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A L E R T

SUPREME COURT REAFFIRMS THAT AN APPELLEE WHO DOES NOT SEEK TO ENLARGE ITS FAVORABLE JUDGMENT NEED NOT FILE A CROSS-APPEAL TO ATTACK A LOWER COURT RULING

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One of a litigator's most crucial tasks is ensuring that issues and arguments in support of a client's position are available if and when the case is presented to an appellate tribunal. While issue preservation is always a concern for appellants, who are subject to the doctrine of waiver, it is also critical to ensure that an appellee is not barred from presenting arguments in defense of the judgment it has won. In that regard, a critical question in every case is whether a victorious party that is unhappy with some of the lower court's rulings must file a cross-appeal from a favorable judgment in order to attack those rulings.

The U.S. Supreme Court addressed this question in *Jennings v. Stephens*, No. 13-7211 (Jan. 14, 2015), and clarified that a cross-appeal is not necessary to enable an appellee to use any argument supported by the record to defend a judgment it has won, so long as that argument does not (a) enlarge the appellee's rights, or (b) reduce the rights of the appellant. In other words, in the context of defending the lower court's judgment in the losing party's appeal, a victorious party may urge the appellate court to affirm that judgment (but not enlarge the relief the appellee obtained) even on a ground on which the lower court ruled against the appellee.

In *Jennings*, the petitioner, who had been sentenced to death, sought federal habeas relief on three theories of ineffective assistance of counsel. The district court granted relief on two of the theories, which involved counsel's failure to present evidence of the petitioner's deprived background and failure to investigate evidence of mental impairment. The district court denied relief on the third theory, which involved counsel's expression during his closing argument that he could not "quarrel with" a death sentence. The court ordered that the state release the petitioner, grant him a new sentencing hearing, or change his sentence to imprisonment in accordance with state law.

The state appealed and attacked the two theories on which the court had awarded relief. The habeas petitioner did not cross-appeal, but he defended the court's judgment not only on the two theories on which the trial court had awarded relief, but also on the theory that the district court had rejected. The Fifth Circuit reversed the relief awarded by the district court on the first two theories but held that it did not have jurisdiction to consider the third theory because the petitioner had not filed a cross-appeal.

The Supreme Court agreed to hear the petitioner's appeal and reversed. The Court reaffirmed the long-standing rule from *United States v. American Railway Express Co.* (1924), that an appellee need not take a cross-appeal to "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court." The Court also reiterated that, absent a cross-appeal, the appellee may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." The Court explained that because what an appellee seeks to defend and enforce is the lower court's judgment and not necessarily its reasoning, it is permissible to rely on alternative grounds to defend the judgment so long as doing so would not enlarge the appellee's rights, detract from the appellant's rights, or require consideration of evidence not in the record.

Applying this rule to the petitioner's case, the Court held that the result was straightforward: success on the petitioner's third theory of ineffective assistance of counsel would not lead to greater relief than the district court had awarded (*i.e.*, a new sentencing or release). Nor would it deprive the state of any rights it had not already lost in the trial court. Thus, the Fifth Circuit had erred in holding that it could not address the petitioner's third argument because of his failure to file a cross-appeal.

Although it did not announce a major new rule of law, *Jennings* is an important reminder that preparing for appeal actually begins at the trial court level. An appellee must take stock of the arguments it wants to make on appeal to determine whether they will change the relief obtained under the judgment, and, if so, must file a cross-appeal. And even before a final judgment is rendered in the trial court, a litigant must be careful to lay a foundation in the record to support whatever arguments it may want to make on appeal in support of a favorable judgment, regardless whether those arguments are successful in the trial court. ◆

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