Washington and Lee Journal of Civil Rights and Social Justice

Volume 1 | Issue 1 Article 18

Spring 4-1-1995

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Recommended Citation

UNITED STATES v. ROBINSON 1992 U.S. App. LEXIS 16861 (4th Cir. 1992) United States Court of Appeals, Fourth Circuit, 1 Race & Ethnic Anc. L. Dig. 72 (1995).
Available at: https://scholarlycommons.law.wlu.edu/crsj/vol1/iss1/18

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UNITED STATES v. ROBINSON

1992 U.S. App. LEXIS 16861 (4th Cir. 1992)
United States Court of Appeals, Fourth Circuit

FACTS

Anthony and Cleveland Robinson, along with five codefendants, were charged with and convicted of various drug related crimes under 21 U.S.C. § 841(a)(1), 846, 848(a), 852 and 860(a). Anthony was convicted of thirteen counts and Cleveland was convicted of eleven counts. These convictions included conspiracy to possess with intent to distribute more than fifty grams of cocaine base (crack) and possession with intent to distribute thirty-six grams of crack cocaine. Both Anthony and Cleveland received life sentences on the continuing criminal enterprise charge and extensive concurrent sentences on the other counts.

The Robinsons appealed their convictions. Among the various issues on appeal, the Robinsons claimed that the federal sentencing guidelines are unconstitutional because they result in disproportionate sentences for blacks convicted of drug offenses involving cocaine in the form of crack.

The Robinsons relied on *State v. Russell,*[1] where the Minnesota Supreme Court employed a more stringent version of the federal rational basis test to examine the Minnesota drug statute. The Minnesota Supreme Court found that the state statute discriminated unfairly based on race. Sentencing under the Minnesota drug laws imposes a penalty of twenty years in prison for possession of three grams of crack cocaine, while possession of three grams of powder cocaine results in only five years in prison. The Minnesota Supreme Court held that harsher sentencing for violations involving crack cocaine as compared to powder cocaine had a disproportionate impact on blacks.[2] Additionally, the Minnesota Supreme Court determined that there was not a rational basis for the differential treatment in sentencing for crack cocaine and powder cocaine under state constitutional law.[3]

Current federal law has a sentencing scheme somewhat comparable to that of the State of Minnesota for cocaine violations. Under the Federal Sentencing Guidelines, there is a one hundred to one ratio in sentences for crack as opposed to powder cocaine.[4] For example, current federal law requires that a first-time offender carrying fifty grams or more of crack cocaine get the same sentence as someone who has five hundred grams of powder cocaine.[5] The federal sentencing disparities are a result of Congress deciding that crack cocaine is one hundred times more harmful than the same amount of powder cocaine.[6]

HOLDING

The Court of Appeals for the Fourth Circuit held that the rational basis test should be applied to judge whether the sentencing guidelines violate the Equal Protection Clause.[7] That is, lacking some proof or underlying discrimination in the statute, differential impact may be sustained if it has a rational basis.[8] According to the court, purposeful discrimination has yet to be shown in the federal sentencing guidelines.[9] The court supported the rationality of the disparate treatment by concluding that "it is common knowledge that crack is . . . much more addictive than powder cocaine."[10]

In a more expansive look at the rationality of the sentencing disparity, the court noted that crack is less expensive, more accessible, more addictive, and specifically targeted towards youth.[11] Thus, the court found that Congress could have rationally concluded that the distribution of crack cocaine is a greater problem for society than that of powder cocaine.[12] Therefore Congress had a rational basis for

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[1] 477 N.W.2d 886 (Minn. 1991).

[2] *Id.* at 889 (Minn. 1991)(holding that the statutory distinction between the quantity of crack cocaine possessed and powder cocaine possessed violated the equal protection guarantees of the Minnesota constitution).

[3] *Id.* at 889.

[4] *See* Pub. L. 99-570, 100 Stat. 3207 (1986).

[5] *Id.*

[6] *See* Woodlee, *Plan Targets Mandatory Drug Terms,* Washington Post, March 2, 1994 at D1.

[7] *United States v. Robinson,* 1992 U.S. App. LEXIS 16861 at 13 (4th Cir. 1992).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 13-14.

[11] *Id.* at 13-14.

[12] *Id.*

imposing harsher sentences for crack cocaine offenses.

