

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Smith](#), 17-13265, 17-13330 (July 2, 2019)

Defendants Smith and Delancy appealed convictions for conspiracy to commit alien smuggling, alien smuggling, and attempted illegal reentry. The Court addressed arguments that a videotaped deposition of a passenger, a smuggled alien in their boat, was erroneously admitted into evidence, and that the prosecutor's comments to the jury during closing argument constituted reversible error. The Eleventh Circuit affirmed the convictions.

The boat operated by Smith and Delancy was seized by the Coast Guard south of Key Largo. The defendants claimed that they were taking the Haitian passengers to Bimini. The government had considerable evidence to the contrary. Most of the passengers were returned to Haiti. Some, including Vixama, were detained in the United States. The government filed a material witness complaint against Vixama and obtained a warrant for her arrest on the material witness complaint. By "agreement of the defendants, the government took a videotaped deposition of Vixama to preserve her testimony for trial." "The defendants did not require the government to show 'exceptional circumstances' under Federal Rule of Criminal Procedure 15(a) to take Vixama's deposition. Rather than having Vixama, an incarcerated material witness, wait in jail until the defendants' trial, the parties agreed she would be deposed and then deported back to Haiti." At the deposition, both defense attorneys were present and cross-examined Vixama.

The material witness complaint was dismissed. When Vixama was not picked up by ICE within 48 hours on an immigration detainer, she was released by the U.S. Marshal. After that release, Homeland Security engaged in multiple efforts to locate Vixama. One subpoena was directed to her counsel from the material witness complaint. That attorney provided a phone number for Vixama's boyfriend, and counsel stated that he believed she would cooperate. Efforts to contact Vixama through that phone number were unsuccessful.

Two days later, at the commencement of the trial, the government stated that it intended to present the deposition testimony and explained the foregoing circumstances, including Vixama's current unavailability.

The challenge to the admissibility of the deposition on appeal was based on the Confrontation Clause. "[P]rior cross-examination alone cannot substitute for the defendant's right to live testimony in the courtroom unless the witness meets the Confrontation Clause's requirement of 'unavailability.'" "A witness is 'unavailable' for purposes of the Confrontation Clause if the witness does not appear and the government has 'made a good-faith effort' to obtain the witness's presence at trial." The prosecution bears the burden of showing it made such a good-faith effort. There was no bright-line test; the inquiry was fact-intensive and looked to the cumulative efforts that were made.

The Eleventh Circuit was highly influenced by the fact that the material witness complaint had been dismissed by the time of the deposition, and there was no basis to take her into custody on that complaint. It was deemed reasonable to turn to ICE for help in locating Vixama as the ICE detainer was then pending. The Court emphasized government efforts to locate Vixama through her material witness counsel four times, including a subpoena served on that counsel; three efforts to communicate through the boyfriend's phone number provided by counsel; and a final effort on the day of trial through a bench warrant which was again sent to former counsel. The government was deemed to have acted reasonably in accepting counsel's assessment that Vixama would cooperate.

The foregoing points were bolstered by "Vixama's obvious determination to go into hiding." Three prior efforts to obtain a U.S. visa had failed, and that was her admitted cause for participating in the illegal smuggling scheme. The mistaken release by the Marshall provided her with the opportunity to abscond.

As to closing argument by the prosecutor, prior to trial, the government filed a Rule 404(b) notice regarding defendant Smith's prior conviction for alien smuggling, for the purpose of proving knowledge, intent and lack of mistake. Counsel for Smith, in closing argument, "argued that a true alien smuggler likely would take the most direct route from the Bahamas to the United States to avoid detection by law enforcement on the open seas," and that would have been a different route.

In rebuttal, the government relied on the prior conviction, which was for conduct in West Palm Beach, near Boynton Beach, which was the end point of the

route defense counsel was suggesting would have been taken. Defense counsel's objection was that it was misleading to "argue that his prior conviction occurred in West Palm Beach simply because the judgment came from the West Palm Beach division," as the division extends from Key West to Fort Pierce.

The Eleventh Circuit found no error in denying a motion for mistrial based on the comment. It was accurate to say that the prior conviction occurred in West Palm Beach, as the judgment of conviction itself was admitted into evidence and supported that. The comment was also in response to defense counsel's argument. The Eleventh Circuit alternatively found that there was no reasonable probability that the jury would have found Smith not guilty but for the comment; this was based on the totality of the other evidence adduced at trial.

One judge dissented with respect to the good-faith effort to locate Vixama. The dissent asserted that the government's efforts were minimal and focused on additional things the government could have done – e.g., routine database search for the boyfriend's address; no other efforts to locate the boyfriend. The extensive dissent addressed what it perceives to be errors in the majority opinion's analysis and further takes issue with the majority's harmless error assessment. A major focus on the part of the dissent was the lack of reasonable steps to follow up on what was initially a promising lead – i.e., the boyfriend's phone number. The majority opinion also includes an extensive section expressly responding to the dissenting opinion.

[Khan v. United States](#), 18-12629 (July 3, 2019)

The Court addressed the issue of "whether an attorney's disregard of a court instruction to obtain the official consent of a foreign government to conduct video depositions on its soil constitutes ineffective assistance of counsel *per se*." Khan was charged with "conspiring to provide and providing or attempting to provide material support to terrorists" and one other related offense.

