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Civil Rights

In This Section:

Jackson v. Birmingham Board of Education
(02-1672)

Ruling Below: (Jackson v. Birmingham Board of Education, 309 F.3d, 1333 (11th Cir. 2002), 83 Empl. Prac. Dec. P 41,235, 170 Ed. Law Rep. 539, 15 Fla. L. Weekly Fed. C 1129, *cert granted* 124 S.Ct. 2834, 71 USLW 3736, 72 USLW 3749, 188 Ed. Law Rep. 619 (2004)). The solicitor General was invited to submit a brief expressing the views of the United States, 124 S.Ct. 365, 157 L.Ed.2d 20 (2004).

A former girls high school basketball team coach, Roderick Jackson, complained of inferior conditions for the girls' varsity team. He thereafter received poor evaluation marks and was fired as a coach, though he remained on the payroll as a physical education teacher. Jackson sued the Birmingham Board of Education for unlawful retaliation under Title IX. The lower court dismissed the suit claiming there was not private right of action for retaliation under Title IX. The Court of Appeals for the Eleventh Circuit affirmed, holding that Title IX does not create a private right of action for retaliation when the claimant did not suffer gender discrimination but merely complained of discrimination suffered by others.

Question Presented: Whether retaliation violates Title IX, whether someone alleging retaliation can bring a private lawsuit, & whether someone who complains of but is not the direct victim of sex discrimination can bring such suit.

Roderick JACKSON, Plaintiff-Appellant
v.
BIRMINGHAM BOARD OF EDUCATION, Defendant-Appellee

United States Court of Appeals
For the Eleventh Circuit

Decided October 21, 2002

[Excerpt: some footnotes and citations omitted]

MARCUS, Circuit Judge:

Roderick Jackson appeals the dismissal of his complaint alleging that the Birmingham Board of Education (the "Board") retaliated against him in violation of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, and the regulations implementing it. While employed by the Board as the coach of a girl's basketball team, Jackson complained about practices that he believed discriminated against his team in violation of Title IX. The school, he maintains, retaliated against him by removing him from his coaching position. The question before us is whether Title IX implies a private right of action in favor of individuals who, although not themselves

the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others. After review of the text and structure of the statute, we can discern no congressional intent in Title IX to create by implication such a private cause of action. Accordingly, we affirm the dismissal of Jackson's complaint.

I.

A.

[The court reviewed *de novo* the district court's order granting a motion to dismiss the complaint.]

B.

According to his complaint, Jackson was hired by the Board as a physical education teacher and girls' basketball coach on or about August 1993. He was transferred to Ensley High School in August 1999, where his duties included coaching the girls' basketball team. While coaching at Ensley, Jackson came to believe that the girls' team was denied equal funding and equal access to sports facilities and equipment. He complained to his supervisors about the apparent differential treatment and, shortly thereafter, he began receiving negative work evaluations. Jackson was ultimately relieved of his coaching duties in May 2001, but remains employed as a tenured physical education teacher.

We assume for purposes of this appeal that the Board retaliated against Jackson for complaining about perceived Title IX violations. The only question before us today is whether Title IX provides Jackson a private right of action and a private remedy against the Board for its allegedly retaliatory actions. [Jackson conceded "that Title IX creates no private rights of action expressly," but claimed] that such a right is impliedly created by §§ 901 and 902 of Title IX, 20 U.S.C. §§ 1681-82, in conjunction with 34 C.F.R. § 100.7(e), an anti-retaliation regulation promulgated by the Department of Education to enforce Title IX.

Section 901 of Title IX, with certain exceptions not at issue here, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

[Section 902 describes the "elaborate administrative enforcement scheme for Title IX" created by Congress and explained by the Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638-39, 119 S. Ct. 1661, 1669, 143 L. Ed. 2d 839 (1999). Federal departments or agencies "empowered to extend Federal financial assistance to any education program or activity" are "authorized and directed to effectuate the provisions of" § 901 through regulation. 20 U.S.C. § 1682.] . . . The primary enforcement mechanism that § 902 gives to agencies is cessation of federal funding: "[c]ompliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance . . . ." *Id.*

[The court described the procedural requirements under section 902 that precede an agency's decision to cut off funding for an alleged violation of section 901. The agency must first attempt to obtain voluntary compliance; next it must hold a hearing to make an express finding of violation on the record; finally it must file "a full written report" with the appropriate House and Senate legislative committees with

jurisdiction over the matter and wait thirty days after filing the report. *Id.*]

Using the authority vested in it by § 902, the Department of Education promulgated 34 C.F.R. § 100.7(e), which prohibits retaliation against anyone who complains of a Title IX violation:

> No recipient [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against *any individual* for the purpose of interfering with any right or privilege secured by section [901 of Title IX] of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e) (emphasis added).

Jackson urges that a private right of action ought to be implied in his favor from the statute and, more particularly, from 34 C.F.R. § 100.7(e). We are unpersuaded. For the reasons we make clear below, we hold that neither Title IX itself nor 34 C.F.R. § 100.7(e) implies a private right of action for retaliation in Jackson's favor.

C.

Our analysis of Jackson's claim is governed in substantial measure by the Supreme Court's recent decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), which we explicate fully for three reasons. First, *Sandoval* distills and clarifies the approach we are obliged to follow in determining whether to imply a private right of action from a statute. Second, *Sandoval* resolved a claim under Title VI of the Civil Rights Act of 1964 ("Title VI"), 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, which is the model for Title IX and whose language Title IX copies nearly verbatim. *See Cannon*, 441 U.S. at 694-95, 99 S. Ct. at 1956-57 ("Title IX was patterned after Title VI . . . . Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class.") . . . Because we therefore read Titles VI and IX *in pari materia*, *Sandoval's* interpretation of Title VI powerfully informs our reading of Title IX. Third, like Jackson, the plaintiffs in *Sandoval* relied on a regulation promulgated to enforce Title VI as the basis for implying a private right of action.

In *Sandoval*, the Supreme Court held that Title VI does not imply a right of action for private litigants to sue recipients of federal funds for "disparate impact" violations. *See Sandoval*, 532 U.S. at 293, 121 S. Ct. at 1523. At issue in *Sandoval* was the claim that the Alabama Department of Public Safety's policy of administering all tests for drivers' licenses in English only has a discriminatory *effect* on racial minorities. Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Recognizing that Title VI itself reaches only acts of intentional discrimination, *see Alexander v. Choate*, 469 U.S. 287, 293, 105 S. Ct. 712, 716, 83 L. Ed. 2d 661 (1985), the plaintiff in *Sandoval* alleged that Alabama's restriction violated 28 C.F.R. § 42.104(b)(2), a Department of Justice regulation promulgated pursuant to § 602 of Title VI, that forbids recipients of

federal funding from "utiliz[ing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 C.F.R. § 42.104(b)(2) (1999) (emphasis added).

The Court in *Sandoval* held that, although a private cause of action exists to enforce § 601, *see* 532 U.S. at 279, 121 S. Ct. at 1516 ("private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"), that right plainly does not extend to the enforcement of disparate impact regulations promulgated under §602. *See Sandoval*, 532 U.S. at 293, 121 S. Ct. at 1523.

In reaching this decision, the Supreme Court stressed that legislative intent is the *only* basis upon which a private right of action may be inferred:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative.* Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Id. at 286-87, 121 S. Ct. at 1519-1520 (citations and quotations omitted and emphasis added). . . .

Sandoval also clearly delimits the sources that are relevant to our search for legislative intent. First and foremost, we look to the statutory text for "'rights-creating' language." *Sandoval*, 532 U.S. at 288, 121 S. Ct. at 1521. . . . "Rights-creating language" is language "explicitly conferr[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case," *Cannon*, 441 U.S. at 690 n.13, 99 S. Ct. at 1954 n.13, or language identifying "the class for whose especial benefit the statute was enacted." *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916), *quoted in Cannon*, 441 U.S. at 689 n.10, 99 S. Ct. at 1953 n.10. In contrast, "statutory language customarily found in criminal statutes . . . and other laws enacted for the protection of the general public," or a statute written "simply as a ban on discriminatory conduct by recipients of federal funds," provides "far less reason to infer a private remedy in favor of individual persons." *Cannon*, 441 U.S. at 690-93, 99 S. Ct. at 1954-55.

Second, we examine the statutory structure within which the provision in question is embedded. If the statutory structure provides a discernible enforcement mechanism, *Sandoval* teaches that we ought not imply a private right of action because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290, 121 S. Ct. at 1521-22.

Third, if (and only if) statutory text and structure have not conclusively resolved whether a private right of action should be

implied, we turn to the legislative history and context within which a statute was passed. *See Sandoval*, 532 U.S. at 288, 121 S. Ct. at 1520. . . .We examine legislative history with a skeptical eye, because "[t]he bar for showing legislative intent is high. 'Congressional intent to create a private right of action will not be presumed. There must be clear evidence of Congress's intent to create a cause of action.'" *McDonald*, 291 F.3d at 723 (quoting *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1345 (11th Cir. 1997)). Moreover, the legislative history of a statute that is itself unclear about whether a private right of action is implied is unlikely to provide much useful guidance. . . .

Relying exclusively on the text and structure of Title VI . . . the Court in *Sandoval* concluded that Title VI implies no private right to sue for actions not motivated by discriminatory intent that result in a disparate impact. *See id.* at 293, 121 S. Ct. at 1523. Examining § 601, the Court determined that it does not imply a private right of action for disparate impact claims, because, as noted above, "§ 601 prohibits only intentional discrimination." *Id.* at 280, 121 S. Ct. at 1516.

The Court turned next to § 602, which, like § 902 of Title IX, authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. The Court concluded that this provision does not imply a private right of action. It first observed that "'rights-creating' language . . . is completely absent from § 602." *Sandoval*, 532 U.S. at 288, 121 S. Ct. at 1521. Indeed, "[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuat[ing]' rights already created by § 601." *Id.* at 289, 121 S. Ct. at 1521 (second alteration in original) (citation omitted).

Further, the Court noted, . . . the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. *Id.* (quoting *California v. Sierra Club*, 451 U.S. 287, 294, 101 S. Ct. 1775, 1779, 68 L. Ed. 2d 101 (1981)) . . . . The Court thus concluded that, "[s]o far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action." *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521.

The Court also found that "the methods § 602 . . . provide[s] for enforcing its authorized regulations . . . suggest" an intent *not* to create a private right of action. *Id.* Section 602 provides for extensive administrative enforcement, as well as "elaborate restrictions" of that enforcement, which "tend[s] to contradict a congressional intent to create privately enforceable rights through § 602 itself." *Id.* at 290, 121 S. Ct. at 1521. In fact, the Court continued, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 290, 121 S. Ct. at 1522.

Having determined that § 601 does not imply a private right of action for disparate impact claims and that § 602 does not imply any private right of action at all, the Court concluded that the regulations promulgated by agencies with the power granted to them

by § 602 to enforce the provisions of § 601 also cannot be the basis of an implied private right of action for disparate impact claims:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. at 291, 121S. Ct. at 1522 (citations and quotations omitted). . . . *Sandoval* thus concluded there is no private right of action to pursue disparate impact claims under Title VI.

II.

With this template in front of us, we turn to Jackson's contention that Title IX, in conjunction with 34 C.F.R. § 100.7(e), implies a private right of action to remedy the type of retaliation he claims to have suffered.

As noted above, Title IX does not expressly provide any private right of action. . . . In *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688-89, 99 S. Ct. 1946, 1953, 60 L. Ed. 2d 560 (1979), however, the Supreme Court held that Title IX implies a private right of action in favor of direct victims of gender discrimination. A woman who was denied admission by two medical schools brought suit against the schools under Title IX, alleging that their admissions policies discriminated against women. Carefully applying the four-part test set out in *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975), . . . the Court found that Title IX implies a private right of action "*in favor of private victims of discrimination.*" *Id.* at 709, 99 S. Ct. at 1964 (emphasis added). The Court implied this private right of action in the plaintiff's favor based, not on § 902 or the regulations promulgated pursuant to it, but exclusively on the text, structure, and legislative history of § 901.

* * *

A.

We begin with the text of § 901. . . . Section 901 aims to prevent and redress gender discrimination and does so by requiring that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also Cannon*, 441 U.S. at 704, 99 S. Ct. at 1961. Nothing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations. Indeed, the statute makes no mention of retaliation at all. Our task, as *Sandoval* makes clear, is to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct. *See Litman v. George*

Mason Univ., 156 F. Supp. 2d 579, 584-85 (E.D. Va. 2001) ("Congress was aware that it could create a right of action for retaliatory treatment, and it did so in Title VII; it did not do so in Title IX.").

Section 902 of Title IX . . . does not vary our conclusion that Congress did not intend Title IX to prohibit retaliation. Section 902, like its twin § 602, is devoid of "rights-creating" language of any kind – whether against gender discrimination, retaliation, or any other kind of harm. Instead, again like § 602, it explicitly directs and authorizes *federal agencies* to regulate recipients of federal funding to effectuate the anti-discrimination provisions of § 901. As detailed above . . . it provides an enforcement mechanism – the cessation of federal funding – and imposes "elaborate restrictions on agency enforcement." *Sandoval*, 532 U.S. at 290, 121 S. Ct. at 1521. These restrictions include requirements that agencies first attempt to attain voluntary compliance, that agencies hold a hearing and make express findings of noncompliance before cutting off funding, and that agencies provide Congress thirty days to consider any proposed funding cut off. *See* 20 U.S.C. § 1682. That § 902 is thus concerned exclusively with the power of federal agencies to regulate recipients of federal funds renders its focus, like §602's,"twice removed" from any consideration of what harm Title IX is meant to remedy. *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521. Section 902 plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation.

Moreover, as *Sandoval* teaches, Section 902's provision of an administrative enforcement mechanism, coupled with § 903's provision of judicial review, strongly counsels against inferring a private right of action against retaliation, because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290, 121 S. Ct. at 1521-22.

We conclude, much like the Supreme Court did in *Sandoval*, that nothing in the text or structure of §§ 901 and 902 yields the conclusion that Congress intended to imply a private cause of action for retaliation. While we "have a measure of latitude to shape a sensible remedial scheme that best comports with the statute" when determining the *scope* of a judicially implied right and the remedies it makes available, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284, 118 S. Ct. 1989, 1996, 141 L. Ed. 2d 277 (1998), we are not free to craft a right that there is no evidence Congress intended to create. *See id.* . . . Our review of §§ 901 and 902 unearths absolutely no indication that Congress intended Title IX to prevent or redress retaliation. Because the text thus evinces no concern with retaliation, we are not free to imply a private right of action to redress it.

Nor does 34 C.F.R. § 100.7(e)'s prohibition on retaliation . . . imply such a private right of action or create a private remedy. It is true, as Jackson asserts, that § 100.7(e) identifies a class to which it extends its protection: "any individual" retaliated against for "complain[ing], testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding or hearing" undertaken to enforce Title IX. This regulatory identification of a protected class cannot be taken, however, as "rights-creating," for the simple reason that "[l]anguage in a regulation . . . may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. Quite simply, if Congress did not enact a statute creating a private cause of

action, we cannot find its intent to do so in this regulation. Because Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R. § 100.7(e) may not be read to create one either.

B.

Moreover, even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination, Jackson is plainly is not within the class meant to be protected by Title IX. As *Cannon* held, § 901 identifies victims of gender discrimination as the class it aims to benefit, and so implies a private right of action in their favor. Nowhere in the text, however, is any mention made of individuals *other* than victims of gender discrimination. Gender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them – parents, teachers, coaches, friends, significant others, and coworkers. Congress could easily have provided some protection or form of relief to these other interested individuals had it chosen to do so – especially for a harm as plainly predictable as the retaliation here at issue – but it did not do so expressly. Nor does any language in § 902 evince an intent to protect anyone other than direct victims of gender discrimination. Indeed, as with § 602 of Title VI, the focus of § 902 is "twice removed" from victims of gender discrimination, *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521, and, consequently, thrice-removed from individuals like Jackson who are not themselves the victims of gender discrimination. Here, there is quite simply no indication of any kind that Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination. We are not free to extend the scope of Title's IX protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.

We thus hold that Title IX does *not* imply a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

* * *

The district court was therefore correct to dismiss Jackson's complaint.

AFFIRMED.

Justices Asked to Broaden Anti-Bias Law
High Court to Consider Title IX Case That Would Ban Retaliation Against Those Who Complain About Sexual Discrimination

Legal Times
June 9, 2004
Christine M. Garton

Title IX is best known for its impact in achieving gender equality in college athletics. But its scope goes beyond athletics to cover gender discrimination in all kinds of federally assisted education programs and activities.

A women's rights group, joined by the U.S. Department of Justice, is asking the U.S. Supreme Court to review a case that could expand Title IX even further to protect those who complain about gender bias but are not victims themselves.

On Thursday during its private conference, the Court is scheduled to consider whether to grant review in dozens of cases including *Jackson v. Birmingham Board of Education*, No. 02-1672, which was first filed more than a year ago. At issue is whether Title IX allows a private right of action for someone who suffered reprisals for complaining about unlawful sex discrimination.

The petition was filed by the National Women's Law Center on behalf of Roderick Jackson, a girls' high school basketball coach in Alabama. He sued the Birmingham Board of Education, alleging that he was removed in 2001 from his coaching position in retaliation for complaining that his team was being denied equal funding and equal access to sports facilities and equipment.

His case was dismissed at the district court level for failure to state a claim, with the judge finding that Title IX does not prohibit retaliation. Jackson appealed, but the 11th U.S. Circuit Court of Appeals agreed with the lower court. Judge Stanley Marcus delivered the 11th Circuit's unanimous opinion, basing most of the court's judgment on the Supreme Court's 2001 ruling in *Alexander v. Sandoval*. That ruling held that Title VI of the Civil Rights Act of 1964 – which prohibits discrimination by recipients of federal aid – does not provide an implied cause of action for cases of disparate impact.

The appeals panel reasoned that under *Sandoval*, the Supreme Court would not possibly entertain a private claim of illegal retaliation under Title IX. The 11th Circuit opinion states also that in the absence of explicit statutory language, Congress did not intend Title IX to cover such cases of retaliation.

Marcia Greenberger, co-president of the NWLC, filed the petition on behalf Jackson and has been joined in the case by former acting Solicitor General Walter Dellinger III, now with the Washington, D.C. office of O'Melveny & Myers.

In October, the Court asked the solicitor general to state the government's views on the case. In a brief filed last month, Solicitor General Theodore Olson agreed with the NWLC, urging the Court to review the case and to ultimately decide in Jackson's favor.

Title IX, which bans gender discrimination, does not specify what types of behavior constitute unlawful discrimination. As a result, lower courts have had to determine

what categories of discrimination are within the scope of Title IX and are therefore prohibited.

In the 1979 case *Cannon v. University of Chicago*, the Supreme Court found that although Title IX does not explicitly allow a private right of action, such a right is implicit for direct victims of gender discrimination. Otherwise, the Court reasoned, individual citizens would be without "effective protection" against practices made unlawful by Title IX.

But the Court has yet to rule on whether retaliatory conduct falls into the category of practices prohibited by Title IX or whether the law was intended to cover individuals who were not direct victims of gender discrimination.

The NWLC argues that the 11th Circuit was incorrect in its analysis of Title IX. Although Title IX does not expressly prohibit retaliation, the NWLC's brief states that an implied right of action against retaliation does exist when considering the "legislative history and context within which [Title IX] was passed."

Evidence can be found in the congressional hearings that Congress intended for retaliation to be prohibited by Title IX, the brief asserts. "This is not a novel argument," says Jocelyn Samuels, vice president for education and employment at the NWLC. "In fact, the Court has recognized that other anti-discrimination statutes inherently prohibit retaliation."

Moreover, the NWLC claims that, in addition to Title IX's implied right of action, an anti-retaliation regulation promulgated by the Department of Education under the statute further bolsters its contention.

The U.S. government brief agrees with the NWLC: "Congress would have understood that, by prohibiting sex discrimination in federally funded educational programs, it was simultaneously forbidding recipients from retaliating against persons who complain about that form of discrimination."

