Fifth Annual CLORE Supreme Court Review
Key Civil Rights and Equality Cases of the 2013-2014 Term

Co-Sponsored by
CUNY School of Law's
Center on Latino and Latina Rights and Equality (CLORE)
The Puerto Rican Bar Association
The Hispanic National Bar Association-New York Region
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Orrick
51 West 52nd Street,
New York, NY 10019-6142

Monday, September 22, 2014
5:30-8:30 P.M.

CLE Program Materials
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September 22, 2014 -- 5:30-8:30 P.M.
Orrick

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Sponsored by: CLORE/CUNY Law, PRBA, HNBA, & Orrick

Reception and Registration (5:30 – 5:45)

Welcome and Introductions (5:45 – 5:55)

Natalie Gomez-Velez, Professor of Law, CUNY School of Law and Director, CLORE
Carlos Perez Hall, President, Puerto Rican Bar Association
Neysa Alsina, President, Hispanic National Bar Association, NY Region

Greetings (5:55 – 6:05): Judge Jenny Rivera [tentative]

Panel Presentation (6:10 – 8:30)

Panelist Introductions: Natalie Gomez-Velez, Moderator (6:10- 6:20)

Affirmative Action and Campaign Finance (6:20-6:40):
Juan Cartagena, President & General Counsel, LatinoJustice PRLDEF
Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (affirmative action state opt out case) & *McCutcheon v. Federal Election Commission* (campaign finance)

Health and Reproductive Rights (6:40-7:00):
Louise Melling, Deputy Legal Director and Director of Liberty Project, ACLU
Burwell v. Hobby Lobby Stores (corporate exemption from contraceptive coverage) & *McCullen v. Coakley* (clinic buffer zone)

Criminal Law (7:00-7:40):
Fabio Arcila, Professor of Law, Touro Law School
(7:00-7:20) *Fernandez v. California* (co-tenant consent to warrantless search) & *Plumhoff v. Rickard* (use of deadly force, police officer firing shots into vehicle attempting to flee. Fourth Amendment, qualified immunity)
Elba Galvan, Court Attorney, New York State Unified Court System
(7:20-7:40) *Rosemond v.United States* (jury instructions); *Kansas v. Cheever* (rebuttal of mental state with evidence of court-ordered mental evaluation and 5th amendment right against self-incrimination)

First Amendment and Administrative Law (7:40–8:00):
Rachel Wainer Apter, Managing Associate, Supreme Court and Appeals**,** Orrick
Town of Greece v. Galloway (prayer at Town Hall meeting) & *NLRB v. Noel Canning* (presidential recess appointments)

Questions and Answers (8:00 -8:10)

Wrap-up and Closing (8:10-8:15)

Panelists' Biographies

Juan Cartagena is a constitutional and civil rights attorney who is the President & General Counsel of LatinoJustice PRLDEF, one of the nation's leading civil rights public interest law offices that represents Latinas and Latinos throughout the country and works to increase their entry into the legal profession. A graduate of Dartmouth College and Columbia University School of Law, Mr. Cartagena currently lectures on constitutional and civil rights law at Rutgers University in New Brunswick. Juan has written numerous articles on constitutional and civil rights issues and the political representation of poor and marginalized communities – especially Puerto Rican and Latino communities – and has recently begun litigating and publishing articles on the effects of mass imprisonment on Latino communities.

Louise Melling is a Deputy Legal Director of the ACLU and the Director of its Center for Liberty. The Center encompasses the ACLU's work on reproductive freedom, women's rights, lesbian gay bisexual and transgender rights, and freedom of religion and belief. Before assuming this role, Ms. Melling was Director of the ACLU Reproductive Freedom Project, in which capacity she oversaw nationwide litigation, communications research, public education campaigns, and advocacy efforts in the state legislatures. Ms. Melling has appeared in federal and state courts around the country to challenge laws that restrict reproductive rights. She has appeared in many media outlets, including CNN, PBS News Hour, Frontline, the New York Times, Washington Post, and USA Today.

Fabio Arcila is a Professor of Law at Touro Law School. Students voted him "Professor of the Year" for 2006-2007. He was on leave as a Visiting Professor at Brooklyn Law School during 2011-2012, and as a Visiting Associate Professor at Fordham University Law School during 2008-2009. His scholarship has focused upon Fourth Amendment search and seizure law, with a general emphasis upon civil searches. He has participated in United States Supreme Court litigation during the certiorari stage in several Fourth Amendment cases, and also authored an amicus brief on behalf of Fourth Amendment historians in Jones, all pro bono. He serves on the planning committee for the annual Northeast People of Color Legal Scholarship Conference; is active in the Hispanic National Bar Association, New York Region; and serves on the board of directors for a national migrant health organization. He has served on the Executive Board of the AALS Section on Minority Groups and numerous of its subcommittees, as well as the planning committee for the Third National People of Color Legal Scholarship Conference.