Prior to trial, Khan moved to depose several witnesses by live video teleconference in Pakistan. "The district court granted that motion on the condition that Khan's attorney . . . obtain formal permission from the Pakistani government to conduct the depositions." Counsel did not obtain that consent, but the district court allowed the depositions to proceed anyway.

At trial, the testimony of one of those witnesses was presented, "but the video feed abruptly ended before the other witnesses could testify, potentially because Pakistani officials cut the internet signal. On the second day of the trial, an effort to

present the deposition testimony of another witness proceeded, and the live video signal was lost almost immediately. Left without the testimony of these witnesses, Khan testified in his defense,” and was convicted. He then pursued a claim of ineffective assistance of counsel in a 28 U.S.C. s. 2255 proceeding, based on counsel’s failure to obtain Pakistani approval. A subsequent investigation was inconclusive as to who shut down the depositions; the district court concluded the Pakistani government was to blame.

Defense counsel traveled to Pakistan and, inter alia, consulted with a local attorney and spoke to two government officials, before filing an affidavit from the local attorney asserting that the depositions were voluntary and that “no such permission or lack of permission is obtainable from the Government of Pakistan.” Khan’s American counsel further provided an affidavit relating his conversations with Pakistani officials with an explanation that if Pakistan was not a party, the government did not “care one way or the other” about depositions in Pakistan. The officials reiterated what they told local counsel, that permission for voluntary depositions was not needed. The local attorney’s affidavit also noted that “United States officials participating in the depositions *would* need permission from the Pakistani government.”

The Eleventh Circuit first concluded that trial counsel’s performance was not deficient. It rejected the argument that deficiency for failing to comply with the court’s instructions was per se. Analyzing deficiency based on the totality of the objective standard of reasonableness, the Court found that counsel’s decision to disregard the court’s instruction was a reasonable trial strategy. This was “uncharted territory,” as depositions in Pakistan for American criminal cases had never been taken before. Efforts were made to find alternatives to depositions in Pakistan, but they were unsuccessful. The witnesses had been previously named as codefendants in the criminal case and faced arrest if they traveled to the United States and the UAE would not permit them to testify on their soil. Counsel’s efforts when in Pakistan were deemed “significant.” Furthermore, Khan offered no reason to believe that the effort to obtain Pakistani approval would have succeeded if pursued, let alone within the narrow timeframe mandated by the district court. It was a further possibility that if efforts to obtain the approval proceeded, the Pakistani government might have denied the request, thereby completely barring any possibility of such depositions.

Counsel did not violate a duty imposed by the district court. The district court had only conditioned the admissibility of the depositions on prior Pakistani government approval. And, “the duty to obey court orders is a duty owed *to the*

court distinct from the duty to provide effective assistance, which runs *to a client* under the Sixth Amendment.” The Eleventh Circuit described counsel’s efforts to comply as “almost herculean.”

Finally, prejudice was not established. Khan could not demonstrate that consent from the Pakistani government would have been obtained. Nor did Khan establish that the loss of the live feed was related to the lack of Pakistani approval. It was also an “understatement” to describe the evidence guilt as “overwhelming.”

Third District Court of Appeal

[Barreiros v. State](#), 3D18-2584 (July 3, 2019)

The Third District reversed the denial of a petition for writ of habeas corpus. The petition had been denied by the trial court with a finding that it had previously been filed and denied in the same court as a motion to correct illegal sentence. Based upon a review of relevant pleadings, the Third District found that the issues raised in the relevant habeas petition and 3.800(a) motion were not the same. The confusion stemmed from the existence of more than one 3.800(a) motion.

[Lucas v. State](#), 3D19-1183 (July 3, 2019)

A habeas petition alleging ineffective assistance of appellate counsel was dismissed as untimely as it was filed more than four years after the judgment and sentence became final on direct review.

Fourth District Court of Appeal

[Delacruz v. State](#), 4D17-2103 (July 3, 2019)

The defendant was charged with theft of large sums of money from her employer. “During her jury trial, and without warning, appellant’s attorney informed the trial court he could no longer continue representation because he had been informed of the possibility that his fee was paid with funds appellant allegedly stole from a subsequent employer. Defense counsel requested leave to withdraw from his representation of the appellant, but the trial court denied the motion. We hold that the denial of the motion was error and reverse.”

The trial court equated the situation to a fee dispute between counsel and client. The Fourth District rejected that comparison: “Here, defense counsel claimed

appellant placed him in a situation where he feared that he would be a target of both litigation and a potential Bar investigation related to the fee paid to him. Defense counsel's concerns went beyond the mere possibility of nonpayment. Under these circumstances, defense counsel established an actual conflict of interest, and the trial court should have permitted defense counsel to withdraw.”

[Johnson v. State](#), 4D18-3528 (July 3, 2019)

In Witherspoon v. State, 214 So. 3d 578 (Fla. 2017), the Supreme Court held that the State must charge attempted felony murder in order to obtain a jury instruction on that offense. It is not enough to allege attempted premeditated murder even though both are forms of attempted first-degree murder.

In this case, the Fourth District affirmed the summary denial of a Rule 3.850 motion which sought relief based on Witherspoon, but the Court certified to the Florida Supreme Court a question of great public importance – whether Witherspoon applies retroactively to previously final convictions.