The NWLC stresses that the Court should make room for Jackson on its docket, as the lower courts are in conflict over the issue. The issue presented in this case "squarely divides the federal courts of appeals and is critical to effective enforcement of Title IX," writes the NWLC in their petition to the Supreme Court.

The 5th U.S. Circuit Court of Appeals in the 1997 decision in *Lowrey v. Texas A&M University System* – a strikingly similar case – held that the plaintiff, a women's athletic coordinator who was removed in retaliation for complaints about disparate treatment of male and female athletes, did have a cause of action for retaliation under Title IX.

"[I]ndividuals in the Fifth Circuit may sue for retaliation under Title IX; those in the Eleventh Circuit may not," says the NWLC. "That conflict by itself warrants the court's intervention."

In its reply brief, lawyers for the Birmingham Board of Education counter that the 11th Circuit was correct in its holding, citing *Alexander v. Sandoval* as precedent and binding authority.

"*Sandoval* established that Title IX, the statutory twin of Title VI, did not create an implied right of action that exceeds the scope of the express statutory right," states the opposing brief, filed by Kenneth Thomas of Thomas, Means, Gillis & Seay in Birmingham, Ala. "Nowhere in the text of

the statute is there even a hint that alleged victims of retaliation ... are also protected."

The brief does not directly respond to the NWLC's argument that review should be granted in light of the circuit split over the issue.

Gender Equity Case Heads to Top Court: Coach Claims He Lost Job For Whistleblowing

Times-Picayune (Louisiana)
October 9, 2003
Mary Orndorff, Newhouse News Service

WASHINGTON – A high school girls basketball coach from Birmingham, Ala., who says he lost his job after complaining that the boys teams were getting favorable treatment is taking a case to the U.S. Supreme Court that could set a precedent in gender discrimination law. If the justices choose to hear the case of Roderick Jackson, they will be deciding whether someone who was not a direct victim of sex discrimination – but allegedly was retaliated against for pointing it out – can sue in federal court.

Jackson, the former coach at Ensley High School, so far has lost every legal battle. But along the way, he gained the attention of the National Women's Law Center, which is representing him in a case that could redefine how the landmark Title IX education law on gender equity is enforced.

"I wasn't looking to be some great newsmaker or anything. I just thought it was a very important point of principle," said Jackson, a tenured physical education teacher at Ensley. "The law has certain guidelines we all have to follow while implementing equity in sports."

Jackson took the head coaching job in 1999 and noticed a pattern of what he argued was shabby treatment of the girls team, including limited gym time, no access to training equipment and the elimination of the junior varsity program. He took his complaints to the school administrators.

By May 2001, after some negative performance evaluations, he was removed as coach. Jackson said his confrontations were with the old administration and that his new bosses "are headed in the right direction." He has reapplied for the coaching job and helped prepare the girls during the pre-season this fall.

But the issue remains: Does an individual who is not directly a victim of sex discrimination have a claim if he believes he was retaliated against for raising the issue on someone else's behalf?

"For students, it would be especially harmful if their teachers or coaches couldn't raise the issue for them," said Dina Lassow, senior counsel with the National Women's Law Center in Washington. "As a coach, he was the one who clearly saw his team wasn't getting equal access to the facilities. To say it's the kids who have to subject themselves to possible retaliation just doesn't make sense."

But the Birmingham Board of Education has argued all along, successfully, that Congress did not even mention retaliation in Title IX of the education law on the books since 1972, and judges can't add it now.

"At the end of the day, I think the Supreme Court is going to have to adhere to what Congress did," said Kenneth Thomas, a lawyer for the school board.

Thomas declined to say why Jackson was fired as coach.

* * *

A Girls' Team, a Fired Coach, and Title IX

The Christian Science Monitor
June 14, 2004
Warren Richey

When coach Roderick Jackson complained that his girls' basketball team was being treated like second-class citizens at Ensley High School in Birmingham, Ala., school administrators took firm and immediate action - against Coach Jackson.

"I was told that I was not a team player, that I needed to play ball or I was going to make problems for myself," Mr. Jackson says. "And they weren't joking." He was fired.

Incensed, Jackson filed suit in federal court under Title IX, which outlaws gender discrimination in public education. To his surprise both a federal judge and a federal appeals court panel threw out his lawsuit saying the law bans sex discrimination, but does not cover acts of retaliation against someone like a coach who fights for what he or she sees as parity on the playing field.

Monday, the US Supreme Court is expected to announce whether it will take up Jackson's case and decide for the entire nation whether the protections of Title IX must be applied broadly in a way that would permit Jackson's suit, or narrowly in a way that would exclude it.

"If the decision [of the appeals court] is left to stand and become the law, it really sets a very bad example and I think would make people cautious about stepping up to protect the rights of those who have been discriminated against," says Walter Dellinger, a Duke University Law School professor and former acting US solicitor general. Mr. Dellinger was hired by the National Women's Law Center in Washington to represent Jackson before the high court.

The case is being closely followed by civil rights activists who are concerned about the potential implications of the case on a range of civil rights laws. If the Supreme Court adopts a restrictive view of Title IX, it will make it more difficult for individuals to fight discrimination.

Others say the case is important because it confronts the proper role of judges in interpreting the law rather than rewriting it through expansive rulings.

Kenneth Thomas, who represents the Birmingham Board of Education, disputes Jackson's portrayal of the case. "We have a story to tell, too," Mr. Thomas says. "All of the facts are not as bad as he has painted them."

Thomas says that if Jackson loses at the Supreme Court, those fired for reporting discrimination will still have recourse to sue for retaliation. He says other civil rights and employment discrimination laws cover retaliatory actions, but Congress never intended to permit such lawsuits under Title IX.

"There is nothing to prevent Congress from amending Title IX to include an antiretaliation provision," he notes.

In its decision rejecting Jackson's case, a three-judge panel of the 11th US Circuit

Court of Appeals in Atlanta ruled that Title IX does not permit an individual to sue for an act of retaliation.

"Gender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them parents, teachers, coaches, friends, significant others, and coworkers," writes Circuit Judge Stanley Marcus for the panel. "Congress could easily have provided some protection or form of relief to these other interested individuals had it chosen to do so especially for a harm as plainly predictable as the retaliation here at issue - but it did not do so."

Last year, a panel of the Fourth US Circuit Court of Appeals in Richmond, Va., reached the opposite conclusion in a similar case. A Virginia Beach school administrator lost her job after she complained about racial discrimination against African-American students who were excluded from certain educational programs. The administrator, who is white, sued the school district for retaliation related to the racial discrimination. The appeals court panel voted 2 to 1 to allow the suit.

Her suit was filed under Title VI of the Civil Rights Act of 1964, which bars discrimination based on race. Congress used identical language in both Title VI and Title IX. That means that the 11th Circuit and the Fourth Circuit can't both be correct. If the high court takes Jackson's case, the justices must declare which appeals court ruled correctly.

Marcia Greenberger of the National Women's Law Center says a ruling against Jackson would persuade many coaches and teachers to keep quiet about discrimination. "I worry about a real snowball effect," she says. "There is a great fear on the part of many to complain."

Jackson says he went to five different school administrators about the unequal treatment of the girls' and boys' basketball teams. Rather than having access to a newly constructed gym, the girls' team was relegated to the old gym with wooden backboards, bent basketball rims, and no heat, Jackson says.

The boys' team was able to pay team expenses from money earned from admission to games and concession-stand proceeds. The girls' team was not.

Jackson's complaints came at a price. "I not only lost the pleasure of coaching, but I lost the added income and added retirement income," Jackson says. "I was labeled a troublemaker and was turned down for other coaching jobs." But there have been some developments. Last fall, after 2-1/2 years away, Jackson was rehired as the acting girls' basketball coach. The team now receives money from concession stands, though not admissions.

In the meantime, his team, the Ensley Yellow Jackets, finished 6-2 this season, behind a team that won the Alabama championship.

While Title IX has given rise to controversies such as that at Ensley High School, it's also been instrumental in increasing the profile of women's sports. In 1981-82, 64,000 women participated in college varsity sports, while 167,000 men did, according to the National Collegiate Athletic Association. In 2000-01, the numbers had changed to 149,000 women and 207,000 men.

High Court Is Rolling Back Implied Private Rights of Action: The Court Refused to Review a Suit Based On a Law Requiring Children's Health Screenings

ABA Journal
February 1, 2003
Steve France

When the U.S. Supreme Court decided Gonzaga University v. Doe last June, the case was just one of a flurry of education-related rulings that closed out the term. It possessed neither the most colorful facts nor the weightiest controversy. After all, the court also ruled on high school drug testing, private school vouchers and whether students may be forced to read their grades aloud.

But no less influential a jurist than Chief Justice William H. Rehnquist confided to a federal judicial conference in July that Gonzaga, 536 U.S. 273, was one of the "sleeper decisions" of 2002.

"What he meant was that the case got little media coverage when it came down in June, but it's likely to have great impact in the future," says University of Southern California law professor Erwin Chemerinsky.

It is easy to understand the lack of media coverage. In an opinion joined by four other justices, Rehnquist said a former student of Gonzaga University could not invoke section 1983 of the Civil Rights Act of 1871 to sue for a violation of a federal educational privacy law. The school allegedly had released personal information about the student to an "unauthorized person" as defined by the 1974 Federal Educational Rights and Privacy Act. (Justice Stephen G. Breyer wrote a separate concurrence, which was joined by Justice David H. Souter.)

Rehnquist explained that he was merely clarifying earlier cases that might have "suggested" a looser standard for determining when people may use section 1983 to protect their rights under the U.S. Constitution and other laws.

But, says New York City civil rights lawyer David Goldberg, "It was less a clarification than an evisceration of what the court's precedents had held."

In fact, coupled with a 2001 ruling, Alexander v. Sandoval, 532 U.S. 275, which narrowed the test for finding "implied rights of action" in federal statutes, the case signals an intention to substantially curb private lawsuits on behalf of minorities, the disabled and beneficiaries of federal entitlements, Goldberg says.

OPPONENTS ON WATCH

Since Gonzaga, lawyers who support allowing such private lawsuits, Goldberg and Chemerinsky among them, have nervously watched the high court's docket as petitions have been filed that could give rise to further restrictions. Opponents of implied private rights of action and of broad use of section 1983 to sue for violations of various other laws have been watching with eager anticipation.

"It is only a matter of time before any and all implied private rights of action under any statute are precluded, whether or not plaintiffs use section 1983," says Michael Greve, director of the Washington, D.C.-based Federalism Project at the American Enterprise Institute.

Then, enforcement of federal laws will be the business solely of government officials, unless Congress has expressly provided individuals a right to sue, according to Greve.

How much time may pass before the justices speak again is, of course, unknown. Rehnquist's remarkable touting of the importance of Gonzaga to the judges conference confirms the likelihood of further developments, but it also may signal a desire to let the lower courts take the lead for a while, Goldberg believes.

The Rehnquist majority will probably choose to let the trend simmer a little bit before attempting another big step, he says. "I think they'll want to give conservative lower courts time to operate in the new legal environment, where defendants will be claiming that significant circuit court precedents are no longer binding."

The courts will not lack for chances to limit litigation rights, Chemerinsky says. He notes that there are "literally hundreds of federal laws that do not create express private rights of action." On the other hand, there are court decisions stretching back decades that recognize an individual's right to sue for injuries caused by violations of those statutes, either because such a right of action is implied by the statute, or substantive rights contained in the statute or regulations can be protected by section 1983.

Already lower federal circuits have taken up the gauntlet. In two cases decided last year, the 11 th U.S. Circuit Court of Appeals shot down implied rights of action in cases alleging retaliation for a gender bias claim, Jackson v. Birmingham Board of Education, 309 F.3d 1333, and discrimination against an airplane passenger, Love v. Delta AirLines, 310 EM 1347.

Jackson was brought by a high– school girls' basketball coach who claimed the school board fired him because he complained that the girls' team was denied equal funding and equal access to sports facilities. He claimed an implied right of action under Title IX, which bars sex discrimination in federally funded educational programs. He also cited a federal regulation that bars retaliation for complaints under Title IX.

Love was brought by a paralyzed woman who became ill on a flight. She claimed that Delta Air Lines failed to provide her with an accessible call button and provided restrooms that were too small to accommodate her wheelchair. She sued under a federal law that prohibits airlines from discriminating against disabled individuals.

The 11th Circuit relied on Sandoval in rejecting the implied rights of action in both lawsuits.

Writing for a 5-4 majority in Sandoval, Justice Antonin Scalia squeezed the general test for finding implied private rights of action. He wrote that the text of Title VI of the 1964 Civil Rights Act, which forbids discrimination in federally funded programs, did not clearly authorize lawsuits based on disparate impacts. Nor could regulations created under the law create such a right, he said. The case had been brought by a non-English speaker who claimed the state of Alabama's English-only driver's license exam had a discriminatory disparate impact.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress," Scalia wrote.

"Neither as originally enacted nor as later amended does Title VI display an intent to

create a freestanding private right of action to enforce regulations promulgated under [the Civil Rights Act]." Congressional intent to permit private lawsuits must be evident in the text and structure of the statute, not merely in the "expectations" of the enacting Congress, Scalia said.

Gonzaga applies Sandoval's narrow approach when identifying which substantive rights may be protected by private lawsuits under section 1983. In either situation, a plaintiff "must show that the statute manifests an intent 'to create not just a private right but also a private remedy,' " Rehnquist wrote, quoting from Sandoval.

Rebecca Epstein of Washington, D.C.-based Trial Lawyers for Public Justice knows about the fallout from the high court cases. When Sandoval was decided, Epstein was litigating a disparate impact case in Michigan. Her clients allege that Michigan's use of standardized tests to select scholarship students keeps a disproportionate number of minority students from receiving assistance.

"Sandoval abruptly reversed nearly three decades of Title VI precedent that allowed such lawsuits," she says. "We had to change our claim to use section 1983." This followed the advice of Justice John Paul Stevens, who in his dissenting opinion in Sandoval said that implied rights of.action against state actors could simply be replaced by a section 1983 civil rights claim.

U.S. District Judge Patrick Duggan allowed the section 1983 claim in an opinion issued in November 2001, before the supreme court decided Gonzaga. White v. Engler, 188 F. Supp. 2d 730 (E.D. Mich.). Other courts, though, have held that a federal regulation alone may not create a right enforceable through section 1983. Epstein breathed a sigh of relief when Michigan did not pounce on the Gonzaga ruling to support a new motion to dismiss.

Greve says that the media will notice the "anti-entitlement federalism" trend represented by Sandoval and Gonzaga as soon as it affects a major welfare program. He had high hopes last fall that the "federalist five" justices would move to curb private lawsuits under "the mother of all entitlement programs, Medicaid." The state of Michigan was seeking review of Westside Mothers v. Haveman, 289 F.3d 852, which allowed a welfare rights group to sue under section 1983 to correct alleged defects in the state's Medicaid-mandated preventive health program for children. The 6th U.S. Circuit Court of Appeals had decided the case just before the Gonzaga decision.

Despite the denial of cert, civil rights advocates like Goldberg were not celebrating. Even if the justices do not address the issue of private rights of action this term, decisions like Westside Mothers "are very much on conservative jurists' radar screen," he says. Future cases are likely to raise the same issues, Goldberg says.

He notes that supreme court justices rarely wish to attract lots of public attention. In that light, it would seem no accident that the audience for Rehnquist's "sleeper" comment about Gonzaga was a group of judges, not a group of reporters.

Garrison S. Johnson v. James Gomez, et al.
(03-636)

Ruling Below: (Johnson v. State of California, 321 F.3d 791, 3 Cal. Daily Op. Serv. 1573, 2003 Daily Journal D.A.R. 2051 (9th Cir.(Cal.) Feb 25, 2003) (NO. 01-56436) *Rehearing and Rehearing en Banc Denied*, 336 F.3d 1117, 3 Cal. Daily Op. Serv. 6629, 2003 Daily Journal D.A.R. 8295 (9th Cir. Jul 28, 2003) (NO. 01-56436), *Cert. Granted*, 124 S.Ct. 1505, 158 L.Ed.2d 151, 4 Cal. Daily Op. Serv. 1730 (U.S. Mar 01, 2004) (NO. 03-636)).

The Ninth Circuit held that the California Department of Corrections' ("CDC's") use of race as a dominant factor in assigning new prison inmates to temporary cell mates for a 60 day observation period did not violate the Equal Protection Clause. Rather than relying on the traditional strict scrutiny analysis in determining whether the plaintiff's constitutional rights were violated, the Ninth Circuit applied a relaxed standard of review applicable to prison inmates, described by *Turner v. Safley*, 482 U.S. 78. To prevail under the first prong of this test, it is the inmate's burden of proving that the alleged constitutional abuse is not "reasonably related to legitimate penological interests." If the inmate rebuts the existence of a common sense connection between the use of race and the legitimate penological interest, the burden shifts to the state to show that the use of race was not irrational. The Ninth Circuit found that Johnson did not produce evidence sufficient to rebut that the CDC's use of racial segregation was reasonably related to the legitimate goal of preventing racially-motivated violence by inmates.

Question Presented: Whether routine racial segregation in temporary prison cell mate housing assignments used to prevent inter-racial violence between new inmates violates the Equal Protection Clause of the Fourteenth Amendment and whether such segregation is subject to a more relaxed standard of judicial review under *Turner v. Safley*.

GARRISON S. JOHNSON, Plaintiff-Appellant
v.
State of California; JAMES H. GOMEZ, Director, Department of Corrections; James Rowland, Defendants-Appellees

United States Court of Appeals
For the Ninth Circuit

Decided February 25, 2003

[Excerpt: some footnotes and citations omitted]

O'SCANNLAIN, Circuit Judge: We must decide whether a prison reception center housing policy, which uses race as

one factor in assigning a new inmate's initial cell mate for 60 days, violates the Equal Protection Clause.

I

Garrison Johnson is an African-American prisoner in the California Department of Corrections ("CDC"), serving his sentence for murder, robbery, and assault with a deadly weapon. On June 22, 1987, he was received at the California Institution for Men in Chino, California . . . [h]e has been through the inmate reception centers at Chino, Folsom, Calipatria. . . . At each facility he was double-celled with another African-American inmate.

According to the staff testimony in the record, when an inmate arrives at a CDC institution either as a transfer from another facility or as a new inmate, he . . . is initially housed in a reception center. At the reception center, the inmate goes through a classification process. The CDC evaluates the inmate's physical, mental, and emotional health. The inmate must also provide vocational and educational goals that he wants to accomplish while incarcerated. Finally, the inmate is given a battery of tests. In making its decision, the CDC reviews the inmate's history in jail and any previous commitments to determine his security needs and classification level. The CDC also looks to see if the inmate has any enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, or inmates with whom he may have had disputes during previous incarcerations.

To determine the double-cell housing placement at the reception center, the CDC looks at several factors including, but not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history, custody designation, and race. Although race is only one of many factors, it is a dominant factor; according to the CDC, the chances of an inmate being assigned a cell mate of another race is "[p]retty close" to zero percent. The CDC considers race when making an initial housing assignment because, in its experience, race is very important to inmates and it plays a significant role in antisocial behavior.

Generally, inmates are listed in four general ethnic categories, black, white, Asian, and other. Within each of these categories, officials at the reception center further divide inmates, for example Japanese and Chinese inmates are generally not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos. Also, Hispanics from Northern California and Hispanics from Southern California are not housed together because, in the administrators' experience, they tend to be at odds with one another.

* * *

[Prison officials unanimously agree that disregarding race in initial housing assignments would put new inmates at risk for suffering racially-motivated violence.]

Although the rest of the prison is fully integrated–there is no distinction based on race as to jobs, meals, yard and recreation time, and vocational and educational assignments–according to the administrators, the confined nature of the cells makes them different from the other areas of the prison. Staff cannot see into the cells without going up to them, and inmates are capable of placing coverings over the windows so that staff cannot see in them at all. Moreover, inmates are confined to their cells for much

of their day. Because of the current levels of racial violence occurring in areas where the staff can easily observe the inmates, the administrators are concerned that they would not be able to protect inmates who are confined in their cells. Thus, the administrators argue that they need 60 days to analyze each inmate on an individual basis to determine whether the inmate poses a danger to others.