Elba Rose Galvan has been a court attorney in New York since 2010. Earlier in her career, Ms. Galvan worked as a litigator and appellate attorney in two private firms. Subsequently, she served as special counsel to the Puerto Rican Legal Defense and Education Fund (currently LatinoJustice PRLDEF) and managed a solo practice. In 2005, Elba was a founding board member of the South Bronx Classical Charter School, where she served through 2006. She serves on the board of Project Epic, a program that sponsors financially disadvantaged high school students to attend pre-college enrichment programs during the summer. Elba was a panelist at the first and third annual CLE entitled "The Supreme Court Term Impact on the Latino Community Practitioners" sponsored by CUNY School of Law's CLORE, the HNBA and the PRBA. She also lectured on the duty of prosecutors to truth and justice at a NYWBA CLE entitled "Criminal Law Issues". She has guest lectured on public interest law at Brooklyn Law School. She is the recipient of the Puerto Rican Bar Association's 2011 Excellence in Advocacy Women's Award. She is the current president of the Puerto Rican Bar Association and formerly served as its vice president and corresponding secretary. She is also co-chair of the New York Women's Bar Association's legislation committee. Elba received her B.A. from Cornell University and J.D. from Howard University School of Law. She is a member of the New York Bar and admitted to practice before the U.S. District Courts for the Southern and Eastern Districts of New York.

Rachel Wainer Apter

Natalie Gomez-Velez (Moderator) is a Professor of Law at the City University of New York (CUNY) School of Law, where she served as Associate Dean for Academic Affairs from 2007-2010. She is a graduate of New York University School of Law where she was an Arthur Garfield Hays Civil Rights/Civil Liberties Fellow. Following three years of private law firm practice in New York City, Natalie became General Counsel/Agency Chief Contracting Officer at the New York City Department of Youth Services. She has served as a staff attorney at the national ACLU Reproductive Freedom Project and at NYU School of Law's Brennan Center for Justice. Natalie has served as Assistant Deputy Attorney General for Public Advocacy in the New York State Attorney General's Office, and as Special Counsel to the Chief Administrative Judge of the New York State Unified Court System. She also has taught at NYU School of Law. Natalie received the Academic Leadership Award from the Hispanic National Bar Foundation in 2010. She currently serves on New York's Statewide Judicial Screening Committee and on the Committee on Non-Lawyers and the Justice Gap appointed by New York Chief Judge Jonathan Lippman. She also serves as a Trustee of the City Parks Foundation and as Chair of its Education Committee.

Schuette v. Coalition to Defend Affirmative Action , Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)
No. 12-682, Argued Oct. 13, 2013, Decided April 22, 2014.
134 S. Ct. 1623, 572 U.S. ___ (2014).

Equal protection challenge to state constitutional amendment prohibiting affirmative action in public education, employment, and contracting. The Court held that Article I § 26 of the Michigan Constitution, having been approved and enacted by its voters, does not violate the 14th Amendment's Equal Protection Clause. Article I § 26 prohibits any state actor within the State of Michigan (including the state, any city, county, public college, university, or community college, school district or "other political subdivision or governmental instrumentality of or within the State of Michigan"), from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin provided that this group or individual is operating in public employment, public education, or public contracting. The Court rejected the political process theory argument inherent in *Washington v. Seattle School District* as a basis for denying Michigan voters the constitutionally protected right to prevent their state government from using race-based or race-conscious admissions policies for college and university admissions. Although the decision specifically focused on the use of a voter-elected State Constitutional amendment for purposes of race-based and race-conscious admissions policies in education, the decision implies that such voter-elected policies would be constitutional in an employment context banning the use of affirmative action in hiring policies involving state employees and state-run facilities.

The District Court upheld the constitutionality of Article I § 26, granting Michigan's motion for summary judgment, and subsequently denying a motion to reconsider that ruling. The Court of Appeals for the Sixth Circuit reversed the District Court's grant of summary judgment, holding that the constitutional provision violated the principles inherent in previous Supreme Court regarding racial integration. After granting certiorari, Justice Kennedy delivered the plurality opinion of the Court in which Chief Justice Roberts and Justice Alito joined; Justice Kagan took no part in the decision. Justice Sotomayor wrote a dissenting opinion, which Justice Ginsburg joined.

Commentaries

- Patricia J. Williams, *The Latest Affirmative Action Decision Isn't Just About Race: The Supreme Court's Decision Sweeps Away Decades of Equal Protection Precedent*, The Nation. http://www.thenation.com/article/179602/latest-affirmative-action-decision-isnt-just-about-race May 19, 2014.

