9-25-1974

09-25-1974 Preliminary Memorandum

Harry A. Blackmun
Associate Justice of the US Supreme Court

No. 73-5768 - Francisco v. Gathright

This first case of the 1974 Term is concerned primarily with procedure. It does involve a substantial procedural question. One problem I have with it is whether the attorney has been so interested in establishing a procedural principle that he has permitted his client to rot in jail for 16 months. He just might have been able to get a new trial in the state court had he been willing to proceed on the state side without worry or concern about the procedural principle. That, at least, is something that perhaps may be developed by questions at the oral argument.

I initially voted to grant and reverse on the authority of Roberts v. LaVallee, 389 U.S. 40. The case probably will still be reversed on the Roberts principle, but opposing considerations may develop at oral argument.

Francisco was convicted by a Virginia court of unlawful possession of heroin with intent to distribute it. An informant purchased the drug from him and police observed the transaction through a window of his apartment. The police then entered the apartment without a warrant and seized heroin on Francisco's person and from his bedroom. A motion to suppress was denied.

There were two basic constitutional issues in the case. The first concerned the validity of the seizure. The second concerned an instruction to the jury (based on a Virginia statute) that a conviction for possession of the drug with intent to distribute may rest (so far as intent is concerned) on the quantity of the drug possessed. In other words, the statute created a presumption as to intent and the instruction carried out that presumption. This goes directly to the

Leary case with the issue of instruction appropriateness.

Francisco appealed to the Virginia Supreme Court, but was not successful in that appeal. He then sought federal habeas. In the meantime, the Virginia Supreme Court decided its Sharp case, which invalidated the statutory presumption as to intent. This decision apparently represented a change in the Virginia law. Presumably, therefore, were Francisco to seek state habeas, he would attain relief and a new trial because of the intervening Sharp decision. The federal district court ruled against Francisco on the seizure claim, but dismissed the instruction claim without prejudice, feeling that this should be left to the state courts, now that Sharp had been decided. The CA 4 affirmed the result. It observed, however, that the district court was premature in reaching the seizure issue on the merits, for it felt that if relief was granted under Sharp, Virginia would either release Francisco or retry him, and thus the seizure issue might be mooted. It thus vacated that portion of the district court opinion denying relief on the seizure issue and directed the dismissal of that claim without prejudice. It affirmed the district court holding with respect to the instruction claim, and thus deferred to the state procedural route.

We thus have a situation where there clearly was exhaustion of state remedies so far as the seizure was concerned, but perhaps not complete exhaustion of state remedies on the instruction issue. In a sense, there was initial exhaustion, but the intervening Sharp decision indicated, at least, that there was relief available on the State side.

The Roberts case was a per curiam decided in 1967 with only JMH

dissenting. Roberts was charged in New York courts with robbery and other crimes. He requested a free copy of a preliminary hearing transcript, but his request was denied. Under a New York statute, a transcript would be provided for a fee. Roberts was convicted, and his conviction was affirmed through appeals in the New York State system. Certiorari was denied. Throughout all this, he raised the constitutional issue involving denial of the transcript. Federal habeas was then denied. Thereafter, however, the New York Court of Appeals held that the statutory requirement of payment for a transcript was a denial of equal protection to an indigent. The CA 2 then held that in these circumstances Roberts should return to the state courts for relief. This Court vacated and remanded the case. It held that the New York statute violated the Equal Protection Clause, and it also held that Roberts had exhausted his state remedies and no substantial interest would be served by requiring him to resubmit to the state courts an issue the resolution of which is predetermined by established federal principles.

It surely appears on the surface that the Roberts case controls this one so far as the instruction issue is concerned. Francisco had preserved the question throughout the Virginia appeals. Then he sought federal habeas. Then the Virginia Supreme Court, in another case, changed its rule and apparently opened the way for him to obtain relief on the state side. The federal district court and the CA 4 seem to have remitted him to the state route, and did so without citing the Roberts case. Are we not, then, precisely governed by the ruling in Roberts?