After 60 days, the inmate either is assigned a cell within the current institution where he will be permanently housed or is transferred to another institution where his classification indicates that he would be more suited. If the inmate is transferred, he again goes through the initial housing screening process. If the inmate stays at the institution and has the appropriate security classification, he may be transferred to a dormitory or a single cell.

Inmates assigned to a dormitory are considered nonviolent, and, thus, inmates of all races are housed together. The CDC does not use race as a factor to determine who is assigned to a dormitory, but within each dormitory it attempts to maintain a racial balance so as to reduce the likelihood of racial violence. Single-cell housing decisions are made completely independent from race. Johnson does not allege that either of these two housing policies violate equal protection.

If the inmate remains in a double cell, the CDC's goal is for inmates to select their own cell mate, so as to maximize the inmates' compatibility and to reduce the possibility of violence. There are designated forms that both inmates must sign indicating that they would like to share a cell together. Unless there are security reasons for not granting an inmate's request to share a cell with another inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions.

II

[Johnson filed the original complaint *pro se* in 1995. In 1998, the district court dismissed the suit after a third amended complaint, but the Ninth Circuit remanded on Johnson's appeal in 2000, "holding that Johnson's allegations were 'sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.'" Johnson v. California, 207 F.3d 650, 655 (9th Cir. 2000).]

On remand, Johnson was appointed counsel . . . [H]is Fourth Amended Complaint . . . [sought] monetary damages [and injunctive relief]. He alleged that James Gomez and James Rowland, former CDC Directors, in their individual capacities violated his constitutional rights by formulating and implementing the CDC housing policy. . . .

[The district court granted summary judgment in favor of the administrators' based on qualified immunity, holding that under Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001),] the former administrators were entitled to qualified immunity because their actions were not clearly unconstitutional. Johnson now appeals from the district court's grant of summary judgment for the administrators.

III

The Supreme Court in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), instructed that before we can determine whether state officials are entitled to qualified immunity, we must first address the merits of the alleged constitutional violation. [The court determined that it must

address Johnson's Constitutional claim on the merits.]

A

Johnson alleges that the state's use of race in making initial housing assignments constitutes an impermissible racial classification afoul of the Equal Protection Clause. [Because the state admits considering race when it assigns inmates their cell mate . . . the policy is suspect on its face, and Johnson need not prove a discriminatory intent or impact. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 n. 27, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)]. The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The central mandate of this Clause "is racial neutrality in governmental decisionmaking." Miller v. Johnson, 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). . . .

[The Supreme Court in Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) held that an Alabama state statute requiring segregated cell blocks in jails and prisons violated the Equal Protection Clause. It also] recognized that prisons present an inherently different situation than society at large . . . [and] that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Id. at 334, 88 S.Ct. 994. . . . Thus, while recognizing the important need to combat racial discrimination, even in prisons, the Court also recognized that the very nature of prisons may require the use of race-based criteria in official decisionmaking under limited circumstances.

Johnson does not dispute that Lee acknowledges that under some circumstances race may be considered in prison decisionmaking, but denies that this is one such instance. [The court distinguished cases cited by Johnson to support a finding that segregation in prison housing assignments is unconstitutional. Unlike in the cited cases, the CDC is fully integrated, and the segregation occurs only as a temporary arrangement which, "according to the CDC, permits it to learn more about the inmates before assigning them to a cell on a more permanent basis."]

In this case, to run a safe prison system, the CDC contends that it must assign cell mates, partly based on the inmates' race, for 60 days so that it can find out more about the inmate and reduce violence within the prison system. The policy is limited to the dangers it seeks to alleviate.

Paramount, in this case, there is also no indication that the use of race in the CDC's decisionmaking disparately affects the inmates. . . . [Unlike other precedents,] disparate treatment is not present in this case: there are no allegations that African-American inmates receive unfavorable cell locations or disparate treatment as compared to their white or Hispanic counterparts. . . .

[Johnson relied upon cases decided before the Supreme Court's "new deferential test for examining the constitutional rights of prisoners," described in *Turner v. Safely*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d (1987). Although the "invidious and pervasive nature of the segregation in those cases probably have been invalidated under *Turner*, the court noted that "in a close case such as the one at hand . . . the standard of review is paramount."]

B

* * *

Turner recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," and that "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." 482 U.S. at 84, 107 S.Ct. 2254 (citation and internal quotations omitted). . . . Thus, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 89, 107 S.Ct. 2254.

[The court described the difficulty to the inmate of proving a prison regulation unconstutional under *Turner*. To prevail, the inmate bears a 'heavy burden' of overcoming "the presumption that the prison officials acted within their 'broad discretion.'" Shaw, 532 U.S. at 232, 121 S.Ct. 1475.] With Turner as our guide, we now consider whether the administrators' temporary housing policy is reasonably related to their concern for increased racial violence.

IV

In Turner, the Court provided four factors to examine in determining whether the prison administrators' actions are reasonably related to a legitimate penological interest. First, a " 'valid, rational connection' [must exist] between the prison regulation and the legitimate governmental interest put forward to justify it." Turner, 482 U.S. at 89, 107 S.Ct. 2254 (quoting Block v. Rutherford, 468 U.S. 576, 586, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984)). Second, we must determine "alternative means of exercising the right that remain open to prison inmates." Id. Third, we must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. Fourth, we must determine whether "ready alternatives" to the CDC's policy are available. Id. The "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." Id.

A

[The court first analyzed whether there was a "legitimate" and "neutral" governmental objective underlying the policy at issue and whether the policy is 'rationally related to that objective'" Mauro v. Arpaio, 188 F.3d 1054, 1059 (9th Cir.1999) (en banc) (quoting Thornburgh v. Abbott, 490 U.S. 401, 414, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989)).The court found that the governmental objective of reducing racially-motivated violence was both legitimate and neutral, since "the housing policy does not provide any advantage or disadvantage to any particular race, and the objective, reducing violence among the inmates and against the staff, has nothing to do with race, but rather with inmate and staff safety." The court then determined that the housing plan was "rationally related to the state's interest." The court rejected Johnson's argument that the prison must first document an instance of racial violence "specific to cell assignments" before it could rationally craft a policy to pre-empt such violence because such analysis "cannot withstand our consistent application of Turner. See, e.g., Casey v. Lewis, 4 F.3d 1516 (9th Cir.1993)].

[The court recounted the "well-documented" history of racially-motivated violence in CDC, citing numerous race riots between Northern and Southern hispanics, white supremacists, and blacks in the past decade,

which threatened prison security and caused lockdowns, injury of numerous inmates and the deaths of several others. The court concluded: "this is hardly a case where the prison administrators are acting on an unsubstantiated record."]

[The court affirmed Johnson's burden of production post-*Turner*, citing *Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999). The court explained that if an inmate presents "sufficient (pre or post) trial evidence that refutes a common-sense connection between a legitimate objective and a prison regulation," . . . then the administrators bear the burden of proving that the "connection is not so 'remote as to render the policy arbitrary or irrational.'" [I]d. (quoting Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir.1999)).]

Given the admittedly high racial tensions and violence already existing within the CDC, there is clearly a common-sense connection between the use of race as the predominant factor in assigning cell mates for 60 days until it is clear how the inmate will adjust to his new environment and reducing racial violence and maintaining a safer environment. . . . .

[Johnson made two arguments to rebut the common sense connection, namely: "that the high levels of racial violence are evidence that the CDC's housing policy does not work. . . and that some gangs are not formed strictly along racial lines." The court responded to these arguments noting that] administrators do not contend that their housing policy is a magical elixir designed to cure all the racial and gang tensions within the prison; they contend only that without their policy, racial violence, both within the cells and in the recreation areas, would increase. Johnson has failed to offer any evidence to refute this connection. Just because racial violence already exists does not mean that pre-existing policies do not work to reduce that violence from being even more pervasive than it already is. . . .

Because Johnson failed to refute the common-sense connection between the policy and prison violence, the "government was not required to make any evidentiary showing concerning the connection." Frost, 197 F.3d at 357. . . . [The court concluded it was "plausible, given the racial violence and tensions already present in the CDC and the knowledge that in other prison settings race-blind housing assignments have caused violence, that the administrators believe using race as one factor in making an initial housing determination is necessary for inmate and staff safety" and found that "*Turner's* first prong has been met."]

B

[The court then considered the second factor under *Turner*, "whether alternative means of exercising the right remain open to prison inmates." The court noted the deference due to corrections officials when other avenues for exercising constitutional rights exist, consistent with Mauro, 188 F.3d at 1061. It then examined Johnson's right "expansively and sensibly" under *Abbott*, 490 U.S. at 417, 109 S.Ct. 1874, "considering "Johnson's right to be free from state-sponsored racial discrimination at a macro level." It noted several precedents in which no impermissible discrimination occurred although particular rights were denied, because in those cases access to a more general right was preserved. The court concluded that "the correct analysis in this case is not whether the state has provided reasonable alternatives from the CDC's use of race as a factor for the first 60 days, but whether the state has provided reasonable alternatives from racial discrimination in general." Applied to this case, because the

policy lasts only temporarily, because there are no "black" cells or "white" cells. . and because "the remainder of the prison is integrated in full without regard to race" the court concluded that Johnson had "reasonable alternatives to exercise [his] constitutional rights.]

C

The third Turner factor requires us to examine what impact accommodating the inmate's asserted right will have on prison personnel, inmates, and the allocation of prison resources. Turner, 482 U.S. at 90, 107 S.Ct. 2254. The CDC administrators contend that failing to consider race in making initial housing assignments would lead to increased racial violence both in the cells and in the common areas. The impact would be significant, jeopardizing the safety of all the inmates and prison staff. Johnson, however, contends that the administrators failed to proffer evidence that not using race as a factor would cause a strain on prison resources. Again, Johnson misconstrues Turner. The CDC does not have to prove that eliminating their policy would impact (1) prison personnel, (2) inmates, and (3) prison resources; rather, Johnson must prove that eliminating the CDC's housing policy would not affect one of these areas in a sufficient manner. See Harper, 494 U.S. at 227, 110 S.Ct. 1028. Johnson has failed to do so.

[The court noted both that "Johnson did not rebut the CDC's claim that racial violence would occur both in cells and in the recreation areas if the CDC did not take race into account" and that "[t]he administrators, moreover, affirmatively proffered evidence to show that inmate and guard safety would be compromised." The court then recounted the CDC's evidence that without consideration of race in housing assignments, racial violence would exist within cells and escalate within common areas. The court concluded that "[w]ithout contrary evidence that the accommodation of the inmates' rights would not affect inmate and staff safety, we must defer to the judgment of the administrators."]

D

The fourth factor we must examine is whether reasonable alternatives to using race as a factor in the initial housing policy would "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests...." Turner, 482 U.S. at 91, 107 S.Ct. 2254. This is not a "least restrictive alternative test"; it is a reasonableness test. Thus, while the regulation need not be a perfect fit to the solution at hand, it cannot be an "exaggerated response." Id. at 90, 107 S.Ct. 2254. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." Id. "The burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the regulation." Mauro, 188 F.3d at 1062.

[Johnson offered two alternatives] . . . [O]fficials could screen inmates (1) on the basis of professed gang affiliation or (2) by examining the inmates' racial animus or a history of interracial violence. [The court assessed the alternatives.] There is little chance that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate. . . . Requesting that inmates provide potentially self-incriminating information themselves. . . does not provide sufficiently reliable data under which the CDC could make a meaningful decision. Without a guarantee of

the veracity of the information, Johnson's argument does not provide a reasonable alternative. [The court then found that the second alternative, an independent evaluation of an inmate's past, would be unreasonable because there is no guarantee of accuracy. The court finally noted that under *Mauro*, 188 F.3d at 1062, Johnson could not prevail "[w]ithout some sort of showing that the CDC could accomplish its goals without incurring a significant cost."]

* * *

Our decision that the CDC policy is not an "exaggerated response" is reinforced when we look to our Eighth Amendment Cruel and Unusual Punishment Clause jurisprudence. Prison authorities are required under the Eighth Amendment to "take reasonable measures to guarantee the safety of the inmates." Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (internal citations and quotations omitted); Harper, 494 U.S. at 223, 110 S.Ct. 1028. . . .

[T]he failure to take race into consideration in cell assignments could be considered "deliberate indifference" to prisoners' safety and could itself constitute a constitutional violation. [The court noted supportive testimony]. To reduce its liability under the Eighth Amendment and to protect inmates, the CDC crafted a policy, assigning cell mates largely along racial lines for a limited time, so as to decrease the risk of racial violence that the administrators are aware exists. Certainly, this is a reasonable response in light of the conflicting responsibilities that the CDC must balance.

V

Although there may be many ways in which to achieve the state's objective in reducing racial violence in the CDC, the path chosen by the State of California is reasonably related to the administrators' concern for racial violence and thus must be upheld. If this policy were implemented beyond the prison walls, undoubtedly, we would strike it down as unconstitutional. The prison system, however, is inherently different and we must defer our judgment to that of the prison administrators until presented evidence demonstrating the unreasonableness of the administrators' policy. The Supreme Court has instructed us that inmates bear a "heavy burden" to show that prison officials acted unconstitutionally, and in this case, Johnson failed to carry his burden. He presented little to no evidence and could not rebut the presumption of constitutionality that the administrators are afforded.

Because Johnson failed to prove that a constitutional violation could be made out, we need not reach the ultimate question of whether the CDC administrators are entitled to qualified immunity. Saucier, 533 U.S. at 201, 121 S.Ct. 2151.

AFFIRMED.

Justices Agree To Evaluate Prison Policy Based on Race

The New York Times
March 2, 2004
Linda Greenhouse

The Supreme Court agreed Monday to hear a challenge to a California prison system policy that segregates inmates by race during their first 60 days of incarceration.

The state has defended the policy, and a federal appeals court has upheld it, as a sensible way to minimize interracial violence at the reception centers where inmates are housed while being screened for long-term placement. One purpose of the screening is to assess a new inmate's potential for violence.

During this 60-day period, inmates are assigned to two-person cells based on whether they are black, white, Asian or "other." Within those categories, the authorities also separate some by national or geographic origin. For example, Japanese and Chinese inmates are not housed together, neither are Laotians and Vietnamese, or Hispanics from Northern and Southern California.

The segregation policy is also used for the first 60 days after an inmate is transferred from one prison to another. In all instances, however, areas of the prison other than the actual cells – the yard, dining hall and work and recreation areas – are not segregated.

The policy has been in effect for more than 25 years. Garrison S. Johnson, a black inmate convicted of murder, challenged it in 1997 by filing a federal lawsuit that he drafted himself. The lower federal courts dismissed the suit while permitting him to amend it with a lawyer's help. Proskauer Rose, a New York law firm with an office in Los Angeles, has been handling the case without charge for the past three years.

In the amended lawsuit, both the Federal District Court in Los Angeles and the United States Court of Appeals for the Ninth Circuit, in San Francisco, upheld the policy. In its ruling in February 2003, the Ninth Circuit said there was "clearly a common-sense connection" between using race for the initial assignment and reducing racial violence in the prison system.

"The housing policy does not provide any advantage or disadvantage to any particular race, and the objective, reducing violence among the inmates and against the staff, has nothing to do with race, but rather with inmate and staff safety," Judge Diarmuid F. O'Scannlain wrote for a three-judge panel of the appeals court.

In the Supreme Court appeal, Johnson v. Gomez, No. 03-636, Mr. Johnson's lawyers argue that the Ninth Circuit applied the wrong legal standard, and that a government policy that makes distinctions on the basis of race has to meet a more searching test than that of common sense or reasonableness. All such policies are presumptively unconstitutional, they said.

"The decision below undermines a national imperative to eliminate racial discrimination," the appeal argues. It adds that though segregating inmates by race might be justified in response to an "extraordinary circumstance involving prison security," it should not be a routine

part of administering a prison system with 100,000 inmates.

A Supreme Court decision in 1968, Lee v. Washington, prohibited segregation in the Alabama prison system. Though Mr. Johnson's lawyers invoked that precedent, the Ninth Circuit disregarded it on the ground that the court in 1968 was addressing a policy that permanently segregated the prison population into whites-only and blacks-only cellblocks. The California policy, by contrast, imposes only short-term segregation and ''is limited to the dangers it seeks to alleviate,'' the appeals court said.

* * *

Rather than the ''strict scrutiny'' usually applied in race discrimination cases, the Ninth Circuit applied a more relaxed standard of review derived from a prison regulation case the Supreme Court decided in 1987. The decision in that case, Turner v. Safley, said that courts should generally uphold prison regulations that are ''reasonably related to a legitimate penological interest.'' The connection between the regulation and the administrators' goal in issuing it must be a valid and rational one, the court said in that case.

Justices to Debate California's Segregated Prison Policy

Los Angeles Times
March 2, 2004
David G. Savage

The U.S. Supreme Court agreed Monday to hear a constitutional challenge to California's policy of segregating new prisoners by race.

For the first 60 days, a new inmate is kept in a cell with another inmate of the same race, in what state officials say is an effort to reduce violence. Skinheads or members of black and Latino gangs are more likely to get into fights if they are housed with someone of another race, the officials say.

The new prisoners are evaluated for their potential for violence, and after 60 days they are assigned to a permanent cell – without regard to their race.

The segregation policy was challenged by Garrison Johnson, a black inmate, who contended that "intentional state racial segregation" violates the Constitution and its guarantee of equal protection of the laws. He lost before a federal judge and the U.S. 9th Circuit Court of Appeals, but the Supreme Court voted to take up his claim.

Since the Brown vs. Board of Education decision in 1954, in which the Supreme Court rejected the notion of "separate but equal" in public education, the high court has frowned upon nearly all government policies or practices that mandate segregation by race. However, judges have upheld moves by prison officials to separate black and white inmates in response to rioting or fighting.

Lawyers for Garrison say this emergency exception is not enough to justify routine racial segregation.

"Over 100,000 California inmates are subject to admittedly segregationist government policies," they wrote in their petition to the court. "Given the history of stigma and racial discrimination that such segregation calls to mind," the court should forbid the routine practice of relying on race as a means to separate prisoners, they said.

In their reply, the state's lawyers stressed the initial "classification" period is temporary, and said it does not result in different or unfair treatment of inmates. Moreover, the inmates are "fully integrated" during the day when they are at work, at meals and in the yards for recreation.

The Supreme Court will hear the case of Johnson vs. Gomez in the fall.

* * *

U.S. Supreme Court to Review California Prison Cell Segregation

The San Diego Daily Transcript
April 30, 2004
Anne Gearan, Associated Press

Washington - Fifty years after the Supreme Court declared racial segregation unconstitutional in public schools, the court agreed Monday to consider whether state prisons may separate new inmates by race as a safety measure.

California routinely assigns newly arrived black prisoners to bunk only with other black prisoners for three months or more, and likewise assigns white and Asian inmates to cells with others of their race or ethnicity.

A black prison inmate challenged the practice as a violation of his constitutional right to equal treatment. Garrison S. Johnson also argued the policy flouts previous Supreme Court rulings striking down segregation in other areas.

"Intentional state racial segregation has been outlawed in this country for over half a century," Johnson's lawyers argued in asking the Supreme Court to hear his appeal.

Prison officials say housing inmates by race helps keep prisoners safe from racial violence, and note that wardens also look at factors such as an inmate's age and health in deciding who rooms with whom.

Segregation is temporary, California Attorney General Bill Lockyer told the Supreme Court in a court filing, and the policy applies only to the two-person cells in which inmates are housed when they first enter the prison system or when they are transferred from one prison to another.

The rest of the prison system is not segregated, and inmates are often allowed to eventually choose their cellmates without regard to race, the state said. The California prison system, with more than 300,000 inmates, is the nation's largest.

"The confined nature of the cells makes them potentially more dangerous than the other areas of the prison," Lockyer wrote in asking the Supreme Court not to hear Johnson's appeal.

Racial violence is a problem in prison areas outside inmate cells, Lockyer said.

"Administrators are concerned they would not be able to protect inmates who are confined in their cells, if they did not consider race as a factor."

