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Supreme Court Watch:Recent Decisions of Selected Criminal Cases

Max P. Salazar, Jr.

American University Washington College of Law

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SUPREME COURT WATCH

RECENT DECISIONS OF SELECTED CRIMINAL CASES | MAX P. SALAZAR, JR.

FILARSKY v. DELIA

Docket Number: 10-1018

Argument: January 17, 2012

Issue:

Whether a private attorney retained to work with government employees in conducting an internal investigation is barred from asserting qualified immunity because of his status as a private lawyer rather than a government employee.

Facts:

Respondent Delia worked for the City of Rialto, California's fire department. In August 2006, he complained that he was feeling sick and obtained a series of letters from his doctor that excused him from work but not from participating in any other activity. After the City became suspicious and saw him buying home-renovation supplies, the City started an internal affairs investigation to see if he was "off-work on false pretenses." The City retained petitioner Filarsky to provide legal analysis and assist in the investigation. After a meeting with Delia and a few Fire Chiefs, Filarsky advised the Chiefs with a specific course of action. The Chiefs followed through and decided to end the investigation after learning that Delia had not used the home-renovation supplies.

Delia sued the City, fire department, Filarsky, and other unidentified individuals under § 1983. The district court granted summary judgment and held that all of the individual defendants, including Filarsky, were entitled to qualified immunity. The Ninth Circuit then affirmed in part and reversed in part. The court affirmed the dismissal of all the individual government defendants while denying summary judgment to Filarsky because he "was not entitled to qualified immunity" "as a private attorney."

Petitioner Filarsky argues that government positions entitled to immunity at both local and state levels have historically been filled with people working in the private and public sectors. As a result, a person's formal institution into

a government position was not dispositive in determining immunity. Rather, eligibility for immunity turned on "whether the temporarily engaged individual was the functional equivalent of a government employee." Thus, according to Filarsky, courts should consider the role performed, supervision of government officials, and "the immunity that would have attached to the government employees performing the same essential government task." As such, Filarsky's main contention is that qualified immunity should extend to lawyers working under the auspices of government.

In contrast, Delia argues that a private individual conducting an interview is not entitled to qualified immunity under *Richardson v. McKnight*, 521 U.S. 399 (1997). Further, he

contends that the policy reasons for qualified immunity would not be fulfilled if immunity was extended to private persons conducting workplace investigations. Delia also does not agree with Filarsky's qualified immunity test discussed above because it is both "arbitrary and unworkable." Finally, Delia points to the distinction between private and public lawyers; specifically, different incentives guide different

principles of action between the two. As such, Delia does not want to extend qualified immunity to private actors.



BLUEFORD v. ARKANSAS

Docket Number: 10-1320

Argument: February 22, 2012

Issue:

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars the re-prosecution of a greater offense after a jury announces that it is "unanimously against" guilt on the greater offense.

Facts:

Petitioner Blueford was charged with capital murder and lesser-included offenses. During closing arguments, the State urged the jury to not consider the lesser-included offenses until they found the petitioner not guilty of first-degree murder. After three hours of deliberation, the jury asked what would happen if they could not agree on any charge. The judge granted a series of dynamite instructions; despite these instructions and two more hours of deliberation, the jury was deadlocked on the lesser-included offense and the judge declared a mistrial. During deliberations, however, the foreperson told the trial judge that “the jury had voted ‘unanimous against’ capital murder and first-degree murder but had voted 9-3 on manslaughter.” As such, petitioner Blueford moved to have the new case brought against him for first-degree murder under a double jeopardy theory. The Arkansas Supreme Court agreed with the court below and held that Blueford could be tried again because voicing jury deliberations did not terminate jeopardy.

Blueford contends that what the foreperson told the court constituted an acquittal under Double Jeopardy jurisprudence. As such, Blueford beseeches the Court to accept substance over form when determining whether the acquittal represents a resolution. He further supports this assertion by noting that the “jury instructions establish acquittals on the greater offenses by virtue of the jury’s deadlock on the lesser-included offense.” Ultimately, Blueford sees deliberation and unequivocal expression of innocence by the jury as enough evidence that an acquittal was reached; any indication otherwise would undermine the Double Jeopardy Clause’s policy goals.

