of two counts of felony theft (each involved stealing less than $100 of videotapes from stores) and was sentenced for each theft under California's three strikes law to a minimum of 25 years imprisonment and a maximum of life imprisonment, with the sentences to run consecutively to each other (thus, his total sentence was a minimum of 50 years imprisonment and a

maximum of life imprisonment). The defendant's prior conviction history met the statute's criteria of two or more prior serious or violent felony convictions. A California appellate court upheld the sentence under the Eighth Amendment. He filed a federal habeas petition challenging the sentence under the Eighth Amendment, and the federal court of appeals reversed the sentence. The Court ruled, reviewing its prior rulings on sentencing under the Eighth Amendment, that the California appellate court's ruling was not contrary to, or involve an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. The Court rejected the analysis used by the federal court of appeals in applying the federal habeas standard of review of state appellate court judgments.

Defense Counsel Provided Ineffective Assistance Under Sixth Amendment When Representing Defendant at Capital Sentencing Hearing

Wiggins v. Smith, 123 S. Ct. 2527, 156 L. Ed. 2d 471, 73 Crim. L. Rep. 410 (26 June 2003). The Court ruled that the defendant's two defense counsel provided ineffective assistance under the Sixth Amendment when representing the defendant at his capital sentencing hearing when they decided not to expand their investigation of the defendant's life history for mitigating evidence. (See the Court's detailed discussion and analysis of the facts in this case.)

State Appellate Court's Ruling That Trial Counsel's Assumed Ineffective Assistance of Counsel Did Not Prejudice Defendant Was Not Contrary to, or Involve Unreasonable Application of *Strickland v. Washington*

Woodford v. Visciotti, 123 S. Ct. 357, 154 L. Ed. 2d 279, 72 Crim. L. Rep. 2070 (4 November 2002). The Court ruled that a state appellate court's ruling that the trial counsel's assumed ineffective assistance of counsel did not prejudice the defendant was not contrary to, or involve an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See the federal habeas review standard under 28 U.S.C. § 2254(d).

State Appellate Court's Ruling That Trial Judge's Comments to Deadlocked Jury and Individual Juror Was Not Contrary to, or Involve Unreasonable Application of Clearly Established United States Supreme Court Rulings

Early v. Packer, 123 S. Ct. 362, 154 L. Ed. 2d 263, 72 Crim. L. Rep. 2068 (4 November 2002). The Court ruled that a state appellate court's ruling that a trial judge's comments to a deadlocked jury and an individual juror was not contrary to, or involve an unreasonable application of clearly established United States Supreme Court rulings. See the federal habeas review standard under 28 U.S.C. § 2254(d).

State Supreme Court's Ruling That Trial Judge's Statements Concerning Defendant's Motion for Directed Verdict of Acquittal of First-Degree Murder Did Not Prevent Prosecution Under Double Jeopardy Clause for First-Degree Murder, Was Not Contrary to, or Involved Unreasonable Application of Clearly Established United States Supreme Court Rulings

Price v. Vincent, 123 S. Ct. 1848, 155 L. Ed. 2d 877, 73 Crim. L. Rep. 208 (19 May 2003). At the close of the state's case in chief and outside the jury's presence, defense counsel moved for a directed verdict of acquittal of first-degree murder based on insufficient evidence of premeditation and deliberation. The judge granted the motion but did not direct a verdict. The next day he reversed himself and said that he would reserve a ruling on the motion. He later permitted the first-degree murder charge to be submitted to the jury. The jury was never informed of the judge's statements. The state supreme court ruled that the judge's statements were not sufficiently final to constitute a judgment of acquittal terminating jeopardy for first-degree murder. In a federal habeas corpus proceeding, a federal court of appeals ruled that double jeopardy barred the prosecution of first-degree murder. The Court ruled that the state supreme court's

ruling was not contrary to, or involved an unreasonable application of clearly established United States Supreme Court rulings.

Actual Decision by Bureau of Alcohol, Tobacco, and Firearms (ATF) on Convicted Felon's Application for Relief from Federal Firearms Disabilities Is Prerequisite to Judicial Review

United States v. Bean, 123 S. Ct. 584, 154 L. Ed. 2d 483, 72 Crim. L. Rep. 206 (10 December 2002). Because of Bean's felony conviction, he was prohibited by 18 U.S.C. § 922(g)(1) from possessing firearms or ammunition. He applied under 18 U.S.C. § 925(c) to the Bureau of Alcohol, Tobacco, and Firearms (ATF) for relief from this disability. The ATF returned the application unprocessed, explaining that its annual appropriations law forbade it from expending any funds to investigate or act on the application. The Court ruled that an actual decision by the ATF on the application is a prerequisite to judicial review, and therefore a district court judge erred in conducting its own inquiry into his fitness to possess a firearm and granting relief from this disability.