The practice dates back more than 25 years, Johnson said. Johnson is serving a sentence for murder, robbery and assault. He was segregated by race upon entering the prison system in 1987, and has been similarly segregated each time he transferred to a new prison, his lawyers said.

The San Francisco-based 9th U.S. Circuit Court of Appeals ruled against Johnson last year.

Prison officials had sound reasons to want to separate inmates by race, and did not treat one race better than another, the appeals judges said.

"The housing policy does not provide an advantage or disadvantage to any particular

race, and the objective reducing violence among inmates and against the staff has nothing to do with race," the appeals court said.

This year marks the 50th anniversary of the Supreme Court's landmark Brown v. Board of Education, which outlawed racial segregation in public schools. Similar rulings followed, including a 1968 case that prohibited blanket racial segregation in state prisons. The court said, however, that in the interest of security, prison officials could take racial tensions into account on a case-by-case basis.

The high court will hear the latest case next fall, with a ruling expected by July 2005.

The case is Johnson v. California, 03-636.

* * *

Syracuse U.: Syracuse Grad, Cell Mate Challenge Prison Housing

Daily Orange (Syracuse U.)
April 16, 2004
Erin Dejesus

SYRACUSE, N.Y. – Viet Mike Ngo, former cellmate of Syracuse University graduate Stephen Liebb, who is currently serving time in a California prison, filed a habeas corpus petition March 30 to a California Supreme Court, claiming that his rooming assignment within the racial classification system of inmates puts him in danger.

Liebb, 57, is serving a 25-year to life sentence in a California prison for first-degree murder and filed his own habeas corpus petition last September on a similar claim, requesting a change in his racial classification from "white" to "other."

Liebb, an Orthodox Jew, and Ngo, who identifies as Jewish, claim that for Jewish people to be classified as white forces them to live with white supremacists or Neo-Nazis, said Liebb in a Jewish Journal of Greater Los Angeles article. The "white" category includes more anti-Semites than any other category.

Liebb, who earned a law degree law at the University of California-Los Angeles after graduating from SU, was convicted of first-degree murder in Santa Monica in 1981. He served 21 years in various prisons and has spent the past eight years in the San Quentin prison, California's oldest correctional facility.

The prison separates prisoners into four racial categories – white, black, Hispanic and an "other" category, which includes Asians and Native Americans. The prison uses the classifications as a way to determine rooming assignments and help control lockdown situations.

Within the California prison system, 29 percent of inmates are white, 29 percent black, 36 percent Hispanic and 6 percent fall into the "other" category, according to the California Department of Corrections.

Prisoners in New York state, however, do not undergo racial segregation.

"We don't segregate based on race or age, only gender," said Linda Foglia of the Department of Correctional Services in Albany. The New York state department classifies prisoners before they reach individual state facilities by other factors such as security level and state of mental health.

A white classification of Jewish people adds to an already hostile prison environment, said Charles Carbone, a lawyer at California Prison Focus, an organization that works to stop human rights violations within California state prisons.

"Prisons are one of the most racially unfriendly environments in the country," Carbone said. "It's especially difficult for Jewish prisoners who are seen as white, but due to their history and culture, they're obviously non-white."

It is too soon to predict the outcome of the suit, said Carbone, whose organization has represented other inmates with similar complaints. But if successful, Liebb's suit

could severely challenge the way cultural definitions are assigned in prisons.

"If it's a victorious case, it will definitely have a precedence in the California court system," Carbone said. "Counting other prison systems, which typically learn by watching, it will have a far-reaching effect in judicial prejudices."

But an appeal to classify Jews into a separate race is unlikely because society as a whole does not recognize Jewish people as within a non-white race, said Zachary Braiterman, an associate professor of Judaic studies at SU.

"I can't even imagine it, frankly, because it's such a old way of thinking about Jews and Judaism," Braiterman said. "Before the Holocaust, Jews were considered a race. After [World War II], I don't think anyone considered the Jews constituted a separate race. It's to the point now where I think it would make people extremely uncomfortable talking about Jews as a separate racial [category]."

The definition of Judaism became more of a religious, cultural identity, rather than a racial identity, after World War II, Braiterman said.

The practice of racial segregation within prisons also is legal, and to many, is the easiest way to promote safety within prisons, Carbone said.

"They realize inmates segregate themselves according to race," Carbone said. "Institutions have a 'conquer and divide' approach to race. If blacks are fighting Latinos, there's a recognition that prisoners will not share a commonality – they will fight amongst themselves."

Smith v. City of Jackson
(03-1160)

Ruling Below: (Smith v. City of Jackson, 351 F.3d 183 (, 92 Fair Empl. Prac. Cas. (BNA) 1824; 84 Empl. Prac. Dec. (CCH) P41,521, 57 Fed. R. Serv. 3d (Callaghan) 1242, *cert. granted* 124 S.Ct. 1724, 158 L.Ed.2d 398).

The Fifth Circuit affirmed the Southern District of Mississippi's ruling that a disparate impact theory of liability is not available to plaintiffs seeking redress for age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"). Three circuit courts had used the Civil Rights Act of 1967 as a blueprint for allowing disparate impact claims under ADEA. The Fifth Circuit held in accordance with six other circuits, finding that critical differences in the text and legislative history of the statutes made it inappropriate to rely on the judicial theory of disparate impact available under the Civil Rights Act in order to uphold a similar cause of action under ADEA. After dismissing the disparate impact claim, the court vacated the district court's summary judgment in favor of defendants on the disparate treatment claim and remanded the case for further consideration of that issue.

Question Presented: Whether ADEA mirrors sufficiently Title VII of the Civil Rights Act of 1964 to support a similar inference that disparate impact claims, which are recognized under Title VII, are available under ADEA without providing proof of discriminatory intent.

Azel P. SMITH et al., Plaintiffs-Appellants
v.
CITY OF JACKSON, Mississippi, Police Department of the CITY OF JACKSON, Mississippi, Defendants-Appellees

United States Court of Appeals
For the Fifth Circuit

Revised, December 4, 2003

[Excerpt: some footnotes and citations omitted]

KING, Chief Judge:

* * *

I.

PROCEDURAL HISTORY

[In 2001, thirty police department employees brought suit under ADEA for injuries resulting from "a performance pay plan ("the plan")," claiming that it discriminated against older worker by providing greater pay increases for "police officers and public safety dispatchers (collectively "officers") under the age of forty."]

* * *

On September 6, 2002, while . . . plaintiffs' motions were pending, the district court granted summary judgment in favor of the defendants on the plaintiffs' disparate impact and disparate treatment claims and denied the plaintiffs' pending motions as moot. Final judgment was entered on this same date.

The plaintiffs appeal this final judgment, maintaining that: (1) the district court erred in concluding that a disparate impact theory of liability is not cognizable under the ADEA. . . .

* * *

III.

THE PLAINTIFFS' DISPARATE IMPACT CLAIM

The plaintiffs raise both disparate treatment and disparate impact theories of liability here. . . .

In a disparate treatment case, liability depends on whether the protected trait - here, age actually motivated the employer's decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993). . . . Proof of discriminatory motive is . . . critical to the success of a plaintiff's discriminatory treatment claim. Id. In contrast, in a disparate impact case, liability may result without a demonstration of discriminatory motive. Id. at 609. . . .

In 1971, the Supreme Court held that plaintiffs may bring disparate impact claims under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). This judicial construction of the statute was codified by Congress in 1991 to make clear that such a theory was available to plaintiffs. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (adding 42 U.S.C. § 2000e-2(k)). The availability of a disparate impact theory under the ADEA, however, is not so clear. In *Hazen Paper Co. v. Biggins*, the Supreme Court expressly declined to weigh in on whether the ADEA entitles a plaintiff to bring a disparate impact cause of action. . . .

This express reservation has led to a debate amongst the courts of appeals regarding whether the ADEA, like Title VII, entitles a plaintiff to bring a disparate impact claim. . . .

After surveying the well-traversed arguments on either side of this debate, we hold that the ADEA was not intended to remedy age- disparate effects that arise from the application of employment plans or practices that are not based on age. Fundamental to our decision is the ADEA's express exception permitting employer conduct based on "reasonable factors other than age" an exception absent from Title VII and the inapplicability to the ADEA context of the policy justifications identified by the Supreme Court (in *Griggs*, 401 U.S. at 430-31) for recognizing a disparate impact cause of action in the Title VII context.

1. Similarities Between the ADEA and Title VII

The construction of a statute begins with the text of the statute itself. The ADEA prohibits discrimination on the basis of age. See 29 U.S.C. § 623 (2000). It was enacted in 1967, before the Supreme Court first interpreted Title VII to allow employees to prove discrimination by showing disparate impact. See *Griggs*, 401 U.S. at 431. [The

text of ADEA sections that prohibit discrimination based on age overlap almost identically with Title VII sections that allow support claims for disparate impact.] This is no coincidence; "the prohibitions of the ADEA were derived in haec verba from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978). . . .

* * *

2. Differences Between the ADEA and Title VII

(1) Section 623(f)(1) of the ADEA

The ADEA's prohibitions against age discrimination in employment are qualified by several exceptions to employer liability set forth in § 623(f). Pursuant to one of these exceptions, an employer can avoid liability under the ADEA if the adverse employment action is "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).

Neither the "reasonable factors other than age" exception nor a parallel provision is found in Title VII. Facially, the exception appears to serve as a safe harbor for employers who can demonstrate that they based their employment action on a reasonable non-age factor, even if the decision leads to an age-disparate result. In a pre-*Hazen* dissenting opinion, Judge Easterbrook argues against recognizing a disparate impact theory of liability under the ADEA based on this "reasonable factors other than age" exception:

> [Section (f)(1)], which says that "reasonable factors other than age" may be the basis of decision implies strongly that the employer may use a ground of decision that is not age, even if it varies with age. . . . The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987). . . .

* * *

We too find that the inclusion of the "reasonable factors other than age" exception to the ADEA creates a critical "asymmetry" between the ADEA and Title VII. . . .

[The dissent suggests that] the prohibitory section and the "reasonable factors other than age" clause could together be read [consistent with courts' treatment of Title VII] as announcing a general rule that disparate impact is actionable but then carving out a defense for adverse impacts that can be justified as a business necessity. . . . We do not believe this course is open to us, however. This circuit long ago held that § 623(f)(1)'s "reasonable factors other than age" provision does not create an affirmative defense to liability; rather, it allows the defendant to bring forward evidence to negate the plaintiff's prima facie case. . . . Therefore, we believe that . . . the ADEA does not prohibit employers from taking actions based on non-age factors, except when those non-age factors are so related to age that they are mere proxies. . . .

The conclusion that this "reasonable factors other than age" exception textually precludes a disparate impact theory of liability under the ADEA is arguably strengthened by the Supreme Court's treatment of a similar exception to the Equal Pay Act[,] . . . originally enacted in 1963. . .

to prohibit discrimination in wages based on gender. [T]he Equal Pay Act contains an exception similar to the "reasonable factors other than age" exception found in the ADEA[. See 29 U.S.C. § 206(d)(1).

* * *

The Court's willingness to find that the Equal Pay Act's "any factor other than sex" exception precludes disparate impact theories of liability under the Equal Pay Act is helpful to our statutory construction of the ADEA. Many provisions in the ADEA have their roots in the Fair Labor Standards Act and the Equal Pay Act. See, e.g., *Lorillard*, 434 U.S. at 577-82. . . .

(2) Legislative History and Policy Considerations

* * *

Congress enacted the ADEA after receiving a 1965 report by the Secretary of Labor regarding the problems of older workers . . . [, which] finds "no evidence of prejudice based on dislike or intolerance of the older worker" and concludes that the main problem older workers faced in the workplace was arbitrary age discrimination – namely explicit age limitations – based on misconceptions about the abilities of older workers. . . . The Report likewise distinguishes between "arbitrary discrimination" based on age and other institutional arrangements that have a disproportionate effect on older workers, finding that different solutions were appropriate for these different problems. Id. at 21-25. . . .

On January 23, 1967, the Secretary transmitted to Congress proposed legislation entitled "Age Discrimination in Employment Act of 1967." In this letter, the Secretary notes that the bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," but that "reasonable differentiations not based solely on age . . . would not fall within the proscription" of the bill. Id. . . . In contrast to the refined purpose evidenced in the historical underpinnings of the ADEA's enactment, the Supreme Court's opinion in *Griggs* discusses Title VII's broad remedial purpose. . . .

[The Court relied on the broad Congressional purpose in enacting Title VII to hold that even facially neutral practices and those unmotivated by discriminatory intent] "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." [401 U.S. at 430.]

The cornerstone of Griggs's holding that disparate impact is cognizable under Title VII is thus the link between the history of educational discrimination on the basis of race and the use of that discrimination to continue to disadvantage individuals on the basis of their race. Id. at 432. However, absent from the scope of the ADEA are the historical and remedial concerns that, in the Title VII context, led to the recognition of disparate impact claims directed at overcoming the consequences of past societal discrimination.

As Justice Stevens explained in his concurring opinion in *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), it is "inappropriate simply to transplant . . . standards in their entirety into a different statutory scheme having a different history." Id. at 255 (Stevens, J., concurring).We heed this advice today and therefore follow the majority of circuit courts to have addressed this issue in

holding that a disparate impact theory of liability is not cognizable under the ADEA. We find insufficient textual support for the recognition of a disparate impact theory of liability in the ADEA. Further, as we see it, the conclusion that the holding in Griggs should be extended to the ADEA context based on the similarities in the prohibitory sections of the ADEA and Title VII ignores important considerations. It ignores the existence of § 623(f)(1) - an express exclusion of employer liability that is present in the ADEA but not present in parallel form in Title VII and it ignores the differing purposes behind the ADEA and Title VII. [The court noted language in *Hazen Paper Co.* that supports this conclusion.]

THE PLAINTIFFS' DISPARATE TREATMENT CLAIM

In contrast to the plaintiffs' disparate impact claim, the plaintiffs' disparate treatment claim is cognizable under the ADEA.

* * *

V.

CONCLUSION

We AFFIRM in part, VACATE in part, and REMAND the case to the district court. Costs shall be borne by appellees.

CARL E. STEWART, Circuit Judge, concurring in part, dissenting in part:

While I agree with the majority's disposition of plaintiff's disparate treatment claim in Part IV of the opinion, I also believe that the district court erred in improvidently dismissing the plaintiff's disparate impact claim and, therefore, I must dissent with regard to Part III.

* * *

I. STATUTORY INTERPRETATION OF THE ADEA

The majority's analysis begins with the premise that the RFOA exception of the ADEA facially appears as a safe harbor to employers. . . . The majority relies in part on a pre-*Hazen* dissent by Judge Easterbrook in *Metz v. Transit Mix, Inc.*, for the proposition that the RFOA exception is "*incomprehensible* unless the prohibition forbids disparate treatment and the exception authorizes disparate impact." 828 F.2d 1202, 1220 (7th Cir. 1987) (emphasis added).

* * *

Moreover, the strongest argument against the language of the RFOA exception precluding disparate impact lies in the substantive provisions of the ADEA and Title VII. In a similar case, a concurrence by Eleventh Circuit Judge Barkett acutely noted:

* * *

> . . . In light of the parallels between the substantive provisions of the ADEA and Title VII, and in light of the fact that Congress has amended the ADEA several times but has never explicitly excluded disparate impact claims, a reasonable interpretation of the [RFOA exception] is that it codifies the business necessity exception to disparate impact claims.

Adams, 255 F.3d at 1327-28 (Barkett, J., concurring).

. . . . Under a theory of disparate impact, employers will still be able to have employment practices and policies that may burden over-age workers in a disproportionate way. These practices will be permissible, despite the disproportionate impact, provided the employer shows they are supported by a business necessity. Upon proving business necessity, the burden shifts to the employee to show that the practice in question was established not because of the legitimacy of the necessity, but merely as a pretext for invidious stereotyping. Therefore, I am not persuaded that adopting a disparate impact theory will lead to any inconsistencies with the RFOA exception.

* * *

The flaw in the majority's logic [comparing the ADEA with the Equal Pay Act] is that the terms "any" and "reasonable" are not synonymous. Under the ADEA, an employer with a disparate impact policy may be liable for age discrimination if factors relied on were not reasonable. Pursuant to the EPA, however, if an employment policy causes wage differences among men and women workers, the employer will not be liable unless the policy in question was based solely on gender. Thus, the ADEA and EPA exceptions cannot be read to have the same meaning unless the word "reasonable" is omitted from the RFOA exception.

Additionally, the majority's contention that the ADEA and Title VII are not similar statutes, insofar as their application of the disparate impact theory, disregards the doctrine of *in pari materia*. It has long been held that judicial interpretations of one statute may be informed by interpretations of similar statutes. . . .

In the context of the ADEA and Title VII, adhering to this canon is particularly well suited because, as the majority concedes, the ADEA grew out of debates on Title VII. Furthermore, *in pari materia* has relevance because both aforementioned statutes apply to similar persons (here, the employees) and similar relationships (here, the employment context). Moreover, Congress carefully chose identical language for its statutes dealing with both discrimination against older workers and discrimination against those due to race or gender. Therefore, the majority should have applied the doctrine of *in pari materia* and interpreted the disparate impact theory as applicable to the ADEA.

II. THE ADEA LEGISLATIVE HISTORY

My second point of disagreement with the majority concerns its portrayal of the legislative history of the ADEA. . . . Although the majority's opinion properly recognizes that the Supreme Court's 1971 endorsement of the disparate impact theory in *Griggs*, 401 U.S. at 430-31, was later in time than Congress's enactment of the ADEA in 1967, the majority attempts to support its position by focusing on the underlying purposes of the legislation.

Although the language of Title VII and the ADEA are almost identical, the majority essentially dismisses *Griggs* as irrelevant to the calculus of age discrimination. . . . While it is undoubtably true that Griggs recognized disparate impact theory as an available tool in the employment discrimination toolbox to remedy past discrimination under Title VII, it does not necessarily follow, as the majority asserts, that the disparate impact tool is available only in a remedial context.

I disagree in two respects with the majority's holding that disparate impact theory should be limited to the context of Title VII. First, the textual similarity between Title VII and the ADEA evinces a congressional intent to provide similar protection against employment discrimination under the two statutes. Second, it is arguable whether historical discrimination should be a necessary precondition for recognizing a disparate impact theory. I acknowledge, as the majority does, that the ADEA and Title VII are distinct because the former lacks a history tied to past discrimination. . . . The Supreme Court in *Griggs*, [however,] did not posit historical discrimination as the sole reason for disparate impact under Title VII . . . . Moreover, the majority's emphasis on the historical posture of the ADEA and Title VII unduly minimizes the statutes shared aim of ridding from the workplace an environment of *concealed* discrimination. *Griggs*, 401 U.S. at 431. Consistent with such an aim, a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination. Therefore, due to the similarity of the ADEA and Title VII language, it is my view that the protection available under both statutes, including that from disparate impact, should also be similar.

* * *

III. CONCLUSION

* * *

[W]ith regards to Part III of the majority opinion, I respectfully dissent.

Supreme Court to Consider Role of Intent in Age Bias

The New York Times
March 30, 2004
Linda Greenhouse

The Supreme Court agreed on Monday to settle one of the most disputed questions in civil rights law: how to win an age discrimination case in the absence of proof that an employer deliberately singled out older workers for unfavorable treatment.

The issue in a case brought by a group of older police officers in Jackson, Miss., is whether the federal law against age discrimination covers policies that do not relate directly to age but that have a disparate impact on older workers.

In this case, the older officers are trying to show that new wage scales, intended to make the pay for more recently hired officers more competitive with other police departments in the region, had the effect of giving proportionately smaller increases to the more senior officers. The 30 plaintiffs in the lawsuit are all at least 40 years old, the age at which coverage under the Age Discrimination in Employment Act begins.

Both the Federal District Court in Jackson and the United States Court of Appeals for the Fifth Circuit, in New Orleans, ruled for the city on the ground that the law requires proof of "disparate treatment," meaning intentional discrimination. Neutral policies that have a differential impact on different age groups are not covered by the law, the appeals court said in a 2-to-1 ruling last November.