Arkansas, on the other hand, relies on *Arizona v. Washington*, 434 U.S. 497 (1978) to conclude that a deadlocked jury warranted a mistrial. As such, jury deliberations do not amount to an acquittal under double jeopardy. Arkansas argues that the court has drawn a bright line between jury verdicts and deliberations; specifically, only the former could result in an acquittal. Further, a jury verdict “is a resolution; it represents juror agreement at the end of deliberations; it is unmistakably clear when it is issued; and it ordinarily cannot be reconsidered once it is accepted.” Finally, Arkansas does not see the jury instructions as creating an independent mechanism for acquittal. Therefore, Arkansas reasons that an implied acquittal does not arise because the jurors were allowed to step down from the different elements and charges pursuant to the jury instructions.

UNITED STATES v. ALVAREZ

Docket No. 11-210

Argument: February 22, 2012

Issue:

Whether the Stolen Valor Act, 18 U.S.C. § 704(b), which makes it a crime to falsely represent that you have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, is facially invalid under the Free Speech Clause of the First Amendment.

Facts:

On July 23, 2007, Xavier Alvarez introduced himself as a retired Marine who was awarded the Congressional Medal of Honor. However, he had never served in the military and his statement garnered no benefits. He was one of the first people prosecuted under the Stolen Valor Act of 2005, where Congress deemed it a crime to “falsely represent...verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.” 18 U.S.C. § 704(b).

Alvarez brought both a facial and as-applied challenges to the constitutionality of the law. The district court denied Alvarez’s motion to dismiss. He pled guilty and was sentenced to three years probation with a \$5,000 fine. The court of appeals reversed and remanded. The court first reasoned that what Alvarez said did not fall into the historical and traditional categories of unprotected speech. Further, the court applied strict scrutiny to the law and did not find it to be narrowly tailored because “other means exist to achieve the interest of stopping such fraud, such as by using more speech, or redrafting the Act to target actual impersonation or fraud.”

The Government argues that the law “prohibits a discrete and narrow category of factual statements: knowingly false representations that a reasonable observer would understand as a factual claim that the speaker has been awarded military honor.” Further, the Government does not agree with the lower court’s decision to apply strict scrutiny when dealing with false factual statements; rather, the petitioner advocates a compelling interest analysis. Finally, the Government argues that the statute provides ample breathing space for protected speech.

Alvarez, on the other hand, agrees with strict scrutiny as the standard. Further, he argues that the Government wants to create a new standard “that would permit prosecution of lies so long as the Government was able to conjure an ‘important’ interest, and so long as the law leaves breathing space for fully protected speech.” Alvarez rejects this test because it criminalizes lies and does not see an inherent value in white lies. Further, he relies on a public policy argument to differentiate puffery and social

speech from harmful lies. Finally, Alvarez concludes that the statute will not survive a constitutional challenge even if the Government's test was adopted.

WOOD v. MILYARD

Docket Number: 10-9995

Argument: February 27, 2012

Issues:

(1) Whether an appellate court has the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense. (2) Whether Colorado lost their statute of limitations defense after telling the district court that it was not challenging the timeliness of Wood's petition.

Facts:

Petitioner Patrick Wood filed a petition for writ of habeas corpus on February 5, 2008. The district court denied two of his six constitutional claims on the merits that dealt with potential double jeopardy violations. The Tenth Circuit then granted him a certificate of appealability, while making both parties argue about the timeliness of Wood's petition and state procedural rules that would prevent the claims from going forward. The court noted, however, that Colorado did not challenge the timeliness of Wood's petition. Even so, the circuit court raised the timeliness defense *sua sponte* and dismissed the claims.