ANALYSIS/APPLICATION

I. Scope of Judicial Review

The most important aspect of a claim of legislative violation of the Equal Protection Clause is the standard of review employed by the court. In determining the appropriate level of review in the present case, the court cited *Rogers v. Lodge,*[13] in that "purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality."[14]

The rational basis test puts the judiciary in the most deferential posture vis-a-vis the legislature.[15] In general terms, the federal rationality or rational basis test is a two-prong analysis: 1) the statute or law must not be arbitrary; and, 2) it must bear a rational relationship to the desired end.[16] Under this standard of review the courts will almost always uphold a challenged statute as long as there are some set of facts that could constitute a rational basis for the legislation.[17]

On the other hand, the strict scrutiny test is the least deferential standard of review.[18] Under strict scrutiny, the court determines whether the legislation bears a sufficiently close relationship to a compelling or prevailing governmental purpose.[19] In other words, this more exacting standard will not be employed unless: 1) there is a compelling governmental interest; and, 2) there is a close connection between the challenged legislation and the compelling interest.[20] This type of review is generally only used in instances where legislation is facially discriminatory.[21] Strict scrutiny review will almost always result in the revocation of the challenged statute.[22] Thus, the aim of those challenging specific legislation is to persuade the court to invoke strict scrutiny review.[23] To date, the United States Supreme Court has been unwilling to apply the strict scrutiny standard to facially neutral legislation without proof the challenged law is discriminatory both in effect and in purpose.[24] As previously stated, the Robinsons needed the federal drug sentencing law subjected to the standard of strict scrutiny in order to prevail on their equal protection claim. It is clear in cases involving crack cocaine violations that the law is discriminatory in effect. However, discriminatory purpose or intent is not as clear. Discriminatory purpose requires proof that the government chose a course of action "because of, and not merely in spite of," the discriminatory impact.[25] This phrase can be interpreted to mean that it is necessary to show that Congress decided on stricter penalties for crack offenses *because* it would have a greater effect on blacks, and that the disproportionate effect was not simply a byproduct of facially-neutral legislation.

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[13] 458 U.S. 613 (1982)(citing *Washington v. Davis*, 426 U.S. 229, 247-248 (1976)).

[14] *Rogers*, 458 U.S. at 617.

[15] *See* Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, § 18.3, at 14 (2d ed. 1992) (describing rational basis review).

[16] *See* Kruse, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 Wash. & Lee L. Rev. 1791, 1794 (1993) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), in which the Supreme Court upheld a state statute which placed a ban on sale of plastic, disposable milk containers. The Court reviewed the statute under the rational basis standard and concluded that the evidence before the legislature supported the classification. The Court then looked at whether the classification was rationally related to the statute's purpose).

[17] *Id.* at 1795 (citing *Western Southern Life Insurance Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1980)).

[18] *See* Rotunda & Nowak, *supra* note 15, § 18.3, at 15 (describing strict scrutiny review).

[19] *See* Kruse, *supra* note 16, at 1796 (citing *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

[20] *See Id.* at 1796.

[21] *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (holding that Court will not apply heightened scrutiny when discriminatory intent is not present); *Washington v. Davis*, 426 U.S. 229, 243 (1976) (holding that the Court will not invoke strict scrutiny in absence of discriminatory intent); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (subjecting racial classification to strict scrutiny review); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (subjecting criminal statute which classified on basis of race to strict scrutiny review).

[22] *See* Kruse, *supra* note 16, at 1796.

[23] *Id.*

[24] *Id.* at 1797(citing *Davis*, 426 U.S. at 242 (holding that discriminatory impact alone fails to trigger strict scrutiny); *Jefferson v. Hackney*, 406 U.S. 535, 546-49 (1972) (declining to use strict scrutiny review without proof of invidious intent).

[25] *See McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (holding that statistical proof of disparate impact in capital punishment cases without evidence of discriminatory purpose is insufficient to invoke strict scrutiny review).

The 1987 United States Supreme Court case of *McCleskey v. Kemp*[26] expanded the intent element of purposeful discrimination to criminal sentencing cases. McCleskey, a black male, was convicted of killing a white police officer and was subsequently sentenced to death. McCleskey's equal protection claim relied entirely on a sophisticated statistical study showing blacks were more likely than whites to be sentenced to death in Georgia. The Supreme Court held that statistical evidence of disparate impact alone was insufficient to prove discriminatory purpose.[27] McCleskey had to prove that the decisionmakers in his case acted with discriminatory purpose. In dictum, the *McCleskey* Court went on to conclude that disparities in sentencing are an inevitable part of our criminal justice system.[28]

The burden of proving purposeful disparate impact falls on the disparate impact plaintiff.[29] Therefore, the Robinsons were in the unenviable position of having to prove that they received a harsher sentence because of the color of their skin. The question of what type of evidence would be necessary to allow the Robinsons to prove purposeful discrimination remains.