Other federal appellate circuits have reached the opposite conclusion, and the legal dispute has been raging for years. Two years ago, the Supreme Court tried to resolve it in a case brought by older workers against the Florida Power Corporation. But the justices dismissed that case without a decision after the argument raised questions about whether the company policies that were the basis for the complaint actually existed.

The Jackson police officers' appeal, Smith v. City of Jackson, No. 03-1160, citing federal labor statistics, said that 70 million employees, nearly half the civilian labor force, are at least 40 years old and are therefore within the age-discrimination act's coverage.

For more than 20 years, the Equal Employment Opportunity Commission has had a regulation on its books that adopts the broader "disparate impact" interpretation of the law. But when the issue was before the Supreme Court two years ago, the Bush administration did not defend the regulation and filed no brief in the case.

Its reticence no doubt reflected the fact that across the entire range of employment discrimination law, the ability of judges to impose remedies when plaintiffs have not proven deliberate discrimination is under sustained attack from employer groups and conservative legal organizations. When the earlier case was pending, one prominent conservative group, the National Legal Center for the Public Interest, published a study of discrimination law that said that the disparate-impact approach "deserves to be attacked at every opportunity."

Interpreting Title VII of the Civil Rights Act of 1964, which bars employment

discrimination on the basis of race and sex, the Supreme Court ruled that suits can be brought under a disparate-impact theory without proof of discriminatory intent. Congress ratified that understanding when it amended Title VII in 1991.

Congress used Title VII as a model when it passed the age discrimination law in 1967, and the argument has been that it should be interpreted in the same manner. But there is one textual difference, as Chief Judge Carolyn Dineen King of the Fifth Circuit pointed out in her majority opinion in the new case before the Supreme Court. The age discrimination law offers employers an exemption "where the differentiation is based on reasonable factors other than age."

Judge King, joined by Judge Patrick E. Higginbotham, said that this phrase "appears to preclude a disparate impact theory of liability" because it "appears to serve as a safe harbor for employers who can demonstrate that they based their employment action on a reasonable non-age factor, even if the decision leads to an age-disparate result."

In a dissenting opinion, Judge Carl E. Stewart said that Congress intended in the age discrimination law to offer the same broad protection as it did in Title VII. Both laws, he said, reflected the recognition "that in a complex society, not all discrimination is apparent or overt" but will often be "subtle and concealed," lacking overt proof of a discriminatory motivation.

* * *

Being Unfair to the Gray-Haired

Star Tribune (Minneapolis, MN)
August 22, 2004
Marshall H. Tanick

About half of the workforce in this country, including more than a million Minnesotans, has a big stake in a case that will be decided this fall by the U.S. Supreme Court. The case will determine the scope of the Federal Age Discrimination Employment Act (ADEA), which covers employees 40 years and older.

The lawsuit, known as Smith vs. City of Jackson, was brought by 30 older police officers in Mississippi. The justices must decide one of the most disputed issues in civil rights law: whether employees who claim age discrimination must prove that management deliberately and intentionally singled out older workers for unfavorable treatment.

The answer is decisive: Many age discrimination claims falter because they lack proof that employers intended to harm older workers. Courts generally have ruled that adverse action taken against older workers, including mass layoffs and other policies that have an unfavorable impact, do not violate the age-bias law because they do not directly relate to age, even though they might have a disparate impact on older workers.

The police officers' case, thrown out by the two lower courts, involves a new wage scale that is intended to pay more to recently hired officers in order to be more competitive with other police departments. The older officers claim that the increased compensation for newer recruits results in proportionally smaller raises for more senior officers in violation of the ADEA.

Lower courts dismissed the case because of the absence of any intentional discrimination. They reasoned that neutral policies that might inadvertently, but not intentionally, have harmed different age groups are not covered by the law.

The issue, however, is not so clear. One appellate judge in the Mississippi case dissented from the ruling, while other federal appellate courts around the country have reached opposite conclusions.

A couple of years ago, the Supreme Court tried to resolve the issue in a lawsuit brought by older workers who were part of a mass layoff at a utility company in Florida. But, at the last moment, the high court decided not to take the case.

The issue now comes squarely before the court in the new case for the 2004-2005 term, which begins in October. While the case affects the 30 individual police officers involved in the case, it also has significant impact on the 70 million employees in the United States who are 40 years old or older.

Disparate doctrine

The doctrine involved in the case is known as "disparate impact." Under the principle, employment policies or practices that are neutral on their face but have an unfavorable impact upon a particular group of employees may be deemed discriminatory. The doctrine applies in other civil rights cases involving discrimination based on race or sex.

The Equal Employment Opportunity Commission (EEOC), which regulates compliance with federal discrimination laws, has adopted the doctrine in its own regulations. But the Bush administration has balked at supporting it. In an unusual move, the administration did not defend the EEOC regulation, or even take a position in the case. Intentional discrimination generally is difficult to prove but is particularly hard to show in age-bias matters. Management can usually cite factors that affect the decisionmaking process related to age in nearly any context. Aware of the potential for bias claims, management rarely creates or leaves a paper trail of discrimination. Consequently, employees who suspect that they have been the victims of age discrimination must resort to circumstantial evidence or inferences of intent rather than direct proof.

Despite these hindrances, age discrimination cases are increasing rapidly, largely because of the graying of the workforce. During the past year, federal courts decided nearly 300 age discrimination cases. Claims of age bias make up about one-fourth of the discrimination charges filed with the EEOC, more than 19,000 of the total of 77,300 claims in 2003, and about one-sixth, 250 of 1,620 total claims, filed in recent years with the parallel Minnesota Human Rights Department.

Although the Mississippi case involves pay differentials, the question of disparate impact often arises in a different context. In layoffs, older employees are usually the first to be let go, often because of their higher salaries. Under the disparate impact doctrine, they would be less vulnerable to layoffs and have more legal clout to contest them.

The Mississippi case is likely to have a substantial impact not only on older employees but across the spectrum of the workplace. Depending upon the ruling, it could affect the treatment of younger employees. The outcome also could influence how employers go about establishing pay scales and select individuals for layoffs. The Supreme Court has not been particularly sympathetic to age discrimination claimants in recent years. The hostility is counter-intuitive to the aging of the court, eight of whose nine members are 65 years or older, and who average 70 years of age.

But they do not face the prospect of losing their jobs or their livelihoods because they are appointed for life terms. This case might be their legacy for the ages.

Age Bias Lawsuits Likely to Skyrocket

Kiplinger Business Forecasts
August 12, 2004
George Brandon

Employers can expect a lot more age discrimination claims in the years ahead, thanks to a combination of demographic and economic factors. Already, the number of age bias charges filed with the federal Equal Employment Opportunity Commission (EEOC) is on the upswing, and that trend will accelerate as millions of baby boomers approach retirement age.

The leading edge of the baby-boom generation—those born in 1946—will soon reach retirement age, while the youngest of the boomers turn 40 this year—the minimum age for coverage under the 1967 Age Discrimination in Employment Act (ADEA). More than half the nation's population is now older than 40.

Not only will more people be covered under ADEA, but many more will work longer because they have no pension or need to boost retirement savings. "The sheer force of changing demographics means you're going to see more claims," says David Wissert, director of the employment law practice for the New Jersey law firm of Lowenstein Sandler.

Adding to the likelihood of more lawsuits is the fact that additional layoffs are hitting white-collar workers, including experienced midlevel managers "who are used to dealing with lawyers and fighting for their rights," says Lawrence Lorber, a Washington, D.C., employment lawyer for the firm of Proskauer Rose.

A Supreme Court decision due next year will likely have a big impact on age bias complaints. The high court will review a case (Smith v. City of Jackson, Miss.) that could determine whether the ADEA bars employment policy changes that would have a disproportionately negative effect on older workers, even if that wasn't the intention. Federal appeals courts have split over whether ADEA should apply in such "disparate impact" cases, and businesses are looking to the Supreme Court to provide a definitive answer.

In the Smith case, a group of older Jackson, Miss., police officers claimed discrimination over a new city pay plan that gave larger pay raises to workers with five years or fewer on the job. The city said it made the policy change to ensure competitive starting pay scales to attract new officers.

The Court's decision could also affect proposed EEOC rule changes that would allow employers to reduce or eliminate health care coverage for retirees who reach age 65 when eligibility for federal Medicare coverage kicks in. The Bush administration has put a temporary hold on the rules in the face of opposition from AARP, an association that represents people 50 years old or older.

If Bush is reelected, he's likely to take his cue from the court decision. If Democratic Sen. John Kerry takes the White House, he'll likely kill the proposed EEOC rules.

An increasing number of age discrimination complaints now stems from benefits policy changes that employers adopt to cut costs or stay competitive. Examples include

converting traditional defined-benefit pensions to cash-balance plans or scrapping seniority-based compensation or promotion policies in favor of performance-based plans.

With employers facing higher health care and benefits costs, future economic downturns are sure to bring more age discrimination complaints, says Tom Osborne, a litigation attorney with AARP. "As the economy worsens, you see the older workers are the first ones to go because they're the highest paid...You get more bang for the buck," he adds.

Although EEOC isn't budgeting for additional enforcement staff, "we absolutely are looking closely at what's happening with age discrimination charges," says Jennifer Kaplan, an EEOC spokeswoman.

Age Discrimination Hard to Prove, But Suits Likely to Grow

Houston Chronicle
May 17, 2004
Dave Carpenter

The youngest baby boomers turn 40 this year, leaving an entire generation not only in the throes of middle age but also protected by federal law from age discrimination in the workplace.

Despite the big demographic shift, there's been no explosion of age discrimination charges so far. The U.S. Equal Employment Opportunity Commission received an annual average of 19,500 age claims over the past two years, down slightly from 1992-93, and claims actually declined 4 percent in 2003 from a year earlier.

But some experts think it may be only a matter of time before discrimination claims go up now that workers 40 or older comprise about half the nation's work force particularly with the age group now dominated by a generation known for going, and getting, its own way.

"Since this generation is not shy about asserting their rights, I think you can expect to see an increase, maybe as people get into their 50s and 60s or in the next big economic downturn," said Joe Markowitz, a Los Angeles-based attorney who represents fired employees.

Thanks partly to medical advances and a growing life span, many boomers anticipate having the option to work longer at their jobs than previous generations did. If they want to be able to fund ambitious retirement plans, they may have little choice other than to do so.

But what if their employers decide otherwise? The result can be a worker's nightmare: Getting replaced by a younger, cheaper employee. Proving age discrimination, however, has been difficult.

Ron Harper says he planned to be an insurance agent with his company until he was 75. But he was only 48 when Allstate eliminated his job, along with those of about 6,500 other agents more than 90 percent of them 40 or older.

Following the layoffs in 2000, Northbrook, Ill.-based Allstate rehired the agents as independent contractors, a move that saved it $600 million a year. Harper, one of 29 agents who sued the company in 2001, contends Allstate took the action not only to save on retirement benefits but to evade employment laws.

"In essence, what they did was, they outsourced us," said the 52- year-old Harper. "They outsourced our jobs to ourselves.

"Why'd they do it? They did it because we're 'old,' and because of those benefits," said Harper, who now owns a pizza restaurant in Thomson, Ga., where he had worked for Allstate.

Allstate disputed that, and so did a federal judge in Philadelphia.

Judge John Fullam said last month Allstate had improperly required the agents to sign a release waiving their right to sue for discrimination in order to stay on as

independent contractors, clearing the way for a trial. But he ruled that the company did not commit age discrimination because, even though the median age those affected was 50, "employees of all ages were treated alike."

In another case, John Guz sued Bechtel National after being laid off at 49, charging he was illegally fired - in part because of his age. He had earned major promotions, merit raises and generally favorable job reviews in 22 years with the San Francisco-based engineering and construction company.

But the California Supreme Court held in 2000 that older workers fired during staff reductions may not claim age discrimination simply because some younger employees were retained.

Age discrimination is "very difficult to prove right now," said Michael Lieder, a Washington-based attorney in the case against Allstate. "Right now the burden is on the plaintiff for proving that the employer has some sort of stereotype that prompted them to take the action."

A case that's to be argued before the U.S. Supreme Courtin the fall, involving police officers in Jackson, Miss., could alter the legal landscape dramatically. The high court said this spring it would consider their appeal in order to clarify what older workers must prove in order to claim that employers were biased in favor of younger people.

In the Jackson case, 30 officers and dispatchers sued over a pay plan they said gave bigger raises to workers under 40. A lower court ruled against them.

"If the Supreme Court decides in favor of the employees, there's going to be a whole lot more cases go forward," said Bob Riordan, an Atlanta-based labor lawyer.
In the meantime, companies that can cite valid business reasons for layoffs are on solid legal ground.

"Employers have become more savvy about how to eliminate positions and restaff in the most economical way," said Heather Sager, a San Francisco attorney who represents management in employment lawsuits. "To that end, numbers save the day when an employer decides to eliminate an older worker's position and restructure it into a job filled by a younger worker."

Age discrimination in the workplace extends beyond layoffs, of course, but it's even harder to prove the existence of any age related "glass ceiling" the invisible barrier that prevents employees from advancing any higher.

Workplace consultant Connie Wang suspects many older professionals believe they're the victims of age discrimination but wouldn't challenge their employers because of an underlying concern that, "Who's going to hire me at my age?"

"We may have a much bigger problem than we can prove on paper," said Wang, managing director of CSW Global, a Connecticut-based consulting firm specializing in diversity issues. "People may feel it, they may even be able to back it up."

Tenet v. Doe
03-1395

Ruling Below: (*Doe v. Tenet*, 9th Cir., 329 F.3d 1135, 2003 U.S. App. LEXIS 10667, 61 Fed. R. Evid. Serv. (Callaghan) 628, 2003 Cal. Daily Op. Service 4460, 2003 Daily Journal DAR 5732)

Federal law does not preclude alleged former spies from pursuing their constitutional, statutory, regulatory, or estoppel claims in district court, so long as these claims are not based on a contract between themselves and the CIA. *Totten v. United States*, 92 U.S. 105 (1876), is applicable through the use of current state secrets doctrine; however, the government has not yet asserted that privilege.

Question Presented: May former spies who claim that the CIA promised to financially support them in return for their services during the Cold War sue the CIA for failure to fulfill its promise to pay them?

John DOE and Jane DOE, Plaintiffs-Appellees,
v.
George J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency; UNITED STATES OF AMERICA, Defendants-Appellants.

United States Court of Appeals
For the Ninth Circuit

Decided May 29, 2003.

[Excerpt; some footnotes and citations omitted]

BERZON, Circuit Judge

Jane and John Doe—fictitious names, adopted for this litigation for reasons that will appear—assert that they performed espionage activities on behalf of the United States against a former Eastern bloc country. The Central Intelligence Agency (the "CIA"), they say, assured them that it would provide assistance in resettling in the United States as well as lifetime financial and other support. According to the Does, the CIA has now reneged on its obligation of support. The United States will neither confirm nor deny the Does' allegations, for reasons of national security.

We must decide whether the Does can sue the CIA for the alleged wrongs committed by the Agency, or whether, instead, their action is either appropriate only in the Court of Federal Claims or precluded by the venerable doctrine enunciated in *Totten v. United States*, 92 U.S. 105, 23 L.Ed. 605 (1875). . . .

We assume, without deciding, that the facts as alleged by the Does are true and construe the complaint in the light most favorable to their case. *See Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). The facts that appear in this opinion, with the exception of procedural history in federal court, are all, therefore,

simply allegations, even when not stated as such.

The Does allege that they were citizens of an Eastern bloc country formerly considered an adversary of the United States. During his tenure as a high ranking diplomat for that country during the Cold War, Mr. Doe approached a person associated with the United States embassy and requested assistance in defecting to the United States. . . .

The agents told the Does that if they agreed to conduct espionage on behalf of the United States, the CIA would arrange for their resettlement in the United States and ensure their financial and personal security "for life." The Does further allege that the agents assured them that this assistance was approved at the highest level of authority at the CIA and was mandated by U.S. law.

The Does state that although they were initially reluctant to conduct espionage activities, they eventually agreed to do what was asked of them. They allege that they carried out their end of the bargain but that the Agency has now reneged and abandoned them to fend for themselves.

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The Does eventually settled in the Seattle area, and were initially provided with a stipend of $20,000 per year, as well as housing and other benefits. Over time, their stipend was increased to $27,000. They say that with the CIA's assistance in providing false identities, resumes, and references, Mr. Doe obtained professional employment in 1987.

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As a result of a corporate merger in 1997, Mr. Doe lost his job. . . .

In 1997, the Does were allegedly informed by a CIA representative that the Agency had determined that the benefits they had previously been provided had been adequate compensation for the services rendered and that further support would not be provided. The Does were then told that they could appeal this decision to the Director. The Does' counsel therefore prepared an appeal to the Director. While so doing, the Does' counsel repeatedly requested from the Agency internal regulations governing the appeals process as well as regulations regarding resettled aliens. The CIA never responded to these requests. Other requests for access to records or individuals within the CIA were also either denied or ignored by the CIA.

Nevertheless, the Does claim, they filed their administrative appeal with the Director in late 1997. It was subsequently denied. The Does assert that they then appealed to the Helms Panel, a panel consisting of former Agency officials. The Does allege that the Helms Panel recommended that the Agency provide the plaintiffs "certain benefits . . . for a period not to exceed one year, and nothing thereafter." The payment was conditioned on the Does' signing waivers and release documents. Apparently, the Does declined to execute such documents and therefore did not receive the payments recommended by the Helms Panel.

The Does then filed suit in the United States District Court for the Western District of Washington. They asserted claims under the Equal Protection and Due Process Clauses of the United States Constitution, seeking declaratory, injunctive, and mandamus relief. Their complaint further requested that the

district court require the CIA to resume payment of the benefits allegedly promised and provide constitutionally adequate internal review procedures. . . . The district court determined that the trial could proceed despite the alleged existence of a secret agreement, and any materials involving national security interests could be adequately protected by submission under seal or by *in camera* review.

The district court also rejected the CIA's contention that the Tucker Act, 28 U.S.C. § 1346, requires that this case be heard in the United States Court of Federal Claims, because, according to the Agency, this was essentially a contract suit seeking money damages from the United States. . . .

The district court went on to determine that the Does had properly stated both substantive and procedural due process claims, even apart from the existence of an alleged secret contract with the Agency. . . .

At the outset, we must address whether the Tucker Act, 28 U.S.C. § 1491(a)(1), precludes the district court from exercising jurisdiction in this case. That Act, in relevant part, grants the Court of Federal Claims exclusive jurisdiction over any claim against the United States in excess of $10,000 that is "founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1).

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The Does' complaint may be read as seeking an injunction directing payment of $27,000 per year because that figure was agreed upon by the Does and the CIA. Such an award derived from the agreement of the parties, although phrased in terms of constitutional due process, would amount to specific performance of the contract that the Does allege that they had with the government—an agreement to "ensure financial and personal security for life." That type of claim falls within the exclusive jurisdiction of the Court of Federal Claims. *See North Star,* 14 F.3d at 37–38 . . . The Tucker Act is a limited waiver of sovereign immunity for contract actions; equitable contract remedies denied to the Court of Federal Claims are not within the waiver and may not be enforced against the United States at all. *See id.* at 38.

The primary additional claim is based on an interest in liberty. The Does[ ] claim that, regardless of the terms of their contract or whether a contract even existed, the CIA brought them into this country under conditions requiring a false identity and false history for their continuing safety. The Does allege and declare that, because of the false history and false references supplied by the CIA and the CIA's refusal to assist them further, no employment is available to them in the United States now that Mr. Doe's employment here was terminated. The failure of the CIA to provide the means for their subsistence, according to the Does, leaves them no alternative but to return to eastern Europe, where they are in danger. The district court held that the Does had raised a triable issue of fact with regard to this claim based on a liberty interest. The district court also held that these same allegations and declarations presented a triable issue of a due process violation based on the duty of the government not to act affirmatively to place a person in a dangerous situation. *See Huffman v. County of Los Angeles,* 147 F.3d 1054, 1059 (9th Cir. 1998). Without indicating any view as to the ultimate merits of these claims, we find no error in the district court's ruling denying summary judgment and permitting these claims to go forward. . . . We also conclude that the district court is not

precluded by the Tucker Act from entertaining these claims, because they are not founded upon, and do not depend on, any alleged contract between the CIA and the Does.