Petitioner Wood recognizes that "affirmative defenses based on statute of limitations must be pled, and such defenses are forfeited or waived if not asserted in the district court." As such, Wood concludes that the circuit court overreached its authority in resurrecting a claim that was not raised, and that not raising it amounts to waiver. Further, Wood recognizes that a district court may in some cases *sua sponte* raise a limitations defense under *Day v. McDonough*, 547 U.S. 198 (2006), but argues against expanding it to appellate courts. Wood explicitly notes the different roles that appellate and district courts hold while also recognizing that the Tenth Circuit alone allows an appellate court to raise a timeliness defense *sua sponte*. Therefore, Wood relies on policy considerations and precedent to bar appellate courts from raising defenses without being pleaded in the lower courts.

The respondent, on the other hand, concentrates on the waiver issue. Specifically, Milyard construes the State's statement as an ambiguous expression as to statute of limitations defense. In other words, the State did not challenge nor concede the timeliness defense, thus, it should not be construed as a waiver. As such, Milyard also recognizes a unique quality in habeas petitions and would afford appellate courts greater

latitude in said proceedings. Further, Milyard's argument rests on the distinction between waiver and forfeiture. Thus, Milyard does not think that what the State said at the district court constituted an "intentional relinquishment of a known right" and that an appellate court has the authority to raise a statute of limitations defense *sua sponte*.

MOHAMAD v. PALESTINIAN AUTHORITY

Docket Number: 11-88

Argument: February 28, 2012

Issue:

Whether the Torture Victim Protection Act of 1991, which authorizes actions against an "individual" who commits acts of torture, permits actions against defendants that are not natural persons.

Facts:

Azzam Rahim, a United States immigrant from the West Bank, was murdered in 1995 under the auspices of the Palestinian Authority (PA). Rahim's son, Mohamad, filed suit against the PA in federal district court; he alleged that they were responsible for torturing and killing his father. The district court held that Mohamad could not sue under the Torture Victim Protection Act because the term "individual" did not extend to organizations. The appellate court affirmed the judgment under a literal reading of the statute.

Petitioner Mohamad argues that the statute's purposes permit expansion of the term "individuals" to non-sovereign organizations by analogizing "individual" to "person." Under an *expressio unius est exclusio alterius* analysis, Mohamad further contends that Congress did not mean to limit liability to "natural persons." Mohamad also analogizes the Torture Victim Protection Act to international documents establishing liability for similar crimes; specifically, these treaties do not concentrate liability to natural persons. Finally, Mohamad looks to legislative history and concludes that Congress intended to use the word "individual" to preclude foreign states from liability. Therefore, Mohamad argues custom should broaden torture violations under the Torture Victim Protection Act to include organizations.

The PA, in contrast, argues for a strict interpretation of the statute. Specifically, "[d]ictionaries, common usage, case law, and statutes all make clear that the ordinary meaning of 'individuals' is a natural person or human being." The respondent rebuts Mohamad's contention that "person" and "individual" are similar. Finally, the PA also looks at Congressional intent and concludes that Congress carefully used "individual" because it wanted to limit liability to natural persons.

SOUTHERN UNION COMPANY v. UNITED STATES

Docket Number: 11-94

Argument: March 19, 2012

Issue:

Whether the Fifth and Sixth Amendment principles that the Supreme Court established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (concluding that a jury must find a fact that increases a prison sentence beyond the otherwise applicable statutory maximum) apply to criminal fines.

Facts:

Southern Union (SU), a gas company, violated a federal statute for storing mercury without a permit. After a mercury spill, SU tried to mitigate damages with surrounding residents. A jury found SU guilty and at sentencing SU was fined \$50,000 for each day of the violation; this amounted to millions. SU objected to this calculation and thought it was inconsistent under *Apprendi* because “the jury did not determine the number of days or duration of the [statute] violation and, therefore, the maximum sentence supported by the jury’s verdict was the maximum fine for a one-day violation.” The district court rejected this argument and held that *Apprendi* does not apply to criminal fines. The appellate court rejected SU’s argument as well and relied on *Oregon v. Ice*, 555 U.S. 160 (2009) to hold *Apprendi* inapplicable to the facts.

