10-1984

Black v. Romano

Lewis F. Powell, Jr.

lgs 10/26/84

PRELIMINARY MEMORANDUM

November 9, 1984 Conference
List 1, Sheet 3

No. 84-465-cfh BLACK, et al. ok v. ROMANO	Cert to CA8 (Ross, Gibson, & Bowman) deny both Federal/Habeas	Timely
No. 84-5557-cfh ROMANO v. BLACK, et al. ok	Cert to CA8 (Ross, Gibson, & Bowman) Federal/Habeas	Timely

deny both - lynda

1. SUMMARY: Petrs Black, et al., contend that CA8 improperly ruled that the judge at resp's probation revocation hearing was required to consider other alternatives to imprisonment, under Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972). In his cross-petn for cert, resp contends that the judge at his probation revocation hearing erroneously admitted a witness's testimony in violation of that witness's Fifth Amendment right against self-incrimination.

2. FACTS AND DECISION BELOW: In 1976, resp pled guilty to two counts of transferring and selling a large quantity of marijuana. He was given a suspended sentence of two concurrent 20-year prison terms and placed on probation for 5 years. In 1977, while on probation, resp was arrested and charged with leaving the scene of an automobile accident--a felony in Missouri. At a probation revocation hearing, resp's probation was revoked and the concurrent 20-year terms imposed. Resp began serving the sentence immediately. The felony charge was later reduced to careless and reckless driving, a misdemeanor, for which resp was fined $100 and costs.

Resp then filed various state and federal motions for post-conviction relief, which were fruitless until his 1982 filing in DC of a petn for habeas corpus challenging the constitutionality of his probation revocation proceeding. While the petn was pending, resp was released on parole. The DC granted the writ on the ground that resp was denied due process by the judge's failure, during the revocation proceeding, to consider

alternatives to the imposition of the prison terms to which resp had previously been sentenced. CA8 affirmed, declining to rule on resp's cross-appeal on the witness's self-incrimination claim.

3. CONTENTIONS: -- Petrs: Petrs contend that CA8's ruling that the judge was required to consider alternatives to imprisonment before reimposing the 20-year imprisonment is not required by either Morrissey or Gagnon, and is in conflict with this Court's decision in Bearden v. Georgia, 103 S.Ct. 2064 (1983), in which JUSTICE WHITE's concurrence stated that there was no support in the Court's case law for the majority's conclusion that a sentencing court is required to consider alternative means of punishment other than imprisonment when probation must be revoked because a probationer cannot pay his fine. Id., at 2074.

Petrs also contend that CA8 was required under 28 U.S.C. §2254(d) to presume that the sentencing judge considered other sentencing alternatives and found them lacking. They argue that CA8's second-guessing of the state sentencing judge here is contrary to its treatment of a federal sentencing judge in United States v. Burkhalter, 588 F.2d 604, 607 (CA8 1978), in which the court presumed that the DC had considered everything it should have. To hold state courts to a higher standard is unfair.

Finally, petrs argue that even if the rulings below were correct, resp should not have been unconditionally released. Instead, a hearing should have been ordered at which the judge would be directed to consider alternatives to imprisonment. Gagnon holds that prisoner should not be released outright until

the state has had a chance to correct any due process deficiency in the revocation proceeding.

Resp: In response to petrs' contentions, resp argues that Gagnon and Morrissey require a court to consider alternatives to imprisonment, that other federal and state courts agree, and that CA8's decision does not conflict with Bearden because that case is limited on its facts to probationers who cannot pay their court-imposed fines. Resp also contends that no hearing should be held to permit the sentencing judge to consider alternatives to imprisonment because a trial judge may not supplement a record to cure errors after he has relinquished jurisdiction. In addition, resp contends that the §2254(d) presumption does not apply because the judge made no factual findings to which any higher court can defer, and because the question is a mixed one of law and fact.

Resp also argues that CA8 correctly ordered his unconditional release because the revocation hearing was unconstitutional, a nullity, and therefore, the courts no longer had jurisdiction over him. Moreover, Mo. statute requires that a probationer be released once he has completed his probation term, and he successfully completed his in jail. It would be unfair to hold another revocation hearing over 7 years after his probation was first revoked. Finally, CA8's decision is limited to its facts and of no precedential value; hence review by this Court is unwarranted.

In his cross-petn, resp argues that in revoking his probation, the judge erroneously relied on testimony by a witness to

the automobile accident, who had claimed her Fifth Amendment right against self-incrimination. Resp had claimed that he was not driving the car at the time of the accident. The witness in question admitted, in response to a question by the prosecution, that she had told police at the scene that she was a passenger in the car resp was driving at the time of the accident. The judge then requested the court reporter to read back the question and the witness's answer. The prosecutor also restated the question to see if the witness had understood it, at which point the witness took the fifth in response. She stated that she had not understood the question the first time, but the judge ruled that she had waived the privilege as to that question. Resp contends that this testimony was erroneous because the waiver was not knowing, and that his due process rights were violated by the wrongful admission of this prejudicial testimony.

Petrs have waived response to the cross-petn.