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Resolution of this case also requires us to decide whether *Totten* bars judicial review of this action.

One hundred twenty-five years ago, the Supreme Court dismissed a civil war spy's case for damages for breach of a contract with the government. *See Totten,* 92 U.S. 105, 23 L.Ed. 605. The Agency maintains that as this case is also one by spies seeking recompense, *Totten* squarely governs this case. We do not agree. *Totten* was indeed a landmark case, and one that retains its core vitality. But . . . *Totten* does not require immediate dismissal as to the Does' case because their claims—those that survive our Tucker Act analysis—do not arise out of an implied or express contract. Instead, the instant case is governed by the state secrets privilege, a separate aspect of the decision in *Totten* that has evolved into a well-articulated body of law addressing situations in which security interests preclude the revelation of factual matter in court.

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The Agency and the dissent treat *Totten* as a jurisdictional bar to any case arising out of a relationship involving spy services. . . . We do not read *Totten* so broadly.

Read with care, *Totten* embodies two rulings. The first, often mistaken for a blanket prohibition on suits arising out of acts of espionage, is instead simply a holding concerning contract law: In *Totten,* the plaintiff, Lloyd, breached his contract with the President by revealing the contract's contents in his lawsuit. The Supreme Court held that because an implicit aspect of the contract was that the parties agreed to keep the very existence of the contract secret, "[t]he publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." *See id.; see also Halpern v. United States,* 258 F.2d 36, 44 (2d Cir. 1958) . . . . For two reasons, the contractual holding of *Totten* is not applicable here. First, . . . unlike Totten, the Does do not seek only enforcement of a contract. Rather their principal concern at this point, as they explain in their brief to this court, is "to compel fair process and application of substantive law to their claims within the Central Intelligence Agency's . . . internal administrative process." As the Agency is accustomed to conducting its affairs in secret, a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage.

Second, *Totten* assumed "publicity" inconsistent with the implicit promise of secrecy as inherent in any judicial proceeding and did not consider whether there are means to conduct judicial proceedings without unacceptable attendant "publicity." Since *Totten,* courts, including the Supreme Court, have developed means of accommodating asserted national security interests in judicial proceedings while remaining mindful that there are circumstances in which no special procedures will be adequate to protect those interests. To the extent that the court can proceed without generating public exposure, it may be possible to fulfill any secrecy promise implicit in the agreement.

Here, the Does have so far proceeded in a manner that has not breached the agreement. They have done everything in their power

not to reveal secret information: They filed suit under fictitious names and revealed only minimal, nonidentifying details in their complaint. Their attorneys for security reasons cleared their complaint with CIA officials before filing it, and received security clearances from the CIA.

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Thus, *Totten's* holding with regard to enforcement of the secrecy aspect of contracts for spy services should not entirely preclude further proceedings in this suit. And with some creativity in devising flexible procedures such as those suggested by courts that have grappled with these issues in the century and a quarter since *Totten,* it may prove possible to resolve the essential issues through court processes. . . .

The other element of *Totten* is an early expression of the evidentiary state secrets privilege: "*[P]ublic policy* forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten,* 92 U.S. at 107 (emphasis added). This public policy principle has flowered into the state secrets doctrine of today. It is principally in this context that the Supreme Court has reaffirmed *Totten's* currency.

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It is therefore the law of this circuit that *Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine. . . . This understanding of the role of *Totten* in the contemporary legal world comports with both *Totten* and later Supreme Court authority. . . . Moreover, it is primarily in the context of the state secrets privilege that the Supreme Court in recent years has affirmatively cited to *Totten.*

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We therefore conclude that *Totten* is applicable to the case before us only as applied through the prism of current state secrets doctrine. . . .

To invoke the state secrets privilege, a formal claim of privilege must be "lodged by the head of the department which has control over the matter, after actual personal consideration [of the evidence] by that officer." *Reynolds,* 345 U.S. at 7–8, 73 S.Ct. 528 (footnotes omitted); *see also Kasza,* 133 F.3d at 1165. After that, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds,* 345 U.S. at 8, 73 S.Ct. 528; *see also Kasza,* 133 F.3d at 1165. The government has not thus far asserted the state secrets privilege in this case and has therefore not complied with the required procedures.

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Finally, because of the limited nature of a procedural due process inquiry, the specifics of the Does' relationship with the CIA—such as the place and manner in which they were recruited, their contacts, and the nature of the espionage—should not need to be revealed. Rather the evidentiary inquiry can be tailored to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest.

As to whether the CIA's procedures adequately protect any such interest, it is not clear that the agency will claim a secrecy interest in those internal procedures. If it does, the court may well be able to review the available procedure for consistency with constitutional standards in proceedings not open to the public.

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It is therefore possible that, after the most careful, respectful, and deferential inquiry, the district court could conclude that the Does' case may go forward in some manner, whether in open court or closed, without jeopardizing any state secrets. Accordingly, this case should be remanded to the district court for further proceedings consistent with the current law on the state secrets privilege, and with this opinion. . . .

The national interest normally requires both protection of state secrets and the protection of fundamental constitutional rights. Here, the CIA has not invoked the state secrets privilege nor has the district court had the opportunity independently to review the invocation of such a privilege. We should not precipitously close the courthouse doors to colorable claims of the denial of constitutional rights. The Does' case must therefore be remanded to the district court to provide the Agency the opportunity to formally invoke the state secrets privilege. If the Agency chooses to do so, the district court must then, after careful inquiry and consideration of alternative modes of adjudication, and with the utmost deference to the government's determination of national security interests, evaluate whether any aspect of the Does' case can go forward. . . .

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

TALLMAN, Circuit Judge, dissenting:

It is the prerogative of the Supreme Court, not ours, to decide whether *Totten v. United States,* 92 U.S. 105, 23 L.Ed. 605 (1875), continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents, or whether the *Totten* doctrine has somehow been supplanted by the modern state secrets evidentiary privilege articulated in *United States v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). My colleagues proclaim that *Totten* is "applicable to the case before us only as applied through the prism of current state secrets doctrine." Maj. Op. at 1151. But *Totten* holds that claims brought by secret agents against the government are nonjusticiable. *Reynolds,* on the other hand, protects against the unveiling of state secrets during the prosecution of an otherwise recognized cause of action. Far from modifying *Totten,* the Court's opinion in *Reynolds* reaffirms *Totten's* jurisdictional bar.

Furthermore, the majority fails to recognize the jurisdictional limitation imposed on the Does' lawsuit by the Tucker Act, which requires that this suit be brought in the Court of Federal Claims. Because the court's opinion is contrary to the clear rule announced in *Totten,* and ignores the limitations on our jurisdiction imposed by the Tucker Act, I respectfully dissent. . . .

In *Totten,* the estate of William A. Lloyd, a spy hired by President Abraham Lincoln to gain information on Confederate troop positions during the Civil War, sought to recover in the Court of Claims compensation Lloyd had allegedly been promised under his secret agreement with the President. 92 U.S. at 105–06. The Supreme Court upheld the lower court's dismissal of the suit,

concluding that the very nature of the contract foreclosed a suit for its enforcement. *Id.* at 107. . . .

The rule in *Totten* is not limited to breach of contract claims brought by those providing secret services to the government. Expanding its holding beyond the contract analysis, the *Totten* Court reasoned that "general principle[s] [of] public policy forbid[ ] the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.* at 107 (emphasis added). Implicit in the Court's public policy holding is an understanding that fundamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security. *See id.* at 106 (discussing the President's powers as Commander in Chief); *see also Dept. of the Navy v. Egan,* 484 U.S. 518, 527, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988) (stating that the authority to protect national security information falls to the President as Commander–in–Chief of the armed services and head of the Executive Branch of government.).

There is a key distinction between spy cases like *Totten* and other classes of cases where Congress has provided an express remedy for relief. In the latter, the evidentiary privilege known as "state secrets" may properly be invoked to block otherwise relevant discovery in a recognized cause of action. An example is *United States v. Reynolds.* In *Reynolds,* the Supreme Court considered—in the context of a tort claim discovery dispute—the protection afforded to discovery of evidence that would reveal state secrets. *Id.* at 3, 73 S.Ct. 528 . . . .

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While *Totten* and *Reynolds* are closely related in that both protect a state secret from disclosure, the rules announced in those cases differ in subtle but important respects. Most importantly, the state secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (e.g., an FTCA case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is non-justiciable before such evidentiary questions are ever reached.

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The majority opinion also errs in limiting the application of *Totten* to contract claims. While such a limitation is necessary to reach the result the majority is determined to announce in this case, the holding in *Totten* belies such a confined application. Rather, the rule announced in *Totten* extends to claims for tort or constitutional violations arising from the secret contractual relationship.

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Totten itself did not limit its holding to those cases involving contracts for secret services. Instead, the Court held that "public policy forbids the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of *matters* which the law itself regards as confidential." 92 U.S. at 107 (emphasis added). The Court did not limit its holding to those circumstances where a secret *contract* must be revealed. Rather, the Court held, much more generally, that the maintenance of a suit is forbidden where *any matter* which the law regards as confidential would have to be disclosed. *Id.*

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To succeed on their substantive due process claim, the Does would have to establish either that a relationship with the CIA in fact existed or that the CIA affirmatively placed them in danger. This they cannot do, for "the employment and the service were to be equally concealed." *Totten,* 92 U.S. at 106.

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Although I do not think it is necessary to the resolution of this case, I note that even if the Does' claims could somehow overcome the *Totten* bar (which they cannot), the Tucker Act, 28 U.S.C. § 1491(a)(1), requires the Does to bring this case in the Court of Federal Claims.

The Tucker Act grants exclusive jurisdiction to the Court of Federal Claims for suits against the United States whenever an action seeks money damages or arises from an express or implied contract. 28 U.S.C. § 1491(a)(1); *Demontiney v. United States ex rel. Dept. of Interior,* 255 F.3d 801, 810 (9th Cir. 2001). . . .

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We lack the power to exercise subject matter jurisdiction when Congress has given it to another court. The Does should not be permitted to evade the valid jurisdictional limitations of the Tucker Act by labeling their action as something other than what it truly is: a breach of contract claim.

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Court to Review Spies' Right to Sue CIA Over Broken Vow

The Washington Post
June 29, 2004
Walter Pincus

The Supreme Court agreed yesterday to review a lower court's decision that permitted an alleged husband-wife Cold War spy team to sue the CIA for allegedly breaking a promise to provide them financial and personal security for life after they carried out espionage for the United States.

At issue is a 130-year-old Supreme Court ruling in a Civil War espionage case that said courts cannot hear cases involving disputes over spying contracts because they involve a secret enterprise and "disclosure of the service might compromise or embarrass our government in its public duties."

In his successful petition to get the justices to review the case, Solicitor General Theodore B. Olson noted that since it was created in 1947, the CIA has been able "to obtain dismissal at the outset of such complaints" and said changing that practice would not only hurt foreign relations but also "impair the ability of the CIA to conduct clandestine intelligence operations."

Although the CIA has not acknowledged it hired the couple, the lawsuit filed by the pair – under the names John and Jane Doe – said the husband was a high-ranking Eastern European diplomat who initially wanted to defect but was persuaded to stay at his post and spy for the United States. In exchange, the couple said, the CIA promised to arrangefor their resettlement in the U.S. and ensure their financial and personal security 'for life,' according to the opinion of the U.S. Court of Appeals for the 9th Circuit.

When their spying was over, the couple was brought to the United States under a law that permits the CIA director to waive immigration rules. The agency eventually settled the couple in Seattle with new identities, housing and other benefits, plus a yearly stipend that started at $20,000. With résumés and references supplied by the agency, the man got a job in 1987, and, as his salary increased, the CIA's stipend decreased. Within two years, his salary had hit $27,000, the amount of the stipend at that time, and the subsidy was ended. But the former spy was given assurances that if he lost his job, "his stipend would be resumed" and the CIA would "always be there" for him and his wife, according to the court opinion.

In 1997, the man lost his job and could not find another. The couple say that the CIA refused to assist in finding new employment and that eventually they turned to a lawyer.

When internal CIA appeals did not get a satisfactory result, they sued in federal court. The CIA said the 1875 Civil War ruling, known as *Totten v. United States*, required dismissal. In that case, the spy, William A. Lloyd, was "under a contract with President Lincoln, made in July 1861" to gather intelligence behind the South's lines for $200 a month, according to the opinion. The court ruled that Lloyd's legal action in effect broke the contract, which required secrecy.

In the current case, the district court ruled that a trial could proceed "despite the alleged existence of a secret agreement,"

and that national security could be protected by sealing evidence and conducting judicial review in private. The circuit court said *Totten* applied only when a contract exists and that the couple could continue the suit "in a manner that avoids public exposure of any secret information."

A CIA spokesman, Bill Harlow, said yesterday that the agency would not comment on the ruling.

Lawsuit Could Affect Spy Recruitment

The Seattle Times
June 29, 2004
Mike Carter

How the U.S. Supreme Court deals with a lawsuit filed by a pair of Cold War spies now living in the Seattle area could determine how successful America is in recruiting spies for the war on terrorism, the couple's lawyer said yesterday.

The high court yesterday said it would hear the case of the couple, identified only as John and Jane Doe, who sued the CIA and its former director, George Tenet, in 1999, claiming they were abandoned by the agency after risking their lives.

Steven Hale, the attorney for the couple and a former CIA lawyer himself, said the case has shaped into the "granddaddy" case that should define the rights of people who spy for the U.S. and the responsibilities of the government to take care of them.

"There's never been a case quite as on-point as this one," said Hale.

Hale sees stark similarities between the Cold War and the emerging war on terrorism. How the case of his clients is decided, he believes, will determine whether the U.S. will be able to obtain the sort of "human intelligence" that the government has admitted it lacked before the Sept. 11, 2001, attacks.

"Can you imagine trying to recruit a general from Iran, or Pakistan, or Afghanistan, when they know that this government could simply cast them aside?" Hale asked. "I can't see how this administration could try to recruit these people, and ask them to risk their lives, under this policy."
At issue is a Civil War-era doctrine that prohibits courts from reviewing secret agreements between the U.S. and its spies.

In 1861, a man named William Lloyd was paid $200 a month by President Abraham Lincoln to infiltrate the Confederacy and provide information on the rebel army's troop movements and fortifications. The man's estate later attempted to get more money. The justices, in a case called "Totten vs. United States," decided that such "secret service" contracts cannot be reviewed by the courts.

Assistant U.S. Attorney Brian Kipnis agreed that the appeal turns squarely on the so-called "Totten Doctrine," which the Supreme Court has not addressed head-on in 129 years.

"This is the first time this doctrine has been directly examined in a long, long time," Kipnis said.

The CIA claims the doctrine should preclude the Seattle-area couple from suing. However, a federal judge in Seattle and a panel from the 9th Circuit Court of Appeals have ruled in favor of the couple.

Their 1999 lawsuit alleges that John Doe was a senior diplomat for an unnamed Eastern Bloc country — identified only as an "enemy" of the U.S. — during the Cold War, which lasted from the end of World

War II until the dissolution of the Soviet Union in the late 1980s.

Doe says that, while working as a diplomat in a third country, he attempted to defect. Instead, he was reluctantly recruited by the CIA as a spy. He says he undertook increasingly dangerous assignments until his exposure as a spy and subsequent death sentence were imminent.

Despite the end of the Cold War, Doe says his life remains in danger because of the amount and type of information he provided his U.S. handlers.

The couple — Doe's wife is identified as a diplomat as well — eventually settled in the Seattle area and were provided with new identities and given help finding jobs using CIA-generated resumes. John Doe claims the agency promised him lifelong support.

However, Doe lost his job and the agency cut him loose — first citing budget constraints, and later saying the government had paid enough for the services he rendered.

Hale said all the Does want is a fair way to review the CIA's decision.

"The government would have you believe they want some sort of stipend that will keep them fat and sassy," said Hale, whose firm is handling the case for free. "Nothing could be farther from the truth."

His firm, Perkins Coie, has spent nearly $1.6 million so far on the Doe litigation.

Suspicious Behavior: The Ninth Circuit Lets Ex-Spies Sue the CIA

National Review Online
June 19, 2003
Robert Pambianco

Tuesday, the federal appeals court in Washington, D.C., ruled that the government is not obligated to release the names of detainees (nor those of their lawyers) who were taken into custody in the wake of the terrorist attacks of September 11, 2001.

The D.C. Circuit's 2-to-1 ruling came as a defeat for activist groups that had filed a Freedom of Information Act suit, seeking to force the government to disclose information about the detainees and the circumstances of their arrests and detention. But the decision in *Center for National Security Studies* v. *Department of Justice* also came as a victory for common sense.

The court accepted as reasonable the government's argument that "disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it." In reaching this result, the court embraced the traditional view that a healthy dose of judicial deference to the executive branch is warranted when it comes to national-security matters. As Judge David Sentelle's majority opinion noted: "America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore."

Regrettably, however, such clear thinking was not in evidence in a recent decision issued by the federal appeals court on the other side of the country. To wit, three weeks ago, the Ninth Circuit, which handles appeals from California and six other western states, plus Alaska and Hawaii, lived up to its reputation for activist jurisprudence — big-time.

In *Doe* v. *Tenet*, the Ninth Circuit ruled that a pair of ex-spies (allegedly onetime citizens of a former Soviet bloc country recruited as U.S. agents) could proceed with their lawsuit against the Central Intelligence Agency.

The plaintiffs, John and Jane Doe, allege that the CIA reneged on a promise to provide them with lifetime financial security and other assistance. As the court explained, the plaintiffs allege that after performing whatever services they were recruited to perform, they were resettled in the United States, where the CIA provided them with compensation and helped Doe obtain employment. The CIA allegedly continued to supplement their income until Doe's salary reached a certain level, at which point the payments were stopped. Later, however, Doe lost his job, and the CIA allegedly declined to resume payments or to provide any further benefits. So the former spies sued the CIA, asserting various due-process and equal-protection claims.

Judge Marsha Berzon wrote the majority opinion, in which she explained that the former spies' lawsuit was not precluded by the precedent established by the Supreme Court in *Totten* v. *United States*. In that post-Civil War case, the Court ruled that the estate of an agent hired by President Lincoln to spy on the Confederacy could not sue the government to enforce the secret agreement. Focusing on the inherently secretive nature of espionage activity, the Court erected a

barrier against "any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." Suits filed by spies against the government would fall into this category.

Undaunted by this seemingly insurmountable hurdle, Judge Berzon theorized that when "[r]ead with care," *Totten* does not require dismissal of all cases arising out of an espionage relationship. In order to reach this result, the Ninth Circuit merged what it called the "venerable" *Totten* doctrine with an evidentiary privilege that applies to the discovery of classified documents. When properly asserted, the so-called state-secrets privilege allows the government to withhold classified material — *in cases that are not otherwise barred and subject to dismissal at the outset.* It has no bearing on cases which, as a result of their subject matter (e.g., espionage agreements), fall outside the courts' jurisdiction.

Judge Richard Tallman — who, like Judge Berzon, was appointed by President Clinton — issued a strong dissenting opinion. He noted that it is not the Ninth Circuit's role to overrule the Supreme Court: "There has been no change in the law of spy contracts since *Totten* was decided in 1875. The secret existence of the espionage relationship and a claim for greater compensation was not justiciable then; it is not justiciable now."

"Unlike the majority," said Judge Tallman, "I have no difficulty rejecting the plaintiffs' invitation to second-guess the DCI's [Director of Central Intelligence] determination of what information remains harmful to national security..."

There is a lot that one could about this case. But the absurdity of allowing former foreign agents to sue the CIA should be obvious to anyone not occupying a tenured faculty position. The business of recruiting and handling foreign intelligence assets is obviously dirty and important work, which is best left to the folks who engage in it for a living. Such activities hardly lend themselves to legal niceties like the finer points of due process — much less to litigation in the courts. To hold otherwise is both unwise and dangerous.