- Lyle Denniston, *Opinion Analysis: Affirmative Action—Up to the Voters*, available at http://www.scotusblog.com/2014/04/opinion-analysis-affirmative-action-up-to-the-voters/ (last visited September 3, 2014).
- Ann K Wooster, *Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases*, 172 A.L.R. Fed. 1 (2001).
- David E. Bernstein, *Supreme Court Review-Preview: Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 NYU J.L. & Liberty 210 (2013)
- Jody Feder, *Banning the Use of Racial Preferences in Higher Education: A Legal Analysis of Schuette v. Coalition to Defend Affirmative Action*, CRS Report (September 3, 2013), *available at* http://fas.org/sgp/crs/misc/R43205.pdf
- Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661 (Apr. 2014)

McCutcheon v. Federal Election Commission (Docket No. 12-536)
No. 12-536, Argued October 8, 2013, Decided April 2, 2014.
134 S.Ct. 1434. 572 U.S. ___ (2014).

Challenge by prospective campaign contributor and others to constitutionality of the aggregate limit on candidate contributions and other contributions to party committees under the Federal Election Campaign Act (FECA) and the Bipartisan Campaign Reform ACT (BCRA). BCRA established two sets of limits on campaign contributions. Base limits restrict how much money a donor may contribute to a particular candidate or committee, and aggregate limits restrict the total amount a donor may contribute to all candidates and committees. Alabama resident Shaun McCutcheon's individual contributions in the 2011-2012 election cycle complied with the base limits set in the BCRA, however, the aggregate limits prevented him from making further contributions. Because McCutcheon still wanted to give money to a number of candidates and committees including the Republican National Committee (RNC), both McCutcheon and the RNC challenged the constitutionality of BCRA's aggregate limits. Plaintiffs claimed that the limits burden protected political speech and are not justified by a compelling government interest, thus violating the First Amendment. The Government argued that the aggregate limits restrict campaign finances to prevent corruption. Applying strict scrutiny review under which the Government may only regulate protected speech "if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest," the Court rejected the Government's argument.

A three-judge panel of the United States District Court for the District of Columbia denied plaintiff's motion for a preliminary injunction and granted the Federal Election Commission's motion to dismiss. Plaintiffs appealed, the Supreme Court granted *certiorari.* The Supreme Court reversed and remanded in a plurality opinion by Chief Justice Roberts which Justices Scalia, Kennedy, Thomas and Alito joined. The plurality held that aggregate limits did little to address corruption, an interest that can only be pursued as long as it does not unnecessarily restrain

individuals' freedom of speech. The Government's chosen means to further a sometimes compelling government interest were not sufficiently tailored according to the Court.

Commentaries

- Richard L. Hasen, *McCutcheon v. FEC*, Brennan Center for Justice, (April 2, 2014), http://www.brennancenter.org/legal-work/mccutcheon-v-fec
- Marc E. Elias, Jonathan S. Berkon, *After McCutcheon*, 127 Harv. L. Rev. F. 373 (2014)
- Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 Harv. L. Rev. F. 380 (2014)

Burwell v. Hobby Lobby Stores

Nos. 13-354,13-356, Argued March 25, 2014, Decided June 30. 2014.
2014 WL 2921709. 573 U.S. ___ (2014).

Closely held for-profit corporations challenged regulations of the U.S. Department of Health and Human Services (HHS), issued under the Patient Protection and Affordable Care Act (ACA) based on allegations that the preventive services coverage mandate for employers violated constitutional and statutory religious freedom protections by requiring contraceptive coverage, which was against the corporations' owners religious beliefs. The corporations argued that the HHS requirement that private companies provide health insurance coverage which includes methods of contraception violates the Religious Freedom Restoration Act (RFRA) of 1993 as applied to closely-held for-profit organizations. RFRA, as codified in 42 USC Sect. 2000bb et seq, as summarized in Justice Alito's majority opinion, prohibits the Federal Government from "taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." Under ACA, employers are required to provide minimum health care coverage, which the Health Resources and Services Administration (HRSA, a component of HHS) has defined as including Federal Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling. HRSA guidelines also allowed certain religious non-profit organizations (i.e. churches) to be exempted from providing health care coverage that included abortifacients, and companies with under 50 employees were exempted from providing health care coverage altogether. Construing RFRA broadly, the Court emphasized that mandating closely-held companies to provide health coverage against the owners' religious beliefs placed a substantial burden on the companies' exercise of religion.

