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Supreme Court Report

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This *Report* summarizes opinions issued on February 27 and March 4, 2019 (Part I); and cases granted review on March 4, 2019 (Part II).

I. Opinions

● *Madison v. Alabama,* 17-7505. In a 5-3 decision, the Court held that (1) the Eighth Amendment does not bar execution of a person who lacks memory of his crime, and (2) the Eighth Amendment prohibits execution of a person who, because he suffers from dementia, is unable to rationally understand the reasons for his sentence. The Court vacated the state court decision holding that petitioner—a 68-year-old man suffering from dementia—may be executed because the state court might have held that "only delusions, and not dementia, can support a finding of incompetency." Petitioner Vernon Madison killed a police officer in 1985 and was sentenced to death in Alabama. His mental condition has since declined and he has suffered a serious of strokes. He has been diagnosed with vascular dementia with attention disorientation and confusion, cognitive impairment, and memory loss. Claiming that he cannot recall his crimes, he petitioned for a stay of execution. Alabama countered that he is still able to rationally understand the reasons for his execution. At a competency hearing, Alabama stressed the absence of psychotic episodes or delusions. The trial court found Madison competent to be executed, finding no evidence of paranoia, delusion, or psychosis. After Madison was unable to obtain federal habeas relief, he returned to state court, arguing that his mental condition had further declined. An Alabama trial court denied his request for relief. In an opinion by Justice Kagan, the Court vacated and remanded.

The Court analyzed the case through the framework of *Panetti v. Quarterman*, 551 U.S. 930, (2007), which—relying on *Ford v. Wainwright*, 477 U.S. 399 (1986)—held that the Eighth Amendment forbids executing a prisoner whose mental illness makes him unable to reach a rational understanding of the reason for the execution. The Court first considered whether the state may execute a prisoner who cannot recall his or her crimes, but is otherwise oriented in time and place, can make logical connections and order his or her thoughts, and comprehends familiar concepts such as crime and punishment. It concluded that lack of memory of the crime by itself does not preclude execution because *Panetti* "asks about understanding, not memory—more specifically, about a person's understanding of why the State seeks capital punishment for a crime, not his memory of the crime itself." The Court next considered whether dementia or a similar disorder is subject to the same Eighth Amendment analysis as psychotic delusions. The Court held that it is, finding that *Panetti* focuses on the effect of a mental condition, not the cause. Judges "must therefore look beyond any given diagnosis to a downstream consequence," namely, whether the prisoner can "'come to grips with' the punishment's meaning." Finally, the Court assessed whether the Alabama trial court applied the latter rule. The Court came "away at the least unsure whether" it did"—especially given Alabama's evidence and arguments in the state court." The Court explained that the Alabama court stated that Madison "did not provide a substantial showing of insanity[] sufficient to convince this Court to stay the execution." This left unclear whether it used "insanity" to refer only to a delusion disorder or also encompassed those with dementia.

Justice Alito filed a dissenting opinion, which Justices Thomas and Gorsuch joined. The dissent insisted that the petition for certiorari raised only the issue of whether the Eighth Amendment prohibits execution of a person who cannot recall his or her crime. At the merits stage, Madison switched the issue to whether dementia can form the basis of mental incompetence. That issue, the dissent said, was not in the petition and was not what the Court agreed to review. The dissent also found little reason to believe that the state court order below was based on an erroneous distinction between dementia and other mental conditions. The state court's conclusion did not make such a distinction when it held that Madison "'ha[d] not carried his burden [of showing] by a preponderance of the evidence . . . that he . . . does not rationally understand the punishment he is about to suffer and why he is about to suffer it.'"

● *Garza v. Idaho,* 17-1026. By a 6-3 vote, the Court held that an attorney's deficient performance that costs a litigant his right to appeal is presumed prejudicial to the litigant, even if the litigant pleaded guilty and signed an appeal waiver. The Court had previously held that ineffective assistance of counsel that results in loss of an appeal right is presumptively prejudicial: "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). The issue here was whether that presumption applies even if the defendant signed an appeal waiver as part of a plea agreement. Petitioner Gilberto Garza signed two plea agreements, both with appeal waivers. Shortly after sentencing, he told his attorney that he wished to appeal the sentence. His attorney advised him that filing an appeal would be problematic because of the waivers, and did not file a notice of appeal. Garza sought post-conviction relief in state court, alleging that his attorney rendered ineffective assistance. The Idaho trial court denied relief, and both the Idaho Court of Appeals and Idaho Supreme Court affirmed. They ruled that Garza could not make the necessary showing of both deficient performance and prejudice. In an opinion by Justice Sotomayor, the Court reversed and remanded.