The Ninth Circuit was good enough to file its decision as "For Publication." That means it can be cited as precedent in the Ninth Circuit. One can only hope it won't be for long.

Local Couple Sues, Says CIA Didn't Keep Cold War Promises

The Seattle Times
October 7, 1999
Mike Carter

A couple who claimed they spied for the United States during the Cold War have sued the Central Intelligence Agency in federal court, claiming it reneged on a promise to support them after they defected and were set up in secret lives in King County.

The man and woman are identified only as John and Jane Doe, out of fear of retaliation - even assassination by the unnamed country they betrayed, according to the lawsuit filed yesterday in Seattle.

They have spent nearly two years trying to quietly resolve their dispute with the CIA, which they allege is defying their civil rights in the name of national security. The couple say the agency has refused to consider their claims, lied about their roles and blocked access to documents and individuals who could prove their case.

They are asking that the court order the agency to uphold its agreement with them and provide them with a fair and impartial forum to resolve their grievances.

The man and woman have retained Seattle's largest law firm, Perkins Coie, to represent them. Both of their attorneys, Steven Hale and Betsy Alaniz, have had to sign secrecy agreements.

Both lawyers were reluctant to talk, citing those agreements and the delicacy of their clients' position.

Nevertheless, they say the issue is one of fundamental fairness: whether the Does, now U.S. citizens, should be afforded equal protection and due process, or whether those civil rights should be trumped by an agency the lawsuit alleges has a long and ragged history of mistreating defectors.

"What I will say is this: The issue here, in this constitutional democracy, is where do you draw that line?" asked Hale. "You have to have some secrets. . . . But weighted against that is a society that believes in rule by law and that no man is above the law. The question becomes whether secrecy is more important than their due process."

The lawsuit names as defendants the CIA, Director George Tenet and the U.S. government.

Calls to CIA headquarters in Langley, Va., yesterday seeking comment were not returned. Kate Pflaumer, U.S. attorney for Western Washington, said she was unaware of the suit and could not comment.

U.S. Rep. Norm Dicks, D-Wash., the ranking Democrat on the House Select Committee for Intelligence, was aware of the couple's complaint and has spoken with their attorney, said press secretary George Behan.

"He has requested information from the intelligence agency and we have intervened to make sure (the attorney) gets what he needs," Behan said this morning. "Beyond that, because the matter is in litigation, we can't comment."

According to the lawsuit, John Doe was a "high-ranking diplomat" for a country identified only as an enemy of the United States. He and his wife were stationed at an embassy in a third country during the Cold War. They were under constant surveillance by their country's security apparatus when, at considerable risk, they approached a U.S. Embassy official and asked to defect.

Instead, they claim, they were taken to a CIA "safe house" and coerced into spying in exchange for a promise that they would be granted asylum later.

The agency, they claim, continued to string them along, escalating their exposure until it was "virtually guaranteed that the nature and extent of these activities would become known [. . .] putting them at lifelong risk of retaliation, including the risk of assassination," the lawsuit said.

Only then were they brought to the United States and given new identities, including fabricated backgrounds. They settled in King County.

Using his new identity and a false resume, and with the help and support of the CIA, Doe secured a job as an unspecified professional. Financial support from the agency decreased as his salary increased, and eventually the CIA subsidy was terminated altogether, the lawsuit claims.
In 1997, Doe was laid off, and he went to the CIA for help, relying on earlier promises that the agency would always provide support. Because of his security status and false identity, he's been unable to find work since, the lawsuit says.

The lawsuit claims the CIA has cast the Does adrift, refusing for a variety of reasons to give them any support - all in alleged breach of earlier promises.

The lawsuit asks the court to issue an injunction ordering the CIA to resume its payments and support of the Does. It also seeks to compel the agency's director to put in place a procedure secret or not that assures the couple a fair and impartial airing of their grievances.

If they have to, they will challenge the Civil War-era doctrine that has allowed the government to sidestep judicial review of its secret deals.

The lawsuit claims the CIA has used that policy, known as the Totten Doctrine, "to block judicial enforcement of its lawful obligations."

The Does also claim that Tenet has abused the statutory authority granted by Congress when the CIA was formed in 1947, obligating him to take whatever steps are necessary to "protect intelligence sources and methods." He has used that authority, they claim, to deny them any meaningful method of redress.

The very existence of those sweeping powers, the lawsuit claims, demands that the CIA have scrupulously fair policies and procedures to resolve disputes.

"If a citizen whose liberty or property is subject to agency actions has no judicial recourse and must avail himself or herself of administrative procedures conducted in secret, then those procedures must be as rigorously fair as possible," the lawsuit claims.

Miller-El v. Dretke
(03-9659)

Ruling Below: (Miller-El v. Dretke, 361 F.3d 849. *Cert. granted,* 124 S. Ct. 2908 (2004)).

Miller-El was convicted of first degree murder and sentenced to death at a jury trial. Miller-El unsuccessful challenged the prosecution's jury selection process as racially biased during the original trial, and subsequently sought habeas review and a Certificate of Appealability ("COA") in order to secure the right to appeal the denial of his habeas petition. In Miller-El's appeal from the trial court's denial of a COA, the Supreme Court found that Miller-El's constitutional claim was "debatable" and remanded the case to the Fifth Circuit, which then granted the COA. The case below is a review of the habeas petition on the merits.

During Miller-El's appeals, the Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), which created a three step process for reviewing claims of racial bias in jury selection. After the defendant makes a prima facie showing that the peremptory challenges were made on the basis of race, the prosecution must present a race-neutral explanation for the peremptory strike. Finally trial court must determine whether in light of the evidence presented by both parties, the prosecution acted primarily based on race. The Fifth Circuit reviewed only the trial court's resolution of the third *Batson* step. The Fifth Circuit found that the defendant did not present clear and convincing evidence that the trial court erred in its determination that the jury selection was motivated by racial discrimination.

Question Presented: Whether the Fifth Circuit properly applied the clear and convincing evidence standard of review to the third step in *Batson* to find that the jury selection process was not racially biased.

Thomas Joe MILLER-EL, Petitioner-Appellant
v.
Douglas DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellees

United States Court of Appeals
For the Fifth Circuit

Revised March 12, 2004

[Excerpt: some footnotes and citations omitted]

DeMoss, Circuit Judge:

Petitioner brings this federal habeas corpus petition claiming, pursuant to Batson v. Kentucky, that the state trial court erred in finding that there was no purposeful discrimination in the selection of his jury. The district court denied Petitioner relief.

The district court then denied a certificate of appealability ("COA"). Petitioner previously appealed to this court and we denied a COA. The Supreme Court reversed. We then granted COA and now address the merits of Petitioner's appeal.

BACKGROUND

[In 1985, Thomas Jo Miller-El, was indicted for capital murder allegedly committed during the armed robbery of a Holiday Inn in Dallas, Texas. He pleaded not guilty, but was convicted during the jury trial.]

[After voir dire and before his conviction, Miller-El moved to strike the jury alleging that the prosecution had systematically used peremptory challenges to exclude blacks during jury selection. The trial court resolved the issue relying on Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965), which required Miller-El to show that the prosecution's conduct was "part of a larger pattern of discrimination aimed at excluding blacks from jury service." Miller-El did not satisfy this test to the lower court and was sentenced to death by the jury. Miller-El appealed the jury selection issue to the Texas Court of Criminal Appeals, which remanded the case for new findings in light of the Supreme Court's ruling in 1986, Batson v. Kentucky.]

[Batson] established a three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. 476 U.S. at 96-98. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Id. at 96-97. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id. at 97-98. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id. at 98.

[The trial court heard new evidence, but concluded in 1989 "that Miller-El's evidence failed to satisfy step one of Batson because it 'did not even raise an inference of racial motivation in the use of the state's peremptory challenges' to support a prima facie case." The court also determined "that the state would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each black venire member excluded. The court further found "no disparate prosecutorial examination of any of the venire [members] in question" and "that the primary reasons for the exercise of the challenges against each of the venire [members] in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty."]

The Texas Court of Criminal Appeals denied Miller-El's appeal, and the Supreme Court denied certiorari. Miller-El's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

[Miller-El unsuccessfully challenged the legal validity of his conviction by filing] a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. . . . Pursuant to 28 U.S.C. § 2253, [he then appealed the denial of the habeas corpus by seeking a COA, a document issued by the federal district court judge supporting that a reasonable jury could find it debatable that the prisoner's constitutional rights have been violated. Without the COA there is no right of appeal. Both the trial court and the Fifth Circuit denied Miller-El's application.] Miller-El appealed to the Supreme Court and certiorari was granted.

[The Court found in 2003] that the federal district court's rejection of Miller-El's Batson claim was "debatable" and thus we had erred in not granting COA on Miller-El's Batson claim. The Supreme Court remanded the case to this Court to determine whether Miller-El can "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." Id. at 348. We granted COA for precisely that determination.

DISCUSSION

Claims of racial discrimination in jury selection are evaluated according to the framework established in Batson v. Kentucky. . . . [After] the defendant . . . make[s] a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race, . . . the burden shifts to the prosecution to provide a race-neutral explanation for striking the venire member in question. 476 U.S. at 96-98. . . . [These first two steps are not at issue in this case. The only issue in this case is the third step, in which it is the defendant's burden to prove] purposeful discrimination. Id. at 98. . . .

* * *

Miller-El argues that the state court's finding of the absence of purposeful discrimination was incorrect and the corresponding factual determinations were "objectively unreasonable" in light of the following four areas of evidence that he claims were before the court. First, evidence of historical discrimination by the Dallas County District Attorney's office in the selection of juries. Second, the use of the "jury shuffle" tactic by the prosecution. Third, the alleged similarity between non-black venire members who were not struck by the prosecution and six blacks who were. Fourth, evidence of so-called disparate questioning with respect to venire members' views on the death penalty and their ability to impose the minimum punishment.

First, Miller-El argues that he presented evidence of the Dallas County District Attorney's office "unofficial policy" of excluding blacks from jury service. . . .

[The United States magistrate judge and district court found] considerable evidence that the Dallas County District Attorney's office had an unofficial policy of excluding blacks from jury service and that this evidence was disturbing. . . . But both the magistrate and district court noted that the historical evidence, however disturbing, is not determinative of whether there was purposeful discrimination in the selection of Miller-El's jury. . . . The Supreme Court stated that proof "that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection" is "relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions" in Miller-El's case. [Because] Miller-El has already met the burden under the first step of Batson . . . historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however . . . the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the

peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect.

Second, [the court determined that] Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the voir dire process including the jury shuffles.

Third, Miller-El argues that . . . similarities between non-black venire members who were not struck by the prosecution and six blacks who were [suggests] that the following six black venire members were victims of racially motivated peremptory strikes: Roderick Bozeman, Billy Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy.

As to each of the black venire members Miller-El claims were the victims of racially motivated peremptory strikes, it is important to identify the prosecution's stated reasons for exercising a peremptory challenge. Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident. Further, we can determine from the record that there were no unchallenged non-black venire members similarly situated, such that their treatment by the prosecution would indicate the reasons for striking the black members were not genuine.

Roderick Bozeman . . . classified himself as the type of person who believed in the death penalty in principle, but who could not actually serve on a capital jury. He verified his inability to impose the death penalty by stating that even if the evidence compelled "yes" answers to the special issues posed to the jury at the punishment stage, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. The prosecution exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his belief that a pattern of violent conduct would not be sufficient to render a defendant deserving of death, and his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence.

Venire member Billy Jean Fields . . . proclaimed that his religious belief was that no one was beyond rehabilitation. . . . Additionally, Fields indicated in his questionnaire and in response to questions by the prosecution that his brother had been incarcerated numerous times for drug offenses. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony.

Venire member Joe Warren answered questions during voir dire in a noncommital manner and indicated ambivalence about the death penalty and his ability to impose it. . . . The prosecution exercised a peremptory challenge to remove Warren. At the Batson hearing, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as the reasons for striking him. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the state had ten challenges remaining before exercising one to remove Warren. The prosecutor noted at the Batson

hearing that an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses and peremptory challenges either remain unused or get used more rapidly. In fact, the prosecutor on cross-examination at the Batson hearing admitted that he would have struck non-black jurors Sandra Hearn and Fernando Gutierrez, who also gave somewhat ambivalent answers regarding the death penalty, before Warren had they come up earlier in the process.

Venire member Edwin Rand described capital punishment as a "touchy subject" during voir dire but did indicate on his questionnaire that he believed in the death penalty. . . . He said, "Somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." The prosecution exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his lack of ability to serve on a capital jury.

Venire member Carrol Boggess indicated on her questionnaire that she had a moral, religious, or personal belief that would prevent her from imposing the death penalty. . . . Boggess also indicated that she had testified as a defense witness at her nephew's theft trial. The prosecution exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's trial.

Venire member Wayman Kennedy stated on his questionnaire he believed in the death penalty . . . only for mass murders or cases involving mutilation . . . [and that] he did not think a murder in the course of a robbery would necessitate the death penalty because "why wouldn't a life sentence be enough." . . . The prosecution exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery, the crime Miller-El was accused of, his view that the death penalty was only appropriate in extreme cases, and his hesitancy in stating that he could answer the special issues according to the evidence.

Miller-El claims that three non-black venire members, Sandra Hearn, Marie Mazza, and Ronald Salsini, expressed views about the death penalty as ambivalent as those expressed by Bozeman, Fields, Warren, Rand, Boggess, and Kennedy, but the three non-black venire members were not struck by the prosecution. The record, especially the voir dire transcript, does not support this assertion.

Sandra Hearn stated in her jury questionnaire and on voir dire that she believed in the death penalty and could assess it in appropriate cases. . . . Hearn also stated she thought the death penalty should be available for more than just murder but also severe torture and extreme child abuse. . . . Miller-El's counsel must have believed Hearn was a pro-prosecution venire member because he attempted to have her challenged for cause on numerous grounds, and when the trial judge found Hearn qualified, Miller-El's counsel requested an additional peremptory strike in order to remove her. In fact, on direct appeal Miller-El continued to argue that the trial court erred in denying his challenge for cause of Hearn, so it seems disingenuous to argue now that she was similarly situated to the black jurors who expressed reservations about imposing the death penalty.

Venire member Maria Mazza indicated on her juror questionnaire that she believed in

the death penalty. When asked about her feelings on the death penalty at voir dire, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony . . . . It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that - a decision that I think I could make one way or the other." Mazza served on Miller-El's jury.

Venire member Ronald Salsini stated he believed in the death penalty and that he could impose the death penalty. He did indicate imposing the death penalty would be difficult; however, he gave a hypothetical crime based on his personal experience as a bank teller that closely paralleled the crime Miller-El was charged with and stated that such a criminal act was deserving of the death penalty. The prosecution did not strike Salsini but Miller-El's counsel did.

Comparing the views expressed by Hearn, Mazza, and Salsini to the views expressed by the challenged black venire members, it is clear that Hearn, Mazza, and Salsini were not similarly situated for several reasons. First, ambivalence about the death penalty was not the sole reason for striking Bozeman, Fields, or Boggess. Second, Warren, Rand, and Kennedy were struck mainly because of ambivalence about the death penalty, but they each also expressed doubts about whether they personally could impose the death penalty even if the evidence indicated the death penalty was appropriate. . . . Under our federal habeas standard of review, however, Miller-El has not shown by clear and convincing evidence that the trial court, who observed the voir dire process, erred in finding the prosecution's reason for striking Rand or the other black venire members credible.

Next, Miller-El claims non-black unchallenged venire members Hearn and Kevin Duke expressed views on rehabilitation similar to the views expressed by the black challenged venire members. Hearn's views have already been discussed. Duke expressed support for the death penalty and said he could impose it. Duke made comments concerning rehabilitation in the context of the availability of parole, not in the context of whether the death penalty was appropriate. Duke served on Miller-El's jury.

Again, the record does not support Miller-El's assertion. . . . Bozeman's and Fields' views on rehabilitation were much stronger than Hearn's and Duke's. Hearn and Duke were not similarly situated to any challenged black venire members.

Finally, Miller-El asserts that non-black venire members Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner were similarly situated to challenged black venire members who had family members with a criminal background. [Vicory, Davis, and Nix were strong state jurors and Miller-El used peremptory strikes to remove them]. Weiner's ten-year-old son had once been arrested for shoplifting. Weiner served on Miller-El's jury.

Again, the record does not support Miller-El's Batson claim. . . . In summary, Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members on whom he is basing his Batson claim. Therefore, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its preliminary challenges credible.

Fourth, Miller-El also argues that the prosecution posed different questions concerning the death penalty and the minimum allowable punishment to the venire members depending on the race of the venire member. The record, however, reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race. The prosecution used questioning to either ferret out a venire member's views on the death penalty or to establish a basis to disqualify venire members who had unfavorable views but were not subject to disqualification on those grounds.

* * *

The prosecution questioned all venire members concerning their views of the death penalty. A majority of the venire members were informed the state was seeking the death penalty and that affirmative answers to three questions submitted to the jury at the punishment phase would result in Miller-El being sentenced to death, and then asked about their views concerning the death penalty. Prosecutors did utilize a "graphic script" to describe an execution in detail to some venire members. Both black and non-black venire members who had expressed reservations never received the script. . . .

Miller-El contends that there were ten black venire members who expressed reservations and seven of these venire members, who were ultimately peremptory challenged by the prosecution, got the script, while there were ten non-black venire members who expressed reservations but only two got the script. Miller-El argues this disparity proves purposeful discrimination and therefore the trial court erred. A review of precisely what the prosecution did in terms of voir dire questioning indicates the trial court, who observed the voir dire process, did not err in finding there was no purposeful discrimination.

* * *

Questioning on voir dire also indicates there was no uncertainty as to the views of these eight non-black venire members. They were so opposed to the death penalty there was no need to give them a detailed description. . . .

The prosecution treated the black venire members no differently. . . .

In summary, sixteen venire members for whom questionnaire information is available, clearly indicated on the questionnaires their feelings on the death penalty, and fifteen of them did not receive the graphic script. The one who did receive the script was non-black venire member Sztybel. Eight venire members gave unclear answers and those eight venire members received the graphic script. The answers given, not race, accurately indicated whether a venire member got the graphic script, and this is confirmation of the prosecution's race-neutral rationale.

The prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser-included offense of murder. Different questioning on the minimum sentence issue was used as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause. . . . Seven black venire members were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. . . . [One black positive state juror was not given the script because the prosecution wanted him on the jury.]

Likewise, there are no similarly situated non-black venire members who, under the prosecution's rationale, would have been questioned about minimum sentencing. This is true because unless a venire member indicated he would be a poor state's juror and would not otherwise be struck for cause or by agreement, there was no reason to use the "manipulative" script. Thus, of the ten non-black venire members who expressed opposition to the death penalty, eight were struck for cause or by agreement, meaning no "manipulative" script was necessary to get them removed. . . . The other two non-black venire members . . . were both given the "manipulative" script and peremptorily struck.

In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred. Therefore, the district court correctly denied Miller-El habeas relief.

* * *

AFFIRMED.

Death Row Inmate Back at High Court; Is 5th Circuit Defying a Supreme Court Ruling?

The National Law Journal
June 21, 2004
Marcia Coyle

Washington-A year after winning a rare victory in the U.S. Supreme Court, a Texas death row inmate, backed once again by a group of prominent former judges and prosecutors, is telling the high court that the 5th U.S. Circuit Court of Appeals has basically thumbed its nose at its first ruling.

Last year, in an 8-1 ruling, the high court found that the lower courts had failed to give "full consideration to the substantial evidence" offered by Thomas Joe Miller-El, who is black, that prosecutors had used racial bias during jury selection in his 1986 capital murder trial. Miller-El v. Cockrell, 537 U.S. 322.

That evidence included the exclusion of 10 of 11 eligible blacks from the jury pool in Miller-El's trial; a history of discrimination by Dallas prosecutors, including training manuals that claimed "minority races almost always empathize with the defendant"; jury shuffles; and a 1986 newspaper report showing that 90% of eligible blacks were excluded by prosecutors using peremptory challenges in 15 death penalty cases from 1980 to 1986.