The District Court for the Western District of Oklahoma denied preliminary injunction for the suit filed by Hobby Lobby Stores (a family-owned chain with more than 500 stores organized around the principles of the Christian faith), but they appealed, moving for en banc consideration. The Tenth Circuit granted the motion and reversed holding that the business was "persons" within the meaning of RFRA and may bring suit, and that HHS regulations posed a substantial burden on their religious beliefs, they then reversed and remanded for District Court to consider remaining factors of preliminary injunction; the Supreme Court granted certiorari and affirmed. A second appellant in this case, Conestoga (another family-owned business run "in

accordance with their religious beliefs and moral principles.") also challenged the regulations. The Third Circuit held that the company was not a "person" under 42 USC 2000bb 1(a), (b) because it was a for-profit business that could not engage in the exercise of religion. Conestoga appealed; certiorari was granted and the Supreme Court reversed and remanded.

Commentaries

- Ilya Shapiro, *Hobby Lobby: Government Can't Violate Religious Liberties Willy-Nilly*, The Federalist, (July 1, 2014), *available at* http://www.cato.org/publications/commentary/hobby-lobby-government-cant-violate-religious-liberties-willy-nilly
- Lawrence Hurley, *Supreme Court Birth Control Ruling Fuels Battle Over Corporate Rights*, The Huffington Post, Politics, (July 1, 2014, 7:00 AM) http://www.huffingtonpost.com/2014/07/01/supreme-court-birth-control-ruling_n_5546959.html
- Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*: *Justices Rule in Favor of Hobby Lobby*, The New York Times, (June 30, 2014) http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html

McCullen v. Coakley (Docket No. 12-1168)
No. 12-1168, Argued January 15, 2014, Decided June 26, 2014.
134 S. Ct. 2518, 573 U.S. ___ (2014).

Revised Massachusetts statute amending the Reproductive Health Care Facilities Act, criminalized knowingly standing on a "public way or sideway" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were offered or performed. The Act exempts four classes of individuals, including "employees or agents of such family acting within the scope of their employment." Mass. Gen. Laws, ch. 266, §§ 120E½. Petitioners, pro-life advocates, attempted to engage women approaching abortion clinics in "sidewalk counseling," to persuade them not to have abortions. However, they were not successful as a result of the implemented "buffer-zones." They sued Attorney General Coakley claiming that the amended Act violated their First Amendment rights both on its face and as applied to them.

The Supreme Court unanimously held that the Act was content neutral because it does not draw content-based distinctions (it didn't criminalized what people say but where they say it), and even if it disproportionately affects speech on certain topics it is justified without reference to the content of the regulated speech. Based on this qualification, the Court applied intermediate scrutiny requiring the government to narrowly tailor its means to serve a significant governmental interest. Respondents' argument that the Act promotes "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways" was not considered significant enough for the creation of "buffer-zones" which placed a burden on

petitioners' freedom of speech. Additionally, according to the Justices, Massachusetts overlooked other alternatives that could further the state's interest.

The United States District Court for the District of Massachusetts, following affirmance of denial of facial challenge, and following bench trial, denied plaintiff's as-applied challenges. The Court of Appeals for the First Circuit affirmed. Certiorari was granted by the Supreme Court, which reversed and remanded holding that the statute was not content-based due to fact that (1) it established buffer zones only at clinics that performed abortions; (2) it exempted certain groups including clinic employees and agents; and the statute was not narrowly tailored to serve significant government interest, violating First Amendment rights. Chief Justice Roberts delivered the 9-0 opinion of the Court, Justice Scalia concurred in judgment with Justices Kennedy and Thomas, and Justice Alito filed opinion concurring in the judgment.

Question Presented: Whether a Massachusetts statute creating a 35-foot "buffer zone" around reproductive healthcare facilities that demonstrators are not allowed to enter is constitutional.

Commentaries

- Ana Choi, *McCullen v. Coakley: "Something for Everyone*", Harvard Law and Policy Review, (June 27, 2014), http://www3.law.harvard.edu/journals/hlpr/2014/06/mccullen-v-coakley-something-for-everyone/
- Michael Scott Leonard, *Supreme Court Invalidates Massachusetts Abortion Clinic "Buffer Zone" McCullen v. Coakley*, Westlaw Journal of Health Law, (July 8, 2014), 2014 WL 3109154 (WJHTH) (Available on Westlaw)
- The Oyez Project at ITT Chicago-Kent College of Law, *McCullen v. Coakley*, (September 2, 2014), http://www.oyez.org/cases/2010-2019/2013/2013_12_1168

Fernandez v. California (Docket No. 12-7822)
No. 12-7822, Argued Nov. 13, 2013, Decided February 25, 2014.
134 S. Ct. 1126, 572 U.S. ___ (2014).