SU’s main argument is that the Court’s reasoning in *Apprendi* does not provide an adequate basis to distinguish between fines and jail time under the Fifth and Sixth Amendment. Further, the Supreme Court’s historical analysis and application of *Apprendi* in *United States v. Booker*, 543 U.S. 220 (2005), does not explicitly isolate imprisonment as the sole sentence that requires a jury to find any fact that increases punishment beyond a statutory maximum. SU also believes the appellate court erred in relying on *Ice* because it “did not involve a criminal fine and is properly understood as a narrow decision that merely declined to extend the *Apprendi* principle to the multiple offense context.” Finally, SU argues that if *Apprendi* does not encompass fines, then innocent people may be forced to plead guilty absent constitutional safeguards against judicial abuse.

The United States does not advocate extending *Apprendi* to criminal fines. Also, the government agrees with the appellate court’s interpretation of *Ice*; specifically, the jury does not have to find any fact when allowing consecutive sentences. Further, criminal fines are fundamentally different than imprisonment or capital punishment because fines “involve a deprivation of property, while [imprisonment or capital punishment involve] a

deprivation of liberty or life.” As such, the United States argues that applying *Apprendi* to fines would undermine the historical distinction or concern between cash punishment and freedom while eroding judicial sentencing discretion.

MILLER v. ALABAMA

Docket Number: 10-9646

Argument: March 20, 2012

Issue:

Whether imposing a sentence of life without possibility of parole on a fourteen-year-old offender who committed capital murder violates the Eighth Amendment under the Cruel and Unusual Punishment Clause.

Facts:

Evan Miller was convicted of capital murder for an offense committed when he was fourteen. He was sentenced to life-without-parole. The Alabama Circuit Court denied Miller’s new-trial motion that called for an Eighth Amendment violation because the court allegedly did not consider Miller’s age or other mitigating circumstances. On appeal, the Alabama Court of Criminal Appeals affirmed because capital murder justified a life-without-parole sentence regardless of age.

Miller argues that fourteen-year-olds should not be subject to a mandatory life sentence without the possibility of release under an Eighth Amendment theory. Specifically, the Court’s holdings in *Roper v. Simmons* and *Graham v. Florida* show that “youth and its attendant features have a critical role to play in determining an adolescent’s culpability.” Therefore, Miller relies mostly on policy considerations and Supreme Court precedent to assert that age should play a bigger role in life-without-parole jurisprudence.

Alabama believes that the Eighth Amendment allows life-without-parole sentences to be imposed on murderers under eighteen. Alabama also relies on statutory analysis across multiple jurisdictions in the United States to assert that most states allow life-without-parole sentences for aggravated murder when the offender was fourteen. The state also rebuts Miller’s argument about the rarity of said sentences because “it is only a very few fourteen-year-olds committing aggravated murder.” Further, Alabama sees the distinction between fourteen and eighteen-year-olds as a judicial fiction when it comes to science, but also recognizes that fourteen-year-olds are exempt from the death penalty whereas their eighteen-year-old compatriots are not. Finally, the state also relies on policy considerations to show that a life-without-parole sentence is appropriate and comports with the Eighth Amendment.

VASQUEZ v. UNITED STATES

Docket Number: 11-199

Argument: March 21, 2012

Issues:

(1) Whether the Seventh Circuit violated the harmless error rule when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on the jury. (2) Whether the Seventh Circuit violated Vasquez's Sixth Amendment right to a jury trial by determining that Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case.

Facts:

Petitioner Alexander Vasquez was charged with conspiracy to possess with intent to distribute cocaine and attempting to possess with the intent to distribute cocaine after a monitored drug transaction where he crashed into a police car and was found at a McDonalds. A government witness testified that Vasquez was not supposed to be there. Also, the government introduced evidence of a prior cocaine conviction for Vasquez of which his role was not duplicated in the case at hand. In addition, the government used recordings to show that Vasquez's lawyer said that "everyone is going to lose at trial and that [Vasquez] should plead guilty." The statements were heard four times and the jury convicted after eight hours of deliberation. On appeal, the Seventh Circuit agreed that the recordings should not have been allowed in, but deemed it a harmless error and affirmed the conviction. The Seventh Circuit reasoned that there was enough evidence to convict otherwise.

