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U.S. Supreme Court Update

P. Michael Jung

Author Contact Information:
P. Michael Jung
Strasburger & Price, LLP
Dallas, TX

michael.jung@strasburger.com
214-651-4724

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INTRODUCTION

The October 2015 Term of the Supreme Court of the United States will likely be the strangest in many years. The sudden death of Justice Scalia and the prolonged delay in obtaining a successor have left the Court shorthanded and have changed the outcome of cases. Traditional voting blocs have eroded, giving rise to strange combinations of justices joining majority and dissenting opinions. And it has been a uniquely Texas term, with a Texas-based redistricting case already in the books and three other major Texas-based cases pending decision in the areas of affirmative action, immigration, and abortion. Finally, as in prior terms, one wonders about the nationwide jurisprudential importance of some of the cases, including ones about the legislative shrinkage of an Indian reservation, hovercraft usage in Alaska national parks, and whether there had been a *Brady* violation in a particular fact-intensive Maryland case.

CASES DECIDED THIS TERM

As of this writing, the Court had decided 41 cases this term (not counting one case where the writ was dismissed as improvidently granted). In order of decision, the cases are summarized as follows.

Maryland v. Kulbicki
577 U.S. ___, 136 S. Ct. 2 (2015)
No. 14-848
Decided October 5, 2015
Per curiam opinion

In a *per curiam* opinion, the Supreme Court chastised the Maryland Court of Appeals for holding that counsel in a 1993 murder case had rendered ineffective assistance by failing to uncover and pursue flaws in the technique of Comparative Bullet Lead Analysis. CBLA was widely accepted at the time and remained so until its 2003 rejection by the Maryland courts. The Supreme Court, noting that effectiveness of counsel must be judged as of the time of the representation, held that the possible theoretical availability of a 1991 report weakly suggesting flaws in the technique did not demonstrate ineffectiveness, inasmuch as there was nothing to suggest that a quest to cast doubt on the widely-accepted technique would have been a priority for competent counsel in 1993.

* * *

Mullenix v. Luna
577 U.S. ___, 136 S. Ct. 305 (2015)
No. 14-1143
Decided November 9, 2015
Per curiam opinion; concurring opinion by Justice Scalia; dissenting opinion by Justice Sotomayor

It seems that once a year, the Supreme Court issues a *per curiam* opinion reminding a lower court that qualified immunity must be judged, not at a high level of generality, but in the specific context presented to the defendant official. In this year's entry, a suspect engaged in a

high-speed chase with police was shot and killed by one officer as his car approached a set of "spike strips" set up by other officers. Reversing both lower courts, the Supreme Court held that immunity turned not on the broad question of whether it is clearly established that an officer cannot "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others," but rather on the narrower question of whether it is clearly unconstitutional to "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." Noting that the answer to that narrower question is highly context-specific, the Court summarily reversed, holding that the officer was entitled to immunity.

Justice Scalia concurred in the judgment, but disputed the Court's characterization of the incident as one involving deadly force, inasmuch as the officer's intent was not to injure or kill the driver but merely to disable his car.

Justice Sotomayor dissented, stressing the officer's illogical decision to fire at the car, contrary to orders. She concluded that the officer's conduct was not supported by any governmental interest and was objectively unreasonable.

* * *

OBB Personenverkehr AG v. Sachs
577 U.S. ___, 136 S. Ct. 390 (2015)
No. 13-1067
Argued October 5, 2015
Decided December 1, 2015
Opinion by Chief Justice Roberts (unanimous)

This case involved the scope of the commercial-activity exception to the Foreign Sovereign Immunities Act, under which a foreign state is not immune when "the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). The plaintiff had purchased a Eurail pass in the United States and, while using the pass to board a train in Innsbruck, Austria, was seriously injured when she fell under the wheels of the train. She sued the railway, which was owned by the Austrian government, in federal court in California, contending that her action was based in part on the sale of the Eurail pass in the United States. The Ninth Circuit, sitting *en banc*, agreed and reversed the dismissal of the claims.

The Supreme Court, declining to reach the question of whether the U.S. travel agent's sale of the pass was attributable to the Austrian railway, reversed on the ground that the plaintiff's action was "based upon" commercial activity in Austria, not the United States. It rejected the Ninth Circuit's conclusion that it was sufficient that one element of the claims (the plaintiff's status as an authorized passenger, based on her purchase of the pass) originated in the United States, instead holding that all elements of the claims must be considered in a quest to identify "the 'particular conduct' that constitutes the 'gravamen' of the suit." This, the Court concluded, was the "tragic episode in Austria." (The Court declined to consider the plaintiff's theory that her claims were based on the overall operation of the railway and its nexus to the United States, because that theory was not raised below.)

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