At issue was whether a warrantless search lawfully may be conducted when a defendant personally present objects to such search, if when s/he is no longer present a co-tenant consents to the search. In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Supreme Court held that the Fourth Amendment does not allow for searches when two co-occupants are present and one consents to a search while the other refuses. However, in *Fernandez*, the Court interpreted *Randolph* as applying only to situations in which both co-tenants are present at the same time. Thus, once a person is removed from their home their objection to consent may be overruled by a co-tenant.

In this case, police officers chased Walter Fernandez, an alleged bank robber, into an apartment building. Detectives heard screams coming from one of the apartments, knocked on the apartment door and Roxanne Rojas answered. When detectives asked Ms. Rojas if they could enter and conduct a search, Fernandez came to the door and refused the detectives entry. Officers removed Fernandez from the apartment, arrested him and took him into custody.

Approximately an hour later, they returned to the apartment and asked Ms. Rojas for consent to search the apartment. Rojas consented verbally and in writing. Gang paraphernalia, a knife, and a gun were found as a result of the search.

Fernandez was charged with robbery, infliction of corporal injury on a spouse, cohabitant, or child's parent, possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition. Petitioner filed a pretrial motion to suppress the evidence found in the apartment, which was denied after a hearing. Fernandez was found guilty and sentenced to 14 years' imprisonment.

The decision was affirmed by the California Court of Appeals, which stated that petitioner's suppression motion had been properly denied because petitioner was not present when Ms. Rojas consented. The California Supreme Court denied the petition for review, and the U.S. Supreme Court granted certiorari. Justice Alito delivered the opinion for the 6-3 majority holding that although a warrant is generally required for a search, the Fourth Amendment's most important requirement is the search's reasonableness. Because Fernandez, the objecting tenant, was no longer present, Ms. Rojas' consent was sufficient authority to render the search reasonable. Justices Scalia and Thomas filed separate concurring opinions. Justice Ginsburg filed a dissenting opinion in which Justices Sotomayor and Kagan joined.

Commentaries

- Orin Kerr, *Five Thoughts on Fernandez v. California*, (February 26, 2014), *available at* http://www.scotusblog.com/2014/02/five-thoughts-on-fernandez-v-california/
- Matt Tako, *Fernandez v. California – An Expansion of Police Power or More of the Same?*, Harvard Civil Rights-Civil Liberties Law Review, (February 28, 2014), *available at* http://harvardcrcl.org/fernandez-v-california-an-expansion-of-police-power-or-more-of-the-same/
- Jay Shapiro, *The Court Takes Another Look at Consent Searches and Georgia v. Randolph*, Lexis Nexis Emerging Issues 7109, 2013. (Available on Lexis)

Plumhoff v. Rickard

No. 12-1117, Argued March 4, 2014, Decided May 27, 2014.
134 S. Ct. 2012, 572 U.S. ___ (2014).

Police Officers fired 15 shots into suspect Rickard's vehicle while he was attempting to flee. Rickard eventually lost control of the vehicle. A combination of gunshot wounds and injuries from the crash resulted in the death of Rickard and a passenger in the car. At issue was whether the police officers used excessive force in violation of the Fourth Amendment. The Court held that the officers' use of deadly force did not amount to excessive force, and they were therefore not in violation of the Fourth Amendment. Furthermore, having violated no established law at the time such force was exercised, the officers were entitled to qualified immunity. The Court also rejected Respondent's contention that even if deadly force was reasonable under the circumstances, firing 15 shots was not. The Court rejected this contention, concluding that police

officers may use deadly force to end a severe threat to public safety until "the threat has ended." Because Rickard was attempting to flee at the time the excessive force was used, such force was not excessive, given that Rickard's method of flight constituted a severe threat to the public. The Court also conceded that had the first round of shots clearly incapacitated the suspect, ceased the threat of continued flight, or had the suspect "given himself up," it may have made a difference in this case.

The Western District of Tennessee denied the officers' motion for summary judgment based on the conclusion that the officers violated the Fourth Amendment and were not entitled to qualified immunity, but the Sixth Circuit Court of Appeals allowed the jurisdictional issue to be decided by a merits panel. The merits panel affirmed the District Court's decision on the merits, and the Supreme Court reversed and remanded. Justice Alito delivered the opinion of the Court, wich Justice Roberts, Scalia, Kennedy, Thomas, Sotomayor and Kagan joined; Justice Ginsburg joined as to the judgment and Parts I, II, and II-C; Justice Breyer joined in the opinion except as to Part III-B-2.