The appendices to the Virginia brief seem to indicate that Judge Millsap was willing, and, in fact, eager to proceed and hear an application in state habeas after the Sharp precedent had been established. Mr. Kaufman, Francisco's counsel, then and here, refused this. I therefore wonder whether this desire on the part of counsel has not resulted in Francisco's staying in jail in the long interim period.

I leave this aside, however, and look to the merits. So far as the jury instruction issue is concerned, I would have great difficulty indeed in distinguishing the Roberts case. It seems to me to be controlling on that issue. That, of course, would be a simple way to decide this case. It was appealing to me when I initially felt that we could grant and reverse this summarily. One can get bogged down in theory, however, by stating that we are presented in federal habeas with one issue where State procedures had been fully exhausted and with another one where it is questionable whether they have been fully exhausted. Should the federal court, therefore, pass upon the exhausted issue and not the exhausted one? Should it refuse to pass on either? Should it pass on both? We have talk here of a doctrine of "derivative exhaustion" which would be to the effect that all issues must be exhausted before a federal court will touch any.

Obviously, there are considerations either way. If the case were remitted to the Virginia courts, a new trial might be granted and the swizure might well fade out on the new trial. Why, then, should the federal courts bother with that issue? On the other hand, that issue has been raised on the State side and has been decided adversely to Francisco. Why, then, should he be obligated to go back into the Virginia courts and do it all over again with

an expected negative result. There are comedy considerations, of course, but have they not been fully served? The Virginia court has now stated its position on the instruction issue and it has stated its position on the seizure issue, although the former was not in Francisco's case. What, therefore, is to be gained by going back to the State side? There will be little injury as between the two systems. There is no factual dispute here. Everyone knows what the facts are.

Dick points out that there are possibly two considerations lurking in the background. The one is whether the instruction was harmless error. This does not impress me, for I do not see how it could be harmless. The other is whether the Sharp decision was retroactive. We are talking here about federal law, however. Yet the Virginia court's attitude on retroactivity of Sharp is not easily ascertained. There are indications that the Virginia would deny a relief in pre-Sharp cases.

Dick outlines very well the opposing considerations, and the varying decisions in the courts of appeals, regarding the derivative exhaustion theory. Here, for what it is worth, it is to be noted that the two claims are really totally unrelated. If we get bogged down in procedural niceties, an astute attorney can avoid all this log jam by dividing his client's claims into separate petitions. This would avoid the difficulty.

In summary, the case holds the possibility of our getting terrifically involved in procedure. I think I am inclined, despite my wonder about counsel's impracticality, to the view that the Roberts case controls this one. This means that the federal district court should decide the jury instruction issue, and should

do so on the ground that that issue had been exhausted on the State side. This is really a questionable ultimate conclusion because it seems fairly apparent that the Virginia court might grant relief. Nevertheless, the Virginia court has already once ruled, and Roberts is controlling. (What, perhaps, I am saying here is that if this case came up without Roberts in the background, I would be inclined to adopt the position taken by Justice Harlan in the Roberts case. But Roberts is on the books, and we may follow it as established law.) This would be an end to the case.

If, however, we are driven to the secondary issue and desire to speak of and pass upon derivative exhaustion (as we would if we, for some reason, were to hold that Roberts was not controlling), then I think I would be inclined to rule against the doctrine of derivative exhaustion. At least in this case I would be willing to hold that he need not exhaust the jury instruction issue on the State side. The seizure issue has been fully exhausted, and I would let the federal court pass upon that issue and, while so doing, pass upon the other one as well. This, it seems to me, saves time for everyone concerned in the long run. Otherwise, we are going to be confronted with separate petitions where one would do. Thus, my inclination is to reverse and to do so following Roberts.

H. A. B.

9/25/74

1. SS S n b avail in NC. Kaufman SG obtd
2. If we adhere, Roberts controls
3 No need to get to derivative exhaustn.

10-15-74

I am on record re Kaufman. concurr in Schneckloth v B 412 US 218, 249 (1973)

+ on Kaufman.