The majority, led by Justice Anthony M. Kennedy, sent the case back to the 5th Circuit, which had refused to review Miller-El's claim, with an explanation of how to evaluate whether prosecutors had purposefully discriminated.

Last March, the 5th Circuit, on remand, rejected Miller-El's claim, holding that he had failed to prove that prosecutors had engaged in purposeful discrimination with their peremptory challenges.

The high court on June 24 is expected to consider whether to hear Miller-El's new petition challenging what his lawyers call the 5th Circuit's "begrudging approach to claims of discrimination in jury selection" under Batson v. Kentucky, 476 U.S. 79 (1986), and its "myopic application" of Batson to Miller-El's case. Miller-El v. Dretke, No. 03-9659.

Representing Miller-El, former Solicitor General Seth Waxman of Washington's Wilmer, Cutler & Pickering and Jim Marcus of the Texas Defender Service noted in their petition that the 5th Circuit "literally incorporated verbatim (without attribution) analyses and discussions" from the dissenting opinion by Justice Clarence Thomas in the first Miller-El case and from the state's unsuccessful brief in that same case.

Opposing the petition, Texas argued that the 5th Circuit "considered all relevant evidence" but found it insufficient to overcome the state trial judge's finding "that prosecutors struck prospective jurors, not because of their race, but because of their unfavorable case-related views."

* * *

Batson Strikes Out in Miller-El Habeas Appeal

Texas Lawyer
March 8, 2004
John Council

With a document in evidence that instructed Dallas prosecutors to keep minorities off juries and a command by the U.S. Supreme Court to review his case, it appeared that Thomas Miller-El's death row habeas writ was the most viable Batson appeal in years. Nevertheless, the 5th U.S. Circuit Court of Appeals recently conducted a detailed look at the voir dire in Miller-El's 1986 capital murder trial and, in its Feb. 26 opinion in Miller-El v. Dretke, found no evidence of racial discrimination.

Three experts believe Miller-El reaffirms how difficult it is for criminal-defense attorneys to prove there was racial bias in a jury selection process – even with evidence that a memo from the Dallas DA's office advocated keeping minorities of jury panels and that 91 percent of African-American venire members were kept off Miller-El's jury panel at his trial.

Even though prosecutors used peremptory strikes to exclude 10 of the 11 blacks eligible to serve on the panel for Miller-El's trial, the 5th Circuit found that Miller-El failed to show by clear and convincing evidence that prosecutors used "purposeful" discrimination in eliminating potential jurors, the standard of proof required by the U.S. Supreme Court's landmark opinion in Batson v. Kentucky (1986), which prohibits racial discrimination in jury selection.

Miller-El was convicted for the 1985 robbery and murder of an Irving hotel clerk. He has contended for years that biased prosecutors used peremptory strikes to keep African-Americans off his jury panel without cause; courts have rejected his habeas writs four separate times, says Lori Ordiway, chief of the appellate division of the Dallas County District Attorney's Office.

After the 5th Circuit denied his certificate of appealability, Miller-El appealed to the U.S. Supreme Court. Miller-El's appeal garnered support from numerous former federal prosecutors and judges – including William Sessions, a former FBI director and a former U.S. district judge for the Western District of Texas – who filed an amicus brief supporting Miller-El's appeal at the Supreme Court.

On Sept. 25, 2003, the high court ordered the 5th Circuit to reconsider Miller-El's Batson claim to determine whether he "can demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court."

Miller-El's attorneys argued in briefs to the 5th Circuit that historical evidence and peremptory strikes prosecutors used against black jurors prejudiced Miller-El's right to a fair trial. Miller-El is black. His attorneys also argued that prosecutors improperly called for jury shuffles and that nonminority venire members who had relatives with criminal backgrounds were not struck by prosecutors, according to the 5th Circuit opinion.

But 5th Circuit Judge Harold R. DeMoss Jr. disagreed, finding that Dallas County Criminal District Court No. 5 had correctly rejected Miller-El's habeas petition, which included Batson claims of racial discrimination during jury selection at his trial.

"In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred," DeMoss wrote in an opinion joined by Judges Edith Jones and Eugene Davis. "Therefore, the district court correctly denied Miller-El habeas relief."

The 5th Circuit's decision stuns one of Miller-El's appellate attorneys.

"If a case like this doesn't win," says Jim Marcus, executive director of the Texas Defender Service, "it's hard to imagine how you could prove a Batson violation." Marcus has not decided if he'll ask for a rehearing at the 5th Circuit or appeal again to the U.S. Supreme Court.

But the decision does not surprise Ordiway, who says the 5th Circuit is far from alone in concluding that no racial discrimination occurred during jury selection in Miller-El's trial.

"We felt like the claim had been thoroughly reviewed," Ordiway says. "And once the 5th Circuit looked at it, we felt that they would come out the same way."

Disturbing Memo

One of the most inflammatory pieces of evidence the 5th Circuit examined was a 1963 "circular" from the Dallas District Attorney's Office that instructed prosecutors to exercise their peremptory strikes against minorities. Henry Wade was the Dallas district attorney from 1950 to 1986. The circular was later adopted in a 1968 training manual titled "Jury Selection in a Criminal Case" that was still in use by the district attorney's office as late as 1976, according to the U.S. Supreme Court opinion.

The original 1963 circular provided the following instruction to prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated," according to the Supreme Court's opinion in Miller-El.

Marcus alleges in an interview that Paul Macaluso, one of the prosecutors involved with Miller-El's trial, followed the instructions in the DA's office training manual.

"Do I have any doubt that Macaluso was following the manual?" Marcus asks. "I don't have any doubt at all."

Macaluso, who was a Dallas County assistant district attorney from 1973 until 1988, says he read the manual on jury selection before joining the DA's office and "was disgusted with it."

"It was nonsense," says Macaluso, now an assistant U.S. attorney in Dallas. "It was not indoctrinated. "

Royce West, a partner in Dallas' West & Gooden who defended Miller-El at trial and now is a state senator, did not return two telephone calls seeking comment before presstime on March 4.

"The people I worked with on death-penalty cases – Batson or no Batson – we were looking for the best jurors regardless of color," Macaluso says.

While the 5th Circuit found the circular disturbing, the judges concluded that the Dallas prosecutors had race-neutral reasons for striking African-American jurors.

"We also note that the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable," DeMoss wrote.

"Here, however . . . the race-neutral reasons [for striking black venire members] are solidly supported by the record in accordance with the prosecutor's legitimate efforts to get a jury of individuals open to imposing the death penalty," DeMoss wrote. The 5th Circuit examined all of the reasons prosecutors gave for striking black venire members. Several of the venire members stated they would not impose the death penalty if they felt the defendant could be rehabilitated. Some were ambivalent about the death penalty and stated that they had "mixed feelings" about capital punishment. And some felt that the death penalty should not be assessed if it were the defendant's first criminal offense.

According to the 5th Circuit opinion, Miller-El claimed that prosecutors asked different questions of black venire members than of white venire members during jury selection, including using a "graphic script" – during which they described the execution process in detail. Prosecutors used the script to ferret out jurors who had reservations about imposing the death penalty.

But the 5th Circuit found that black and white jurors were treated the same by prosecutors, regardless of the script.

"The prosecution treated the black venire members no differently," according to the opinion, which noted that black venire members who answered "yes" when asked if they supported the death penalty on a questionnaire were not read the graphic script.

"The black venire members who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing a combination of uncertainty and philosophical opposition to the death penalty," according to the opinion.

Not Strong

Three criminal law experts believe that Miller-El contains the strongest Batson claims the 5th Circuit has heard in years. Even so, the case illustrates how hard it is to prove racial discrimination in jury selection.

"Batson is sort of not the really major problem that everybody thought it was going to be when it first came up," says Fred Moss, a criminal law professor at Southern Methodist University Dedman School of Law. "It seems that just about any colorable argument will get past a Batson challenge."

William Delmore, chief of the legal services bureau of the Harris County District Attorney's Office, welcomes Miller-El.

"The defense did a good job of making the argument that the challenges were [pretexts]. But they were legitimate," Delmore says.

"And speaking just for the prosecutors in this office, we don't have any incentive to remove black jurors," Delmore says. "And we understand the black jurors are often victims of crime, they're fine citizens, and there is no reason to exclude them from juries."

Philip Wischkaemper, who serves as the capital assistance attorney for the Criminal Defense Lawyers Association, says Miller-El shows that Batson claims are not the strongest issues to bring up in habeas writs.

"Just almost anything will do for challenging somebody pre-emptively as long as it's not related to race," Wischkaemper says. "It's like harmless error. It's so hard for many of these defendants to articulate harm."

Still, Wischkaemper says he'll keep advising habeas attorneys to file Batson claims on behalf of their clients if the facts warrant it.

"I'm certainly not going to discourage anyone from pursing a Batson claim," Wischkaemper says. "You never know."

Death Row Inmate Loses Appeal Claiming Racism

Houston Chronicle
February 28, 2004
Thomas Korosec

An appeals court has ruled against a Texas death row inmate who claimed Dallas County prosecutors wrongly excluded blacks from the jury during his 1986 trial.

The case of Thomas Miller-El, who is black, gained national attention last year when the U.S. Supreme Court found that "the culture of the district attorney's office (in Dallas) in the past was suffused with bias against African-Americans" and that "happenstance" could not explain why 10 out of 11 potential black jurors were turned away by the prosecutor during jury selection in Miller-El's case.

But the high court's ruling was only procedural. It ordered the Fifth Circuit Court of Appeals in New Orleans to review Miller-El's claim that his jury was picked on racial grounds.

A three-judge panel for the lower court ruled Wednesday that Miller-El's attorneys failed to provide "clear and convincing evidence" that blacks were improperly passed over during jury selection.

"The Supreme Court used some harsh language about the historical practices of this office, but those didn't affect what happened in this case," said Lori Ordiway, chief of the Dallas County district attorney's office appellate section. "There was no racial discrimination."

She said the ruling proved "what we have said all along. . . . Jurors were struck for the purpose of getting a fair jury that would consider imposing the death penalty."

Jim Marcus, Miller-El's appeals lawyer and director of the Houston-based Texas Defender Service, said he intends to take the case back to the Supreme Court. "If you can't prove discrimination here, where 10 of 11 blacks who are qualified to serve are let go, then (the law on the issue) is dead letter."

In November 1985, Miller-El, his wife, and another man robbed a Holiday Inn in Dallas during which two employees were ordered to lie on the floor. The employees were gagged and bound. Miller-El shot one victim, Doug Walker, twice in the back, killing him. He shot the other, Donald Ray Hall, in the side. Hall is now paralyzed from the chest down.

Miller-El's execution, which was scheduled for February 2003, was stayed pending his appeal.

High Court Revisits Racial Bias in Jury Selection

The Christian Science Monitor
October 16, 2002
Warren Richey

WASHINGTON – The Sixth Amendment to the US Constitution guarantees in all criminal cases trial by an impartial jury. That means a group of individuals comprised of a cross section of the community willing and able to judge the evidence without affording special consideration to either the prosecutor or the defendant.

But what happens when race enters the equation?

In some jurisdictions in the US, prosecutors long followed a secret policy of excluding as many African-Americans as possible from a jury whenever the defendant was black. They did so because they believed that African-American jurors would be more likely than other jurors to acquit black defendants regardless of the evidence presented at trial.

The US Supreme Court ruled in 1986 that such jury-selection tactics are unconstitutional in a case called Batson v. Kentucky. But the issue of jurors and race remains an Achilles heel of the American system of justice.

Wednesday, the US Supreme Court is examining the selection of a jury in Dallas County, Texas, that took place two months before the court's 1986 Batson decision. At issue is whether Texas death-row inmate Thomas Joe Miller-El was denied a fair trial when prosecutors excluded 10 of 11 qualified African-Americans from his jury.

A closely watched case

Aside from the obvious importance to Mr. Miller-El, the case is significant because it may offer judges, prosecutors, and defense counsel nationwide firm guidance on how to handle claims of racial discrimination in jury selection.

But the case could also represent something of a crossroads for the court.

On one side, a majority of justices have recently shown a heightened concern about the fairness of procedures used in death-penalty cases. On the other hand, a majority of justices have also upheld Congressional efforts to short-circuit the use of federal habeas petitions – like Miller-El's – to challenge death sentences.

Legal analysts will be watching closely during Wednesday's oral argument for clues about how the justices view the case. They'll be paying particular attention to the centrist, swing judge, Anthony Kennedy.

"This case comes to this court from a dark chapter of blatant and open racial discrimination in jury selection," writes Jim Marcus of Texas Defender Service in Houston in his brief to the court on behalf of Miller-El.

"If the blatant discrimination patent in this record is not condemned, then the subtler forms of unconstitutional race discrimination that sometimes, regrettably, occur in jury selection in our own era are

much more likely to go undetected," Mr. Marcus says.

Controversial Winnowing decision

Officials with the Texas Attorney General's Office say the Dallas County prosecutors acted properly during jury selection in Miller-El's case. The prosecutors removed those jurors who expressed unfavorable views about the death penalty, regardless of their race, says Gena Bunn, chief of the Capital Litigation Division of the Texas Attorney General's Office, in her brief.

"The vast majority of nonminority panelists favored the death penalty and were willing to impose it, while the vast majority of African-American panelists were either opposed to the death penalty or were unwilling to impose it," Ms. Bunn says. "Thus, to the extent that a greater percentage of African-Americans were [excluded from the jury], those percentages mirror divergent views on the death penalty of minority and nonminority [prospective jurors]," she says.

The panel that sentenced Miller-El to death was comprised of one African-American, nine whites, a Latino, and a Filipino-American.

When confronted with the jury discrimination issue in the wake of the 1986 Supreme Court decision, Miller-El's trial judge ruled that the Dallas County prosecutors were entitled to exclude the prospective black jurors. The judge said that there was no evidence of specific discriminatory intent by the prosecutors.

Lawyers for Miller-El counter that the trial judge did not give enough weight to evidence that the Dallas County District Attorney's office maintained a longtime pattern and practice of using race in jury selection to help secure convictions.

A 'how to' manual on discrimination

In the 1960s and 1970s, they say, the office offered formal training in discriminatory jury-selection tactics and even printed a manual to help clarify the issue for new prosecutors. "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.... [T]hey will not do on juries," says a 1963 Dallas County training manual quoted by Miller-El's lawyers.

Elisabeth Semel of the Death Penalty Clinic of the University of California School of Law in Berkeley says the judge at Miller-El's trial failed to give proper weight to the long history of jury selection discrimination in Dallas County. That history, combined with the fact that prosecutors excluded 10 of 11 African-American prospective jurors should define a constitutional violation under the Batson decision, she says.

George Kendall of the NAACP Legal Defense and Educational Fund agrees. He says the Supreme Court should require trial judges to consider all the facts relevant to allegations of racial discrimination in jury selection.

"Unless the case is before a very conscientious judge, Batson is not worth the paper it is printed on," Mr. Kendall says.

Which judge should judge?

But lawyers for Texas counter that the trial judge in Miller-El's case made the necessary determinations in accord with the Batson decision. They say Miller-El is simply

looking for an appeals court judge willing to agree with him.

The trial judge is in a better position than appeals-court judges to determine whether prosecutors acted properly, lawyers for Texas say. "The trial judge is essentially a witness to the very conduct alleged to be discriminatory," Ms. Bunn says in her brief. She says factual determinations by trial courts in such cases should be accorded "great deference."

Ms. Semel says the issue is much broader: "It really has to do with whether or not we are going to have a criminal justice system in which we vigorously protect the right of all citizens to participate in the jury system."

High Court Rules Inmate Deserves His Bias Hearing

The Washington Post
February 26, 2003
Charles Lane

The Supreme Court ruled yesterday that an African American on death row in Texas should get another chance to have his sentence overturned because of alleged racial bias at his 1986 murder trial – a decision that sent a firm reminder to state and lower federal courts that they must guard against constitutional violations in the criminal justice system.

By a vote of 8 to 1, with Justice Clarence Thomas dissenting, the court ruled that the New Orleans-based U.S. Court of Appeals for the 5th Circuit should have granted Thomas Joe Miller-El a hearing on his claim that Dallas County district attorneys violated his constitutional right to a discrimination-free trial by summarily excluding 10 out of 11 blacks who were eligible to serve on the jury in his case.

"In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," Justice Anthony M. Kennedy wrote in the opinion of the court.

Capital punishment foes and advocates of changes in the criminal justice system had argued that Miller-El's case was an egregious example of why many Americans, especially minorities, distrust state criminal justice systems. And a Supreme Court that has not often looked favorably on defendants' efforts to reverse state criminal judgments seemed to agree.

"The court is saying that the job here is not to rubber-stamp the state courts, that you have to be vigilant about having the opportunity to check constitutional violations," said Diann Rust-Tierney, director of the American Civil Liberties Union's Capital Punishment Project.

In his dissent, Thomas said Miller-El's "arguments rest on circumstantial evidence and speculation."

The Miller-El case was one of many cases brought in recent years by death row inmates trying to sustain constitutional claims in the streamlined federal death-penalty appeal process set up by Congress in the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA). The law limited death row inmates' ability to challenge their sentences in federal court, thus making them more dependent on state courts for the protection of their constitutional rights.

AEDPA embodied an approach favored by Chief Justice William H. Rehnquist and other conservative members of the Supreme Court, but yesterday's eight-member majority showed that there are still limits to the deference the federal judiciary gives to state court rulings.

Yesterday's ruling could help some state inmates get federal court reviews of their sentences, particularly in the 5th Circuit, whose jurisdiction encompasses Texas, the country's leading death penalty state. That, in turn, means that state courts will have to

take more care in reviewing claims of racial bias and other constitutional violations, legal analysts said.

In turning down Miller-El's request for a hearing, the 5th Circuit appeals court had said that he lacked "clear and convincing" proof of racial bias, but this was the wrong legal standard, the Supreme Court ruled. The high court said that, to gain a hearing, all Miller-El needed to show was that his claim "was debatable among jurists of reason."

To prove racial discrimination in the use of peremptory strikes by the prosecution, Miller-El must show that prosecutors had no credible race-neutral reason to exclude a disproportionate number of blacks. And, under AEDPA, he will still have to produce "clear and convincing" evidence that the state judge who ruled that his evidence "did not even raise an inference of racial motivation" was wrong.

Though that question was not for the high court to decide, the justices seemed to credit Miller-El's case. Kennedy wrote that it was "relevant" that the Dallas County district attorney's office had been "suffused with bias" in the past, including in the use of a 1963 circular instructing prosecutors, "Do not take Jews, Negroes, Dagos, Mexicans . . . on a jury." Kennedy accused both the state court and the 5th Circuit court of a "dismissive and strained interpretation" of the facts.

A jury of nine whites, an Asian American, a Latino and an African American found Miller-El guilty of capital murder in the brutal slaying of a Holiday Inn employee, Doug Walker, in November 1985.

Miller-El alleges that the prosecutors manipulated the jury pool by asking potential black jurors deceptive and leading questions, and by exploiting a unique Texas practice called a "jury shuffle" to move blacks out of the front rows of the jury pool.

All of this, Miller-El argues, reflected the lingering influence in 1986 of longstanding discriminatory practices in jury selection by the Dallas County district attorney – as evidenced by testimony from former prosecutors and internal documents. Prosecutors counter that their office had ended its racially biased practices by 1986 and that what Miller-El depicts as racial discrimination was actually a race-neutral effort to find and remove potential jurors who would be reluctant to impose the death penalty.

Justice Antonin Scalia wrote separately to say that, although he agreed with the majority's legal interpretation, he thought the Texas authorities had a plausible case.

In his dissenting opinion, Thomas flatly agreed with them. He noted that prosecutors aggressively questioned both white and black jurors who seemed ambivalent about the death penalty.

He said that the 5th Circuit court was right in this case to insist on "clear and convincing" evidence of state court error before permitting Miller-El a hearing, adding that "the simple truth is that petitioner has not presented anything remotely resembling 'clear and convincing' evidence of purposeful discrimination." Thomas called the evidence of past discrimination by the Dallas district attorney "entirely circumstantial."

The case is Miller-El v. Cockrell, No. 01-7662.