Commentaries

- Richard P. Shafer, *When Does Police Officer's Use of Force During Arrest Become so Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871 (42 U.S.C.A. Sect. 1983)*, 60 A.L.R. Fed. 204 (2009)
- 35 No. 6 Cal. Tort Rep. NL1, *Fourth Amendment Was Not Violated When Police Shot Driver of Car that Police Were Chasing* (June 2014)
- Robert Weems, *Questioning the U.S. Supreme Court's Legalistic Qualified Immunity Approach and Suggestions for a Better Approach*, U.S. District Courts, June 2014 (working paper series).
- Scheidegger, Kent, *Why Wasn't Plumhoff v. Rickard a Summary Reversal?* Crime and Consequences, available at http://www.crimeandconsequences.com/crimblog/2014/05/why-wasnt-plumhoff-v-rickard-a.html (last visited June 22, 2014)
- Seth Stoughton, Supreme Court Has Myopic View of Police Chases, Brennan Center for Justice at the New York University School of Law, available at http://www.brennancenter.org/blog/supreme-court-has-myopic-view-police-chases (last visited June 22, 2014).
- Lyle Denniston, *Opinion Analysis: More Power to Stop High-Speed Chases*, available at http://www.scotusblog.com/2014/05/opinion-analysis-more-power-to-stop-high-speed-chases/ (last visited June 22, 2014)

Rosemond v. United States (Docket No. 12-895)
Nos. 12-895, Argued November 12, 2013, Decided March 5 2014.
134 S. Ct. 1240. 573 U.S. ___ (2014).

Defendant Rosemond was convicted on several drug- and firearm-related offenses after victim Gonzalez was shot when he attempted to leave without paying the marijuana that Rosemond and Ronald sold him. The government's case theory was that Rosemond either shot the gun or that he aided and abetted the shooter. Rosemond appealed his conviction arguing that the trial court's instructions were insufficient because intent to commit the alleged crime must be shown in order to satisfy an aiding and abetting theory. The trial judge instructed the jury that Rosemond was guilty of aiding and abetting the offense if he (1) "knew his cohort used a firearm in the drug trafficking crime" and (2) "knowingly and actively participated in the drug trafficking crime." The Court held that active participation in an underlying drug trafficking or violent crime with advance knowledge that a partner would use or carry a gun while committing the crime satisfies the aiding and abetting components. Common law, the Court emphasized, imposed aiding and abetting liability on a person who facilitated any element of a criminal offense, not necessarily all the elements. Additionally, intent is satisfied when a person participates in a criminal offense with full knowledge of the circumstances constituting the charged offense. However, the trial court's instructions failed to require that Rosemond knew in advance that his partner was going to carry a gun. The jury has to consider not merely whether Rosemond knew, but when the requisite knowledge was obtained.

After his conviction in a jury trial in the U.S. District Court for the District of Utah of using firearms during federal drug-trafficking offense, Rosemond appealed to the Tenth Circuit, which affirmed the conviction. The Supreme Court granted certiorari and Justice Kagan delivered the opinion of the Court vacating and remanding.

Commentaries

- Jay Shapiro, *Supreme Court Addresses Jury Instructions for Aiding and Abetting Drug Trafficking*, 2014 Emerging Issues 7167. (Available on Lexis)
- Jeremy Byellin, *SCOTUS Rules in First Landmark Aiding and Abetting Case in Over 30 Years*, Thomson Reuters Legal Solutions Blog, (March 7, 2014) http://blog.legalsolutions.thomsonreuters.com/top-legal-news/scotus-rules-first-landmark-aiding-abetting-case-30-years/
- Wesley M. Oliver, *Limiting Criminal Law's "In For a Penny, In For a Pound" Doctrine,* Georgetown Law Journal Online, Vol 103 Online: 8, *available at:* http://georgetownlawjournal.org/glj-online/limiting-criminal-laws-in-for-a-penny-in-for-a-pound-doctrine-2/

Kansas v. Cheever (Docket No. 12-609)
No. 12-609, Argued October 16, 2013, Decided December 11. 2013.
134 S. Ct. 596, 572 U.S. ___ (2014).

On January 19, 2005, Scott D. Cheever was cooking and ingesting methamphetamines at the residence of Darrell and Belinda Coopers in Kansas when County Sheriff Samuels arrived to handle an unrelated outstanding warrant. After being warned by a friend that officers were en route, Cheever hid in an upstairs bedroom, holding a loaded .44 caliber revolver. As Cheever heard Samuels climbing the stairs he stepped out and shot him. Samuels was killed and other officers were injured. The State charged Cheever with capital murder.

Cheever filed notice that he "intend[ed] to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events on January 19, 2005, which negated his ability to form specific intent," asserting a voluntary intoxication defense. The judge ordered him to a psychiatric examination by a psychiatrist hired by the government. The court then allowed the prosecution to bring the transcript of the psychiatric interview into evidence to impeach Cheever's testimony regarding the order of events the day of the incident. After the defense rested its case, the prosecution called the psychiatrist as a rebuttal witness to rebut Cheever's claim regarding his mental capacity at the time of the crime. Cheever was found guilty and sentenced to death.