The United States Supreme Court has determined that the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[30] Furthering the notion that disparate impact is not irrelevant, the United States Supreme Court concluded that an invidious discriminatory purpose may be inferred from the totality of the relevant facts, including the fact that the law has a greater effect on one race.[31] But disproportionate impact alone does not render a statute unconstitutional:

> Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule[32] that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.[33]

Accordingly, under the purposeful discrimination requirement, statistical evidence of disparate impact is relevant in proving discriminatory intent, but alone it is insufficient to invoke the higher standard of review in federal equal protection analysis.[34]

Additional evidence must therefore be presented which furthers the conclusion that the questioned statute has a discriminatory purpose. As an example, *Arlington Heights*[35] illustrated the type of proof necessary to satisfy the intent element of purposeful discrimination. It suggested that the historical background of the decision, the specific events leading to the challenged action, and any departures from normal procedures would be instructive in determining discriminatory intent.[36]

An examination of the legislative history of the passage of the federal sentencing guidelines reveals the following:

[26] *Id.*

[27] *Id.* at 292.

[28] *Id.* at 311-312.

[29] *Id.* at 297 (holding defendant must show decisionmakers acted with purposeful discrimination).

[30] *Rogers*, 458 U.S. at 618.

[31] *Washington*, 426 U.S. at 235, 242 (holding that federal courts would not utilize strict scrutiny review unless discriminatory purpose shown with disparate impact. In key *Washington*, black applicants for District of Columbia police officers were rejected because of a failed personnel exam. The plaintiff sued on the ground that the test was racially discriminatory because of its disproportionate impact on minorities. The Court concluded that disproportionate impact, without proof of discriminatory intent, did not trigger strict scrutiny review).

[32] *Id.* at 242 (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964).

[33] *Id.*

[34] *McCleskey*, 481 U.S. at 297.

[35] 429 U.S. 252, 263 (holding that developer failed to prove discriminatory purpose in housing development dispute). In *Arlington Heights*, the Court dealt with the refusal of Arlington Heights to rezone a parcel of land to multiple-family from single-family. The Metropolitan Housing Development Corporation alleged that the decision by Arlington Heights would result in racially disparate impact. The Court reaffirmed its decision in *Washington v. Davis* which required a showing of discriminatory intent.

[36] *Id.* at 267 (concluding that in determining whether discriminatory purpose was a motivating factor required a sensitive inquiry into all circumstantial and direct evidence as may be available).

> Examples [of race-oriented arguments and racial tension] include Congressional testimony that most crack sellers are Haitian, black, or Trinidadian, "wearing gold chains and diamond-studded bracelets." There were also statements that black crack dealers would corrupt white drug users and white communities. These statements clearly indicate an underlying racial bias.[37]

Additionally, examples of departures from normal procedure exist as the Act was hurried through Congress.[38]

Every federal appellate court that has considered an equal protection challenge in such cases has come to the same conclusion as the Fourth Circuit.[39] One can therefore assume that it is highly improbable that any federal court will find that portions of the federal sentencing guidelines have a discriminatory purpose.

II. Levels of Disparate Impact

The United States Supreme Court did leave a possible distinction within disparate impact cases in *Arlington Heights v. Metropolitan Housing Dev. Corp.*[40] The Court stated:

> [S]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face . . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative and the Court must look to other evidence.[41]

In *Yick Wo v. Hopkins*,[42] the statute in question allowed the San Francisco Board of Supervisors to grant permits to operate laundries in wooden buildings. The regulation, although facially neutral, resulted in a huge disparity between the applicants receiving the permits. The board granted permits to almost all of the white applicants, while none of the Chinese applicants were granted similar permits. In *Gomillion v. Lightfoot*,[43] the Alabama legislature reconfigured the corporate boundary of a city from a square to a twenty-eight-sided figure which resulted in the exclusion of all but four or five of the previously four hundred black voters while not displacing any white voters. The United States Supreme Court thus has set up a difference between simple disparate impact cases and "stark" disparate impact cases (as illustrated in *Yick Wo* and *Gomillion*). By stating that "absent a pattern as stark as *Gomillion* and *Yick Wo*, impact alone is not determinative,"[44] the Court allows for the inference that if there is impact as stark as is presented by these cases, then impact alone may be sufficient to show discriminatory purpose. Thereby, the United States Supreme Court presumes a discriminatory purpose in such "stark" cases and places the burden on the govern-