When Defendant Was Convicted of Murder and Sentenced to Life Imprisonment Because of Hung Jury in Capital Sentencing Hearing, and Then Conviction Was Set Aside on Appeal, Double Jeopardy Did Not Bar Death Sentence on Retrial

Sattazahn v. Pennsylvania, 123 S. Ct. 732, 154 L. Ed. 2d 588, 72 Crim. L. Rep. 296 (14 January 2003). The defendant was convicted of murder. The jury deadlocked at the capital sentencing hearing and a life sentence was imposed as required by Pennsylvania law. The defendant appealed his conviction, and an appellate court ordered a new trial. At the second trial, the defendant was convicted of murder and sentenced to death. The Court ruled, distinguishing Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), that neither the Double Jeopardy Clause nor the Due Process Clause barred the state from obtaining the death sentence. [Author's note: This ruling has no direct impact in North Carolina because G.S. 15A-1335 prohibits the imposition of a more severe sentence on retrial after a conviction or sentence has been set aside on direct review or collateral attack.]

Statute May Constitutionally Criminalize Cross-Burning Committed With Intent to Intimidate, But Statute May Not Include Prima Facie Evidence Provision That Cross-Burning Is Prima Facie Evidence of Intent to Intimidate

Virginia v. Black, 123 S. Ct. 1536, 155 L. Ed. 2d 535, 73 Crim. L. Rep. 39 (7 April 2003). The Court ruled, encompassing multiple opinions, that a statute may constitutionally criminalize cross-burning committed with an intent to intimidate a person, but the statute may not include a provision that cross-burning is prima facie evidence of intent to intimidate.

Public Housing Authority's Trespass Policy Is Not Facially Invalid Under First Amendment's Overbreadth Doctrine

Virginia v. Hicks, 123 S. Ct. 2191, 156 L. Ed. 2d 148, 73 Crim. L. Rep. 331 (16 June 2003). The defendant was given notice not to return to the public housing authority's property. He then returned and was convicted of trespass. He challenged the authority's trespass policy on First Amendment overbreadth doctrine because the housing authority director's unwritten rule for leafleters and demonstrators required advance permission. His conviction did not involve constitutionally protected conduct. The Court ruled that the trespass policy, taken as a whole, was not substantially overbroad judged in relation to its plainly legitimate sweep and thus the policy was not facially invalid under the First Amendment.

Federal Court of Appeals Erred in Not Issuing Certificate of Appealability to Federal Habeas Corpus Petitioner from Adverse Federal District Court Ruling on *Batson v. Kentucky* Issue

Miller-El v. Cockrell, 123 S. Ct. 1029, 154 L. Ed. 2d 931, 72 Crim. L. Rep. 433 (25 February 2003). The Court ruled that the Fifth Circuit Court of Appeals erred in not issuing a certificate of appealability to a federal habeas corpus petitioner from an adverse federal district court ruling on a Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), issue. To obtain the certificate of appealability, the petitioner must only show a substantial showing of the denial of a constitutional right. The Court examined the petitioner's *Batson* claim (for example, 91% of eligible African-Americans were excluded by the state from the petitioner's venire; some of the state's proffered race-neutral rationales for striking African-Americans pertained as well to some white jurors who were not challenged and had served on the jury; the state's use of racially-disparate questioning) and ruled that a substantial showing had been made.

Federal Criminal Defendant May Assert Ineffective-Assistance-of-Counsel Claim in Federal Collateral Proceeding Even Though Defendant Could Have, But Did Not Raise Claim on Direct Appeal

Massaro v. United States, 123 S. Ct. 1690, 155 L. Ed. 2d 714, 73 Crim. L. Rep. 119 (23 April 2003). The Court ruled that a federal criminal defendant may assert an ineffective-assistance-of-counsel claim in a federal collateral proceeding even though the defendant could have but did not raise the claim on direct appeal. [Author's note: For North Carolina cases involving this issue with a state criminal defendant in a state court, see State v. Fair, 354 N.C. 131, 557 S.E.2d 500 (2001), and State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544 (2001).]