The crux of the case was whether the *Flores-Ortega* presumption of prejudice applies in light of the appeal waivers. The Court noted that no appeal waiver serves as an absolute bar to all appellate claims. Some waivers do not bar all claims, and the prosecution may forfeit or waive a waiver. Additionally, some claims are unwaivable as a matter of law, such as the claim that the waiver itself is unenforceable because it was unknowing or involuntary. The Court next observed that filing a notice of appeal is a ministerial task that doesn't require counsel to specify which claims will be asserted on appeal. Given that context, the Court said "it should be clear . . . that simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope."

The Court then concluded that the *Flores-Ortega* presumption of prejudice applied even if appeal rights have been waived. *Flores-Ortega* reasoned that failure to file a notice of appeal forfeits an "appellate proceeding altogether," which is even worse than being "denied counsel at a critical stage," for which prejudice is presumed. The Court concluded that "[t]hat rationale applies just as well here because . . . Garza retained a right to appeal at least some issues despite the waiver he signed." Indeed, the defendant in *Flores-Ortega* pleaded guilty, which reduced the available appealable issues. That Garza had still fewer issues to appeal doesn't change the analysis. The Court rejected the United States' argument (as amicus) that a defendant, to obtain a presumption of prejudice, must show on a "case-specific" basis that he requested an appeal on a non-waived issue or that he had a non-frivolous ground for appeal. The Court said this approach "cannot be squared with our precedent and would likely prove both unfair and inefficient in practice."

Justice Thomas filed a dissenting opinion that Justice Gorsuch joined in full and Justice Alito in part. In the portion of the dissent Justice Alito joined, Justice Thomas wrote that the Court's holding "is neither compelled by precedent nor consistent with the use of appeal waivers in plea bargaining." As to the former, *Flores-Ortega* did not involve appeal waivers. As to the latter, he found counsel's actions professionally reasonable because appealing "would have created serious risks for Garza"—losing the benefits of the plea agreement—"while having no chance at all of achieving Garza's stated goals for an appeal." And a defendant cannot show prejudice unless he or she "(1) identifies claims he would have pursued that were outside the appeal waiver; (2) shows that the plea was involuntary or unknowing; or (3) establishes that the government breached the plea agreement." Here, Petitioner did not make that showing.

In the part of his dissent joined only by Justice Gorsuch, Justice Thomas questioned the Court's decisions holding that the Sixth Amendment right to counsel grants "a right to *effective* counsel." "Because little available evidence suggests that this reading is correct as an original matter, the Court should tread carefully before extending our precedents in this area." He found that "the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel, not as a guarantee of government-funded counsel." And he found no evidence that "defendants could mount a constitutional attack based on their counsel's failure to render effective assistance." Justice Thomas described the lineage of precedent establishing a right to appointment of counsel that performs effectively, including *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Strickland*. He noted "a few problems with these precedents" and cautioned against expanding them, holding that "the States and the Federal Government are capable of making the policy determinations necessary to assign public resources for appointed counsel. . . . It is beyond our constitutionally prescribed role to make these policy choices ourselves."

● *BNSF Railway Company v. Loos,* 17-1042. By a 7-2 vote, the Court held that "a railroad's payment to an employee for working time lost due to an on-the-job injury [is] taxable compensation under the [Railroad Retirement Tax Act (RRTA)]." Respondent Michael Loos was injured while working in a BNSF Railway railyard. He sued under the Federal Employer's Liability Act and was awarded $126,212.78, including $30,000 ascribed to lost wages. The RRTA funds a retirement benefit system for railroad workers. Workers are taxed on their "compensation," which includes "any form of money remuneration paid to an individual for services rendered as an employee." 45 U.S.C. §231(h)(1). BNSF moved for an offset against the judgment, claiming that the $30,000 in lost wages was "compensation" taxable under the RRTA. BNSF specifically asserted that it was required to withhold $3,765 in RRTA taxes attributable to those lost wages. The district court rejected the requested offset, and the Eighth Circuit affirmed. In an opinion by Justice Ginsburg, the Court reversed and remanded.