On appeal to the Kansas Supreme Court, Cheever argued that the State had violated this Fifth Amendment right to avoid self-incrimination by bringing in evidence from the court-ordered mental evaluation of the defendant to rebut an affirmative defense based on incapacity; and by impeaching the testimony he had previously made in his own defense. The Kansas Supreme Court affirmed in part, reversed in part, and remanded. The Supreme Court granted certiorari, vacated and remanded holding that the prosecution could introduce evidence from defendant's court-ordered mental evaluation to rebut defendant's expert testimony.

Justice Sotomayor delivered the unanimous opinion of the Court stating that the Fifth Amendment does not prevent the prosecution from introducing psychiatric evidence to rebut psychiatric evidence presented by the defense, because the jury should hear both sides of any discussion in order to further the adversarial process. This ruling complies with Fifth Amendment jurisprudence preventing defendants from avoiding cross-examination.

Commentaries

- William Peacock, *Kansas v. Cheever: Compelled Mental Exams OK'd for Rebuttal*, FindLaw Supreme Court Blog, (December 11, 2013), *available at:* http://blogs.findlaw.com/supreme_court/2013/12/kansas-v-cheever-compelled-mental-exams-okd-for-rebuttal.html
- American Bar Association, *U.S. Supreme Court Finds No Right Against Self-Incrimination*, Project Press Newsletter, (Spring, 2014. Available at: http://www.americanbar.org/publications/project_press/2014/spring/us-supreme-court-finds-no-right-against-self-incrimination.html

- *Supreme Court Reinstates Death Penalty Holding Prosecution May Introduce Expert Psychological Opinion Rebutting Voluntary Intoxication Defense*, 33 Dev. Mental Health L. 14 (2014) (Available on Westlaw)
- Tianyi Pan, Case Review: *Kansas v. Cheever,* Amicus. Available at: http://amicusmagazine.org/case-review-kansas-v-cheever/

Town of Greece v. Galloway

No. 12-696, Argued Nov. 6, 2013, Decided May 5, 2014.
134 S. Ct. 1811, 572 U.S. ___ (2014).

Two board meeting members from the town of Greece, New York brought suit alleging that the town violated the First Amendment's Establishment Clause by sponsoring sectarian prayers and preferring Christians over other prayer givers, requesting that such practice not be abolished but rather modified so as not to include a particular faith or belief. Reversing the Court of Appeals for the Second Circuit's decision, Justice Kennedy delivered the opinion of the Court (except as to Part II-B) holding that the town of Greece did not violate the First Amendment's Establishment Clause by opening its monthly board meetings with a prayer. Upholding the legislative prayer practice as part "of the fabric of our society," the Court held steadfastly to the historical precedent set by legislative bodies in regards to prayer practice, dating back to the First Congress paying official chaplains to hold prayers before Congressional meetings. The Court rejected the argument that prayers must be nonsectarian or ecumenical to be Constitutional, as there is no case precedent for such view. However, the Court left open the possibility that if the prayer practice, over time, "shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," then such practice may be violative of the First Amendment. Thus, as long as the Town of Greece continues to have a nondiscrimination policy, and does not direct the public to participate in the prayers or single out dissidents for opprobrium, their prayer practice is constitutionally permissible. Lastly, the Court clarified that simply being "offended" by a prayer practice does not transform such practice into a "coercive" one—which, if found to be in existence, would be inconsistent with the Constitution.

The District Court of the Western District of New York, finding no impermissible preference for Christianity, found no constitutional violation and granted summary judgment in favor of the Town of Greece. Court of Appeals for the 2nd Circuit reversed the District Court's decision, holding that the totality of the circumstances would lead a reasonable observer to conclude that Greece was endorsing Christianity. The Supreme Court reversed the Court of Appeals for the 2nd Circuit with Justice Kennedy writing the opinion of the Court (except as to Part II-B) with Justice Roberts and Alito joining in full; Justice Scalia wrote a concurring opinion (except as to Part II-B), in which Justice Thomas joined (except as in Part II-B), concurring in part and concurring in judgment; Justice Breyer filed a dissenting opinion; Justice Kagan dissented in which Justice Ginsburg, Breyer, and Sotomayor joined.