4. DISCUSSION: Neither Morrissey nor Gagnon holds, as CA8 said they did, that a sentencing judge must consider alternatives to imprisonment in a probation revocation proceeding. Morrissey did hold that a judge is required to give written findings of his reasons for revoking parole, and both cases noted that part of the reason for requiring revocation hearings is to help ensure that the judge weighs the individual's situation and decides whether revocation is appropriate or whether rehabilitation can continue outside of prison. Nonetheless, the cases fall short of requiring the judge to explicitly consider alternatives

to imprisonment, and JUSTICE WHITE noted this in his concurrence in Bearden.

On the other hand, the sentencing judge here apparently made very sparse findings of fact. Petrs rely on the judge's statement during the original sentencing that if at any time resp violated the conditions of probation, the judge would send him to jail for 20 years to argue that it was clear the judge thought imprisonment would be the only proper alternative should resp violate his probation. CA8 ruled that this was just the usual threat to probationers to make them toe the line.

Although I find the case to be close, given the lack of direct support in Morrissey and Gagnon for CA8's decision, I am inclined to recommend a denial. Petrs have cited no lower court cases in conflict, while resp has cited several state and federal cases supporting CA8's view. Although CA8 erred in reading Morrissey and Gagnon as direct support, CA8's decision can be seen as a logical extension of the thrust of those cases to ensure a thorough investigation of a probationer's case before probation is revoked. Moreover, although CA8 was not limited to its facts, as resp contends, I am sure that that court was reacting in part to the facts that resp had received the maximum sentence for the marijuana charges--the first brush he had ever had with the law--and that he was sent to serve that sentence because of a felony charge, later reduced to a misdemeanor, that was not remotely related to the marijuana misdeeds.

I do not find much merit to petrs' §2254(d) argument. Rather than arguing that there is a factual finding to which the

presumption applies, petrs argue only that the record did not show that the judge's decision was clearly erroneous, and they admit that it is unclear whether the judge considered any sentencing alternatives.

As to whether the court erred in granting an unconditional release, petrs err in arguing that Gagnon requires that a hearing be held. There, the parolee had been released from jail to parole before his case was decided; because parole involved restraints on liberty, the Court held that a hearing must be held to determine whether the previous probation revocation had been proper. Although I do not see much merit in resp's argument that the court has relinquished jurisdiction over him, nonetheless, he has completely served in jail the time that he would have been on probation. This Court has ruled in a different context that an individual may serve his probation time in jail. Burns v. United States, 287 U.S. 216, 233 (1932).

If the petn is denied, there is no need to consider resp's cross-petn. This claim is not cert-worthy, in any event, because the judge's ruling that the witness had waived her Fifth Amendment right essentially depends on a factual finding that she had understood the question when posed to her the first time. This finding was reasonable under the circumstances, and I see no reason to review this claim.

5. RECOMMENDATION: I recommend denial in both 84-465 yes and 84-5557.

There is no response.

October 26, 1984 Simpson Opin in petn

lgs 10/26/84

PRELIMINARY MEMORANDUM

November 9, 1984, Conference
List 1, Sheet 3

No. 84-5557-cfh	Cert to CA8 (Ross, Gibson, & Bowman)	
ROMANO (probationer)		
v.		
BLACK, et al. (Mo. warden and probation officials)	Federal/Habeas	Timely

5. RECOMMENDATION: I recommend denial.

Response has been waived.

deny - Lynda

October 26, 1984 Simpson Opin in petn

November 9, 1984

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*...

Submitted ....., *19*... *Announced* ....., *19*...

84-5557

No.

ROMANO

vs.

BLACK, DIR.

Waiver of right to file brief.

Grow
returned

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Same vote
84-465
as

November 9, 1984

Court	*Voted on*....., *19*...	84-465	
Argued ....., *19*...	*Assigned* ....., *19*...	No.	
Submitted ....., *19*...	*Announced* ....., *19*...		

BLACK, DIR. MO DOC.

vs.

ROMANO

Also motion to proceed ifp.

BRW thinks
Mun is for. mt
dearin. SDC says case
is enormously important.

Grant (CJ will take second look.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				Join 3									
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.			✓	both									
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

November 21, 1984

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 84-465

Submitted ....., *19*... *Announced* ....., *19*...

BLACK, DIR. MO DOC.

vs.

ROMANO

Also motion to proceed ifp.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											
		✓											

November 21, 1984

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 84-5557

Submitted ....., *19*... *Announced* ....., *19*...

ROMANO

vs.

BLACK, DIR.

Waiver of right to file brief.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.			✓										
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

April 18, 1985

84-465 Black v. Romano

Dear Sandra:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 18, 1985

Re: 84-465 - Black & Moore v. Romano

Dear Sandra:

Please join me.

Respectfully,

JPS

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 22, 1985

84-465 - Black v. Romano

Dear Sandra,

Please join me.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 25, 1985

Re: No. 84-465 Black v. Romano

Dear Sandra,

Please join me.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1985

Re: No. 84-465, Black v. Romano

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1985

Re: No. 84-465 - Black v. Romano

Dear Sandra:

I join.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1985

No. 84-465

Black v. Romano

Dear Thurgood,

Please join me in your concurrence.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

84-465 Black v. Romano (Lynda)

LFP out - letter 4/18/85
SOC for the Court
1st draft 4/18/85
2nd draft 5/9/85
3rd draft 5/14/85
Joined by JPS 4/18/85
BRW 4/22/85
WHR 4/25/85
SOC 5/13/85

TM concurring
1st draft 5/8/85
2nd draft 5/11/85
Joined by WJB 5/16/85