The Court noted that the RRTA's definition of compensation is materially indistinguishable from the Federal Insurance Contributions Act's definition of "wages." Under precedent interpreting FICA, wage-based compensation such as back pay qualifies as wages. See, *e.g.*, *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946). *Nierotko* explained that the statutory phrase "any service . . . performed" denotes "breadth of coverage," which sweeps "the entire employer-employee relationship"—including "pay received for periods of absence from active service." The Court concluded that damages for lost wages, such as those awarded here, are functionally equivalent to an award of back pay, which are taxable under that decision and the IRS's longstanding construction. The Court rejected the Eighth Circuit's view that the statutory history requires the opposite result. As originally enacted in 1937 and amended in 1946, the RRTA expressly stated that "compensation" included pay for time lost. But later amendments to the statute removed those references. The Court concluded that this change did not matter: Congress left the core definition of "compensation" unchanged; one of the amendments was billed as technical; and the RRTA's current definition of "compensation" excludes a limited subset of payments for time lost (such as sick pay and disability pay), which would be superfluous if pay for time lost wasn't generally covered. The Court rejected a counterargument that the $30,000 is compensation for an injury instead of for employment services, relying on precedent holding that back pay is awarded to redress the loss of wages. Also unpersuasive to the Court was Loos's argument that the Internal Revenue Code excludes personal injury damages from gross income. 26 U.S.C. §104(a)(2). The Court held that the relevant inquiry under the RRTA was "compensation," not gross income for tax purposes.

Justice Gorsuch filed a dissenting opinion, joined by Justice Thomas. The dissent reasoned that a lawsuit recovery related to physical injury at work is more akin to compensation for injury than to compensation for services. The dissent highlighted the facts of the case, such as that Loos injured his knee when he fell into a hidden drainage grate, and was ultimately fired for missing work due to the injury. He was awarded damages on a negligence theory. The dissent insisted that negligence damages for an injured knee would not ordinarily be described as compensation for services rendered. Rather, they are compensation for an injury. Lost wages may be the measurement for a portion of the damage, but that does not make the damages compensation for services. Additionally, said the dissent, the RRTA previously defined taxable compensation to include compensation for time lost, but that provision was removed in 1975. The dissent read this removal as an indication that compensation for time lost is not currently included in the definition of taxable compensation. The dissent also found unpersuasive comparisons to the Federal Insurance Contributions Act and *Nierotko*, which "concerned a different statute, a different legal claim, and a different factual context."

- *Jam v. International Finance Corp.,* 17-1011. By a 7-1 vote, the Court held that international organizations have the immunity from suit that foreign governments *currently* enjoy, as opposed to the near-absolute immunity foreign governments enjoyed when Congress enacted the International Organizations Immunities Act of 1945 (IOIA). Respondent International Finance Corporation (IFC) is an international development bank headquartered in Washington, D.C. In 2008, IFC loaned $450 million to a company in India to help finance the construction of a power plant in Gujarat, India. Petitioners, local farmers and fishermen and a small village, allege that the power plant has polluted the air, land, and water in the surrounding areas. They sued IFC for injunctive relief and damages. The district court concluded that IFC was immune from suit under the IOIA. Specifically, the IOIA provides that international organizations, such as IFC, are granted the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. §288a(b). Petitioners argued that "same immunity" is in reference to the immunity that foreign governments enjoy today. IFC argued that "same immunity" refers to the immunity that foreign governments enjoyed when the IOIA was enacted in 1945, which was virtually absolute. Following D.C. Circuit precedent, the district court agreed with IFC and dismissed the suit. The D.C. Circuit affirmed. In an opinion by Chief Justice Roberts, the Court reversed.