Commentaries

- Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—US Supreme Court Cases,* 15 A.L.R.Fed.2d 573 (2006)
- Sean Rose, *Will the Legislture Please Bow their Heads? How "Town of Greece v. Galloway" Can Reset Legislative Prayer Jurisprudence…and Why it is Necessary,* 15 Rutgers J. Law & Relig. 183 (2013) (before decision)
- Pamela C. Corley, *Town Prayer and the Establishment Clause: Town of Greece v. Galloway,* The Justice System Journal (2014) (ahead-of-print)
- Alan E. Brownstein, *Twon of Greece v. Galloway: Constitutional Challenges to State Sponsored Prayers at Local Government Meetings,* 47 University of California, Davis, Law Review (2013-14) (forthcoming)

NRLB v. Noel Canning

No. 12-1281, Argued Jan. 13, 2014, Decided June 26, 2014.
134 S. Ct. 2550, 573 U.S. ___ (2014).

The National Labor Relations Board (NLRB) found that a Pepsi-Cola distributor, Noel Canning, unlawfully refused to write and execute a collective-bargaining agreement with a labor union mandating the distributor to make the employees whole for any losses. The Supreme Court unanimously held that, under Const. Art. II, § 2, cl. 3., the Recess Appointment Clause, the President may fill all vacancies that may occur during inter- and intra-summer session recess (of substantial length), and when calculating such recess, the *pro forma* sessions shall be included. The Recess Appointment Clause, however, is not triggered if the Senate recess is so brief as not to require the consent of the House. The Court further held that the Presidential appointments of three of the five NLRB Board Members during Congress' 3-day *pro forma* session, violated the Constitution because the recess was too brief to trigger the Recess Appointment Clause.

The District Court of Columbia Circuit set the Board's order aside finding that the appointment was invalid because it fell outside of the Recess Appointment Clause, and the Court of Appeals agreed. The Supreme Court granted certiorari. Justice Breyer wrote the majority opinion for the Court, with Justice Scalia writing a concurring opinion in the judgment with whom Chief Justice Roberts, Justice Thomas and Justice Alito joined.

Commentaries

- Jeff Shesol, *Did History Win in Noel Canning?*, The New Yorker, (June 2014) *available at* *http://www.newyorker.com/online/blogs/newsdesk/2014/06/supreme-court-recess-appointments-power-noel-canning.html*
- Will Baude, *Immediate Thoughts on Noel Canning*, The Volokh Conspiracy, The Washington Post, (June 2014) *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/26/immediate-thoughts-on-noel-canning/

LINKS TO FULL CASES

Schuette v. Coalition to Defend Affirmative Action , Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)

No. 12-682, Argued Oct. 13, 2013, Decided April 22, 2014.

134 S. Ct. 1623, 572 U.S. ___ (2014), *available at*
http://www.supremecourt.gov/opinions/13pdf/12-682_8759.pdf

McCutcheon v. Federal Election Commission (Docket No. 12-536)

No. 12-536, Argued October 8, 2013, Decided April 2, 2014.

134 S.Ct. 1434. 572 U.S. ___ (2014), *available at*

http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf

Burwell v. Hobby Lobby Stores

Nos. 13-354,13-356, Argued March 25, 2014, Decided June 30. 2014.

2014 WL 2921709. 573 U.S. ___ (2014), *available at*

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McCullen v. Coakley (Docket No. 12-1168)

No. 12-1168, Argued January 15, 2014, Decided June 26, 2014.

134 S. Ct. 2518, 573 U.S. ___ (2014), *available at*

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Fernandez v. California (Docket No. 12-7822)

No. 12-7822, Argued Nov. 13, 2013, Decided February 25, 2014.

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Plumhoff v. Rickard

No. 12-1117, Argued March 4, 2014, Decided May 27, 2014.

134 S. Ct. 2012, 572 U.S. ___ (2014), *available at*

http://www.supremecourt.gov/opinions/13pdf/12-1117_1bn5.pdf

Rosemond v. United States (Docket No. 12-895)

Nos. 12-895, Argued November 12, 2013, Decided March 5 2014.

134 S. Ct. 1240. 573 U.S. ___ (2014), *available at*
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Kansas v. Cheever (Docket No. 12-609)

No. 12-609, Argued October 16, 2013, Decided December 11. 2013.

134 S. Ct. 596, 572 U.S. ___ (2014), *available at* http://www.supremecourt.gov/opinions/13pdf/12-609_g314.pdf

Town of Greece v. Galloway

No. 12-696, Argued Nov. 6, 2013, Decided May 5, 2014.

134 S. Ct. 1811, 572 U.S. ___ (2014), *available at*
http://www.supremecourt.gov/opinions/13pdf/12-696_bpm1.pdf

NRLB v. Noel Canning

No. 12-1281, Argued Jan. 13, 2014, Decided June 26, 2014.

134 S. Ct. 2550, 573 U.S. ___ (2014), *available at*

http://www.supremecourt.gov/opinions/13pdf/12-1281_mc8p.pdf