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[37] *See* Maxwell, *A Disparity That Is Worlds Apart: The Federal Sentencing Guidelines Treatment of Crack Cocaine and Powder Cocaine*, 1 REAL Digest (1995) (reviewing 132 Cong. Rec. S4670 (daily ed. April 22, 1986)("Most of the dealers, as with past drug trends, are black or Hispanic . . . Haitians also comprise a large number of those selling cocaine rocks . . . That's new and disconcerting . . . because they previously had not seen Haitians selling drugs. Whites rarely sell the cocaine rocks. Streets sales of cocaine rocks have occurred in the same neighborhoods where other drugs were sold in the past: run-down, black neighborhoods . . . . But the drug market also is creeping into other neighborhoods. An interracial neighborhood . . . has become one of West Palm Beach's most highly visible cocaine rock areas. Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not").

[38] *Id.* (citing *United States v. Walls*, 841 F. Supp. 24, 29 (D.D.C. 1994)("In further reference to departure from normal legislative procedure, *amici* also offered Sterling's observation that: [t]he development of this omnibus bill was extraordinary. Typically Members introduce bills which are referenced to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill"); 123 Cong. Rec. S13969 (daily ed. Sept. 27, 1986)(statement by Sen. Bingaman)("Despite the necessity of this legislation, our haste to enact a drug bill before we adjourn this Congress raises some questions and some potential concerns. Are we acting to insure short term political gain from a sudden and popularly recognized problem? Or are we making a commitment to address a serious social malaise?").

[39] *See United States v. Frazier*, 981 F.2d 92 (3rd Cir. 1992), *cert. denied* 113 S.Ct. 1662; *United States v. Watson*, 953 F.2d 895 (5th Cir. 1992), *cert. denied*.

[40] *See supra* note 21.

[41] *Arlington Heights*, 429 U.S. at 266.

[42] 118 U.S. 356 (1886).

[43] 364 U.S. 339 (1960).

[44] *Arlington Heights*, 492 U.S. at 266.

ment to show "no intent." This line of reasoning is consistent with Justice Marshall's dissent in *Personnel Administrator of Mass. v. Feeney*,[45] even though it is a gender discrimination case. Justice Marshall concluded:

> Although neutral in form, the statute is anything but neutral in application....Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme.[46]

The majority of defendants in powder cocaine cases are white (approximately forty-two percent) while only three percent of crack cocaine defendants are white.[47] Based upon these statistics, it seems clear that harsher crack sentences are falling almost exclusively on blacks. Couple these statistics with the police procedures to fight the "war on drugs," and it appears that the drug laws are being discriminatorily applied.[48]

The Fourth Circuit has made an effort to close this possible line of attack by making the conclusory statement that "there is no argument of discriminatory application of the law that raises *Yick Wo* concerns."[49] This issue does not appear to have been sufficiently addressed. Counsel for defendants convicted under the federal drug laws for crack cocaine violations will need to develop this argument to its fullest before the court. The Fourth Circuit has already stated that defendants will have a tough burden to carry if they plan on making this "stark" impact distinction.

CONCLUSION

There appears to be circumstantial evidence available in the legislative history of the Controlled Substances Act and the procedures followed in its enactment to support a finding of hidden or underlying racial motives. However, a successful attack on the federal sentencing scheme grounded in the Equal Protection Clause appears to be remote at this time.

A possible untapped alternative in attempting to prove purposeful discrimination in the federal sentencing guidelines is to push the "stark" disparate impact argument which is buried in the United States Supreme Court case of *Arlington Heights*.

Summary and Analysis Prepared by:
J. Scott Perkins

[45] 442 U.S. 256 (1979)(holding that a state preference program for veterans that does not specifically favor males, but in which males are almost exclusively benefitted, does not deny equal protection to women).

[46] *Id.*, at 284 (Marshall, J., dissenting).

[47] *See* Woodlee, *Plan Targets Mandatory Drug Terms*, Washington Post, March 2, 1994 at D1.

[48] *See United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992)(Heaney, J., dissenting)(noting that crack raids are targeted at minority neighborhoods, not Caucasian neighborhoods); *see also* Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245, 2320 (1992)(citing studies indicating that blacks comprise 90% of drug arrestees but only 12% of the total drug users).

[49] *See United States v. D'Anjou*, 16 F.3d 604, 612 (4th Cir. 1994) (holding that sentencing guidelines equating one unit of crack cocaine with one hundred units of powder cocaine did not violate the Equal Protection Clause; there is evidence of disparate impact, but no evidence of discriminatory purpose).