Petitioner Vasquez asks the Supreme Court to reconsider the appellate court's harmless-error analysis. Specifically, the analysis should "require consideration of an error's effect in the context of the entire record." Further, Vasquez argues that the error heavily influenced the jury's decision to convict. As such, the Court should not focus on "overwhelming independent evidence" because it undermines the policy governing harmless-error jurisprudence and violates the Sixth Amendment right to a jury trial. Therefore, Vasquez contends that a judge makes a guilt determination when he/she only asks if there was enough independent evidence to convict and allows prejudicial evidence into the record erroneously.

The United States agrees with the Seventh Circuit in that the court "appropriately articulated the harmless-error standard and correctly concluded based on its review of the 'evidence as a whole' that the non-constitutional trial error did not alter the

verdict." Further, the government argues that the appellate court complied with the standard and independently determined that there was a "fair assurance" that the jury's decision would not have been different had the error not been made. The government also disagrees with Vasquez's Sixth Amendment claim because it was the jury who convicted him in the first place. Thus, the United States concludes that the Seventh Circuit's application of the harmless-error standard was objective and the erroneous admission of evidence was harmless because the case would not have been decided differently.

REICHLE v. HOWARDS

Docket Number: 11-262

Argument: March 21, 2012

Issues:

(1) Whether probable cause to make an arrest bars a First Amendment retaliatory arrest claim. (2) Whether the court below erred by denying qualified and absolute immunity to petitioners where probable cause existed for respondent's arrest, the arrest comported with the Fourth Amendment, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.

Facts:

On June 16, 2006, respondent Howards walked through an outdoor shopping center to take his son to a piano recital. He saw Vice President Dick Cheney shaking hands and taking pictures with patrons. Secret Service Agent Doyle protected Vice President Cheney that day and heard Howards say, "I'm going to ask [Cheney] how many kids he's killed today." Agent Doyle also saw an opaque bag in Howards' hands. Howards approached the Vice President, exchanged a few words, touched Cheney's right shoulder with his open hand, and walked away. Protective Intelligence Coordinator Agent Reichle was called to investigate the incident and determined there was probable cause to arrest Howards. Howards was detained for a few hours at the Eagle County Sheriff's Department, but state charges were eventually dropped and no federal charges were filed.

Howards sued Agents Reichle and Doyle under § 1983 alleging First and Fourth Amendment violations. The district court denied the Agents' motion for summary judgment. The Tenth Circuit affirmed in part and reversed in part. The court rejected the Fourth Amendment claim on the idea that the Agents had probable cause to arrest. However, the court held that probable cause was not a bar to Howard's First Amendment retaliation claim.

The Agents argue that the First Amendment claim should be barred under an extension of *Hartman v. Moore*; here, the Supreme Court barred retaliatory prosecution claims where probable cause supports the prosecution. Further, the Agents argue that they should have flexibility in arresting people who can cause potential harm to the President without hesitation. Also, the Agents beseech the Court to protect them under qualified immunity. Therefore, the Agents want the probable cause standard to bar retaliatory arrest claims against the Secret Service.

In contrast, Howards argues that a First Amendment retaliatory arrest suit should lie “regardless of whether the arresting officer possessed probable cause to make an arrest when that officer was actually motivated by personal animus toward the protected speech.” Further, Howards does not want the Agents’ qualified immunity to be transferred into absolute immunity because probable cause itself should not legalize a retaliatory prosecution. Ultimately, Howards does not think that probable cause should bar a First Amendment retaliation arrest suit.

DORSEY v. UNITED STATES / HILL V.

Docket Number: 11-5683 (Dorsey); 11-5721 (Hill)

Argument: April 17, 2012

Issue:

Whether the Fair Sentencing Act of 2010 applies in an initial sentencing proceeding that takes place on or after the statute’s effective date if the offense occurred before that date.

