US Supreme Court limits Sixth Amendment right to legal counsel

Michael Stapleton
15 June 2009

On May 26, the US Supreme handed down a ruling weakening a key civil liberties protection laid down in the first ten amendments of the US Constitution, known as the Bill of Rights.

In the case of *Montejo v. Louisiana*, decided by a five-to-four majority, the court limited the right to legal counsel that is stipulated in the Sixth Amendment. "Swing" Justice Anthony Kennedy joined with the four justices who comprise the right-wing bloc on the court to override one of the court's prior decisions, a highly unusual occurrence. The decision, authored by the ideological leader of the court's right wing, Antonin Scalia, and joined by Chief Justice John Roberts, Justice Clarence Thomas and Justice Thomas Alito, overruled *Michigan v. Jackson*, decided in 1986.

Justice John Paul Stevens, who authored the *Jackson* opinion, wrote a dissent which was joined by Justices David Souter and Ruth Bader Ginsburg, and, except for a footnote, by Justice Stephen Breyer. Stevens also read his dissent aloud in court, something rarely done.

The petitioner in the case, Jesse Montejo, was arrested by law enforcement in Gretna, Louisiana on September 6, 2002 in connection with the robbery and murder of Lewis Ferrari. Montejo waived his *Miranda* rights, which include the right of silence and the right to an attorney, and police questioned him through the late afternoon and evening of September 6, and the early morning hours of September 7. During this questioning, Montejo ultimately admitted that he shot and killed Ferrari during the course of a botched robbery. Montejo appeared in St. Tammany Parish district court on September 10 and a judge appointed an attorney to represent him.

Later on September 10, without the knowledge or consent of Montejo's court-appointed attorney, two detectives took him on a drive to locate the murder weapon. During the course of the ride, Montejo again waived his *Miranda* rights and wrote an apology letter to Ferrari's widow.

Upon his return, for the first time Montejo met his attorney, who was outraged that the detectives had questioned his client without the presence or permission of legal counsel. At trial, the district court allowed the prosecutor to introduce the letter of apology over the objection of defense counsel that the letter was obtained by police in violation of the Sixth Amendment right to counsel. The jury convicted Montejo and the trial court sentenced him to death.

The Louisiana Supreme Court upheld the conviction and sentence, as well as the trial court's decision to allow the introduction of the letter. With regard to the letter, the Louisiana Supreme Court attempted to distinguish Montejo's case from the US Supreme Court's decision in *Michigan v. Jackson*. *Jackson* prohibits police from initiating questioning of "a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment," unless they obtain permission from the defendant's attorney. The Louisiana Supreme Court claimed that *Jackson* did not apply because Montejo had not "requested" counsel at his arraignment; rather the court had appointed him counsel on its own initiative.

The US Supreme Court unanimously agreed to hear Montejo's case, but instead of correcting the Louisiana Supreme Court's tortuous reading of *Jackson*, five of the justices took the opportunity to water down the protections provided by the Bill of Rights by overruling *Jackson*. Justice Stevens recognized the extraordinary nature of the majority's decision by beginning his dissent with the following paragraph:

"Today the Court properly concludes that the Louisiana Supreme Court's parsimonious reading of our decision in [*Jackson*] is indefensible. Yet the Court does not reverse. Rather, on its own initiative and without any evidence that

the longstanding Sixth Amendment protections established in *Jackson* have caused any harm to the workings of the criminal justice system, the Court rejects *Jackson* outright on the grounds that it is 'untenable as a theoretical and doctrinal matter.' That conclusion rests on a misinterpretation of *Jackson*'s rationale and a gross undervaluation of the rule of *stare decisis*. The police interrogation in this case clearly violated petitioner's Sixth Amendment right to counsel."

The majority's decision makes clear their intention of watering down the Bill of Rights. The court could have invoked the doctrine of "harmless error" to uphold Montejo's conviction while still acknowledging, or not ruling upon, the police violation of his Sixth Amendment rights. Appellate courts have long used "harmless error" to declare that a new trial is unnecessary because the errors made at trial did not affect the outcome. In 1967, the Supreme Court held that this can apply even when the errors involve constitutional violations. In Montejo's case, the September 10, 2002 letter was superfluous for the conviction because the jury heard the admissions Montejo made on September 6 and 7, 2002. Instead, the court seized upon the Montejo case to attack the Sixth Amendment.

At the same time, the majority's decision to overrule *Jackson* also undermines the principle of *stare decisis*, which guides courts to follow precedents established in prior cases. While the US Supreme Court has always had the authority to overrule one of its prior decisions, *stare decisis* dictates that it should do so with caution. Commenting on the decision of the five justice majority to overrule *Jackson*, Stevens wrote: "Despite the fact that the rule established in *Jackson* remains relevant, well grounded in constitutional precedent, and easily administrable, the Court today rejects it *sua sponte* [on its own]. Such a decision can only diminish the public's confidence in the reliability and fairness of our system of justice."

The majority's rationale for overruling *Jackson* predictably included exaggerated worries about "letting guilty and possibly dangerous criminals go free." In response, the dissent pointed out "several *amici* [friends of the court] with interest in law enforcement have conceded that the application of *Jackson*'s protective rule rarely impedes prosecution." Scalia flippantly replied in his opinion that "if the rule truly does not hinder law enforcement or make much practical difference, then there is no reason to be particularly exercised about its demise."

In his opinion, Scalia blurred the distinction between the Fifth and Sixth Amendments by, as Stevens stated in the dissent, "assuming that the *Miranda* warnings given in this case, designed purely to safeguard the Fifth Amendment right against self-crimination, were somehow adequate to protect Montejo's more robust Sixth Amendment right to counsel." As Stevens' noted, "the purpose of the Sixth Amendment is to protect the unaided layman at critical confrontations with his adversary by giving him the right to rely on counsel as a medium between himself and the State." The majority labeled Stevens' dissent a revisionist view of *Jackson*—even though Stevens was the author of the *Jackson* decision in 1986.

Perhaps most telling in regard to the majority's attitude towards the Bill of Rights is Scalia's quotation of the following portion of then-Justice William Rehnquist's dissent in *Jackson*. Rehnquist, who was promoted by President Reagan in 1986 to the position of chief justice, a post he held until his death in 2005, wrote that prohibiting all police interrogations from the moment a defendant's Sixth Amendment right to counsel becomes effective would constitute a "shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society."

This broadside reflects the anti-democratic outlook which sees the Bill of Rights as fundamentally at odds with the interests of the "larger society." It also exposes the right-wing justices' claim that it is they who interpret with fidelity the intent of the framers of the Constitution. The framers of the Bill of Rights were of the revolutionary generation of 1776. They drew up the first ten amendments to the Constitution in the light of the struggle against the repression of the British crown, against which the American Revolution was fought. The Bill of Rights was drawn up and passed for the explicit purpose of protecting individual liberties against the excesses of the state. The Court's decision in *Montejo* is one of many recent decisions which seeks to undo those revolutionary gains.