The Court concluded, first, that the language of the IOIA "more naturally lends itself to petitioners' reading" that it grants international organizations the "same immunity" from suit that foreign governments enjoy today. The statutory language "seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity." The Court noted that Congress could have otherwise "simply stated that international organizations 'shall enjoy absolute immunity from suit,' or specified some other fixed level of immunity." IFC countered that the "purpose of international organization immunity is distinct from the purpose of foreign sovereign immunity" because international organization immunity "allow[s] such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country." The Court found this analysis "backward." "Whatever the ultimate purpose of international organization immunity may be," "the legislative purpose is expressed by the ordinary meaning of the words used."

Second, the Court found its position bolstered by "a canon of statutory interpretation that was well established when the IOIA was drafted": "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." Applying that cannon here, the "IOIA's reference to the immunity enjoyed by foreign governments is a general rather than a specific reference . . . to an external body of potentially evolving law—the law of foreign sovereign immunity." The Court also rejected the D.C. Circuit's reliance on the IOIA's delegation provision, which "allow[s] the President to modify on a case-by-case basis, the immunity rules that would otherwise apply to a particular international organization." The Court found this delegation "perfectly compatible with the notion" that immunity rules "might themselves change over time in light of developments in the law governing foreign sovereign immunity." The Court further recognized that its position gave the proper "special attention" to the "opinion of the State Department." Finally, the Court rejected IFC's practical concerns as "inflated."

Justice Breyer dissented. He concluded that the statute grants international organizations immunity from lawsuits arising from their commercial activities—"just as foreign governments possessed that immunity when Congress enacted the statute." Relying "more heavily than does the majority upon the statute's history, its context, its purposes, and its consequences," Justice Breyer highlighted that "in difficult cases like this one, purpose-based methods of interpretation can often shine a useful light upon opaque statutory language, leading to a result that reflects greater legal coherence and is, as a practical matter, more sound."

● *Fourth Estate Public Benefit Corp. v. Wall-Street.com,* 17-571. Under §411(a) of the Copyright Act, "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." The Court unanimously held that "registration of [a] copyright claim has been made," and a copyright claimant may bring an infringement suit, only when the Copyright Office registers a copyright (and not earlier, when the claimant delivers the registration application).The Court added, however, that a copyright owner can recover for infringement that occurs both before and after registration. Petitioner produces news content, which it licensed to respondent. Respondent cancelled the agreement but continued to use the content. Petitioner sued, alleging a copyright violation. At the time of the lawsuit, petitioner had applied for a copyright, but the Copyright Office had not processed the application. The Eleventh Circuit dismissed the complaint because the Register of Copyrights had not acted on the application. In an opinion by Justice Ginsburg, the Court affirmed.

The Court noted that under copyright law, an author gains exclusive rights to a work immediately upon creation. The Copyright Act entitles a copyright owner to sue for infringement of those rights. Registration is a prerequisite to an enforcement action, akin to administrative exhaustion. The Court focused on the statutory text: "Read together, §411(a)'s opening sentences focus not on the claimant's act of applying for registration, but on action by the Copyright Office—namely, its registration or refusal to register a copyright claim." Other provisions of the Copyright Act, found the Court, support this interpretation. For example, §410(b) requires the Register of Copyrights to determine that the application relates to copyrightable material before registration. This suggests that registration is discrete from the application process. The Court also noted that, in circumstances where enforcement prior to registration is required, there is a preregistration process available for work that is vulnerable to pre-distribution infringement, such as a movie. 17 U.S.C. §408(f)(2). This process would have little utility if a completed application qualified as registration.

The Court rejected petitioner's contrary argument that registration "has been made" at the time that an application is made. Among other things, the Court noted that as recently as 1993 Congress declined to adopt a proposal to allow suit upon an application. Petitioner raised the specter that requiring a copyright holder to wait for registration may result in an enforcement right expiring under a statute of limitations. The Court noted, however, that the statute of limitations is three years, and the average application wait is seven months, leaving ample time. The Court also emphasized that if infringement occurs before registration, or even before an application, the copyright owner may still recover damages for the pre-registration period or obtain an injunction in a lawsuit brought after registration.