Facts:

The Fair Sentencing Act of 2010 (FSA) reduced the disparity between crack and powdered cocaine necessary to trigger possible United States criminal penalties while eliminating a five-year mandatory minimum sentence for crack cocaine possession. The *Dorsey v. United States* and *Hill v. United States* litigations were consolidated. In August 2008, Dorsey was arrested in Illinois and charged with possession with intent to distribute five or more grams of cocaine base. Petitioner Dorsey admitted to possessing 5.5 grams of crack cocaine. He asked for an FSA sentence on this and prior felony drug convictions but the district court rejected his argument. The appellate court affirmed the judgment below because it did not interpret the FSA as a law that applies retroactively.

In March 2007, petitioner Hill sold around 53.3 grams of crack cocaine to an informant. He was charged and convicted with distributing fifty grams or more of cocaine base. He was sentenced to 120 months in jail even though the mandatory minimum for his offense would have been five years had the FSA been retroactively applied. The appellate court affirmed under similar reasoning in *Dorsey*.

Petitioners under *Dorsey* and *Hill* argue that Congress intended the FSA to apply retroactively and the language in the statute reflected that aim. Accordingly, “it would make little sense to require the [Sentencing] Commission to incorporate the [new] ratio into emergency Guidelines if the pre-FSA mandatory minimums would remain ‘applicable law’ for the thousands of pre-enactment offenders who would be sentenced under those emergency guidelines.” Petitioners then looked at legislative history to show that if Congress intended the FSA to take effect post-enactment, then an earlier version with similar wording would not have been scratched. Finally, Dorsey and Hill argue that the purpose of the FSA was to ensure fairness in cocaine sentencing and not applying it retroactively would halter that goal.

The United States argues that Section 109 of the U.S. Code forbids retroactivity because the FSA does not expressly endorse such an application. The government thus does not find any justification to apply the FSA retroactively under the four corners of the statute. Finally, the United States disputes the petitioner’s fairness argument by arguing that “Congress never avowedly changes sentencing practices to make them less fair; yet the general rule . . . in Section 109 precludes retroactive application of those changes in the mine run of cases.” Therefore, the United States asserts a prospective application of the FSA.

ARIZONA v. UNITED STATES

Docket Number: 11-182

Argument: April 25, 2012

Issue:

Whether federal immigration laws preclude Arizona’s efforts at cooperative law enforcement and impliedly preempt four provisions of S.B. 1070 (state law authorizing and directing law enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and imposing penalties for non-compliance with federal immigration requirements) facially.

Facts:

Arizona enacted a state law (S.B. 1070) meant to help authorize and direct state law enforcement officers to cooperate and talk to federal officials about enforcing federal immigration laws. The United States filed suit to enjoin four provisions of the law that allegedly federal law preempts. The district court held that federal immigration law preempted said four provisions and the appellate court affirmed.

The government argues that they alone have jurisdiction over immigration issues. Further, the Supreme Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941), “established that Congress had left no room for the States to adopt their own rival registration

rules. Section 3 of S.B. 1070 fails under that holding.” As such, it is up to Congress and the federal government to deal with immigration issues while not permitting Arizona to create its own immigration policy. Therefore, the United States beseeches the Supreme Court to render the Arizona law unconstitutional.

Arizona, however, sees no clear conflict between S.B. 1070 and federal law. Further, the state rejects the idea that it’s creating its own immigration policy. Ultimately, Arizona sees itself as a state that suffers from disproportionate impact because of illegal immigration. Therefore, Arizona seeks to strike a balance between creating its immigration policy and being “impliedly stripped of its plenary authority and at the mercy of the federal executive’s lax enforcement policy.” Thus, Arizona seeks to have the four provisions previously enjoined upheld.

ABOUT THE AUTHOR

Max P. Salazar, Jr. graduated from Duke University and received his B.A. in Political Science with a minor in Religion. He will receive his J.D. degree from American University, Washington College of Law in 2013, where he serves as a Line Editor for the Criminal Law Brief. He is also a member of the Mock Trial Honor Society and Latino Law Students’ Association. Before law school, Max worked on the Senate campaign for Jim Neal in North Carolina. Among other duties for the campaign, Salazar served as the liaison between campaign officials and the Latin American community by translating information for Spanish speaking residents.