- *Rimini Street, Inc. v. Oracle USA Inc.,* 17-1625. The Copyright Act provides that a district court "in its discretion may allow the recovery of full costs." In turn, the general "costs" statute lists six categories of litigation expenses that a court may award as a cost. The Court unanimously held that a district court's discretion to award "full costs" to a party in copyright litigation is limited to the six categories specified in the general costs statute. Both Oracle and Rimini Street offer software maintenance services. Oracle sued Rimini, asserting claims under the Copyright Act. A jury found that Rimini had infringed various Oracle copyrights and awarded Oracle $35.6 million in damages for copyright infringement and $14.4 million in damages for violations of state computer access statutes. After judgment, the court awarded Oracle $28.5 million in attorney's fees and $4.95 million in costs. The court also awarded $12.8 million "for litigation expenses such as expert witnesses, e-discovery, and jury consulting." The Ninth Circuit reduced the costs award but affirmed the $12.8 million award. In an opinion by Justice Kavanaugh, the Court reversed in part and remanded.

The Court explained that the general costs statute, codified at 28 U.S.C. §§1821 and 1920, "create[s] a default rule and establishes a clear baseline against which Congress may legislate." The Court highlighted three of its cases that adhered to this baseline approach to interpreting federal costs statutes. The Court concluded that Oracle's three arguments to the contrary were not persuasive. First, the Court rejected the notion that by using the adjective "full" to describe "costs," Congress departed from the baseline approach. "Rather, 'full costs' are all the 'costs' otherwise available under the law. The word 'full' operates in the phrase 'full costs' just as it operates in other common phrases: A 'full moon' means the moon, not Mars. A 'full breakfast' means breakfast, not lunch." Second, the Court rejected the argument that "full costs" is a historical term of art that encompasses more than the costs listed in the statute. Third, the Court concluded that its interpretation would not create surplusage concerns. Historically, cost awards were mandatory; "the term 'full' fixed both a floor and a ceiling for the amount of 'costs' that could be awarded." The Court noted that even if Oracle were correct, "[r]edundancy is not a silver bullet." "If one possible interpretation of a statute would cause some redundancy and another interpretation would avoid redundancy, that difference in the two interpretations can supply a clue as to the better interpretation of a statute. But only a clue. Sometimes the better overall reading of the statute contains some redundancy."

II. Cases Granted Review

● *Iancu v. NantKwest Inc.,* 18-801. When the U.S. Patent and Trademark Office (PTO) denies a patent application, the unsuccessful applicant may bring a civil action against the Director of the PTO in district court. 35 U.S.C. §145. In that action, "[a]ll the expenses of the proceedings shall be paid by the applicant." At issue is whether that "encompasses the personnel expenses the [PTO] incurs when its employees, including attorneys, defend the agency in Section 145 litigation." In other words, must the applicant pay the United States' attorney's fees?

In 2001, Dr. Hans Klingerman filed a patent application related to cancer treatment. Klingerman later assigned the application to respondent NantKwest. The Patent Trial and Appeal Board rejected the application based on obviousness. In 2013, NantKwest filed suit under 13 U.S.C. §154. The district court granted summary judgment to the PTO, and the court of appeals affirmed. The Board then moved for $111,696.39 of expenses, including $78,592.50 in attorney and paralegal fees. The district court declined to award fees, holding that the American Rule generally prevents awards of attorney fees, and "[t]he language of §145 neither specifically nor expressly requires plaintiffs to pay their opponent's attorneys' fees." A panel of the Federal Circuit reversed, relying on treatises, dictionary definitions, and Court precedent to conclude that "expenses" include attorney's fees under §145. The Federal Circuit then granted en banc review and reached the opposite conclusion. It affirmed the district court, holding that "the American Rule prohibits courts from shifting attorneys' fees from one party to another absent a 'specific and explicit' directive from Congress. The phrase '[a]ll the expenses of the proceedings' falls short of this stringent standard." 898 F.3d 1177.

It its petition, the United States argues that the ordinary meaning of "expenses" includes attorney's fees. It adds that §154's district-court process imposes hardship on the Board when compared to a direct administrative appeal, which Congress meant to offset by an award of attorney's fees. The United States distinguishes this case from situations controlled by the American Rule on the ground that this is not a situation where a loser pays; expenses are shifted to the applicant whether or not the applicant is a prevailing party. NantKwest counters that the American Rule applies whenever attorney's fees are shifted, and §154 does not give the necessary specific and explicit authorization to overcome the rule.

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