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Civil Rights—Procedure

Public Employees' Qualified Immunity No Bar To High Court Review of Underlying Defense

The U.S. Supreme Court May 26 held that it could review child-protective services investigators' challenge to an appellate court's finding that their warrantless interview of an elementary school student violated the Fourth Amendment, even though the appeals court also found that they enjoyed qualified immunity from damages liability (*Camreta v. Greene*, U.S., No. 09-1454, 5/26/11).

In an opinion by Justice Elena Kagan, the court ruled 5-4 that even though Article III of the Constitution bars review of cases where there is no case or controversy and the court usually declines review of cases brought by prevailing parties, the immunized investigators were entitled to review of the constitutional ruling because they will be subject to prospective application of the holding. But the court ruled that constitutional issue was moot based on other circumstances and vacated the appellate court's ruling.

Nancy Leong, professor of civil rights litigation at the University of Denver School of Law, told BNA May 26 that this case is important because it shows how the procedural structure under which constitutional questions are adjudicated can affect the substantive analysis of those questions. She also said that the holding is a big deal for government entities because they are usually concerned more about the constitutional issues in cases like this, and up until now they could not appeal adverse holdings on those issues if their employees were granted qualified immunity.

Carolyn A. Kubitschek, Lansner Kubitschek Schaffer, New York, who represented the student in this case, told BNA May 26 that she was not really surprised by the opinion. She said that after three quarters of the questions posed to her at oral argument were on mootness, she decided that the court would not reach the constitutional question. She added that the court's ruling leaves the constitutional question open in the Ninth Circuit, but other circuits, such as the Second Circuit, have rules in place requiring investigators, absent exigent circumstances, to get a court order before questioning students in school.

Oregon Attorney General John Kroger said May 26 that the opinion "will give law enforcement officials and child welfare workers greater leeway to protect children from abuse."

Sherri Morgan, associate counsel, National Association of Social Workers, which filed an amicus brief supporting the employees, told BNA May 26 that NASW is pleased that the court struck down the Ninth Circuit's warrant requirement, and, based on the qualified immunity ruling, supports state officials who make child investigation decisions. She added, however, that "the Court's opinion has a narrow application, and does not leave social workers and child welfare workers across the nation with a better understanding of the key issue as to when a warrant is required."

Suspected Sexual Abuse. Almost 10 years ago, when S.G. was in elementary school in Oregon, authorities got a tip that her father may be sexually abusing her. State child protective services worker Camreta and local deputy sheriff Alford went to her school and interviewed S.G. about the allegations. Her mother was not present and the investigators did not obtain a search warrant.

S.G.'s mother eventually sued Camreta, Alford, and others under 42 U.S.C. § 1983. The Ninth Circuit ultimately ruled that the officials violated S.G.'s constitutional rights by not obtaining a warrant. It also held, however, that the defendants were shielded by qualified immunity from monetary liability because the constitutional right at issue was not clearly established under then existing law.

Camreta and Alford filed for a writ of certiorari with the Supreme Court. Review was granted on two issues, whether government officials who are protected by qualified immunity may nevertheless obtain review of a decision that their conduct violated the Constitution, and whether the appellate court properly held that the interview at issue breached the Fourth Amendment.

Immunity Doesn't Prevent Review. The court noted that under 28 U.S.C. § 1254(1) it has unqualified power to grant certiorari "upon the petition of any party." This language "covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below," it said.

Even so, S.G. argued that Article III and the court's practice of not granting review to prevailing parties barred review in this case.

Article III grants the court authority to adjudicate legal disputes only in the context of "Cases" or "Controversies." To enforce this limitation, litigants must demonstrate that they have a personal stake in the suit, the court said.

The Article III standard can be met by immunized officials because the challenged judgment "may have pro-

spective effect on the parties,” the court said. It explained that if the official “regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages actions. . . . Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability.”

Practice and Prudence. The court acknowledged that as a matter of practice and prudence “we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so.” When it does depart from this practice, however, it generally points to important policy reasons for allowing the appeal.

“We think just such a reason places qualified immunity cases in a special category when it comes to this Court’s review of appeals brought by winners,” the court said. It explained that the constitutional determinations sought to be reviewed by those with qualified immunity “are not mere dicta or ‘statements of opinion.’” Instead, it said that they “are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong.”

In cases involving qualified immunity, the underlying rulings are “self-consciously designed to produce this effect by establishing controlling law and preventing invocations of immunity in later cases,” the court said. Furthermore, they are “designed this way with this Court’s permission, to promote clarity—and observance—of constitutional rules,” it said.

Taken together, these features of qualified immunity “support bending our usual rule to permit consideration of immunized officials’ petitions,” the court said.

The court stressed that its holding “addresses only our own authority to review cases in this procedural posture”—not courts of appeals’ authority—and “concerns only what this Court *may* review.” It added that the decision of what to review will be made on a case-by-case basis.

Issue Is Moot. Even so, the court found the constitutional ruling at issue moot. It said that even though Camreta is still a child protective services employee, “S.G. can no longer claim the plaintiff’s usual stake in preserving the court’s holding because she is no longer in need of any protection from the challenged practice.” It explained that S.G. is a few months shy of turning 18 years old, lives in Florida, and is about to graduate from high school. “Time and distance combined have stymied our ability to consider this petition,” it said.

According to the court, when a civil suit becomes moot pending appeal, the judgment below ordinarily should be vacated. A party seeking review of an adverse ruling that is thwarted by the vagaries of circumstance should not be forced to acquiesce in that ruling, it said.

Justice Antonin Scalia concurred based on precedent, but suggested that if the question is properly raised, he would consider ending “the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity.”

Justice Sonia Sotomayor, joined by Justice Stephen G. Breyer, concurred in the judgment based on moot-

ness. She would not have reached the immunity question for lack of a “genuine case or controversy between the parties before us.”

Dissenting Justice Anthony M. Kennedy, joined by Justice Clarence Thomas, argued that the court should not “override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions.”

Interesting Invitation. Denver’s Leong found Scalia’s concurrence interesting. She noted that in *Saucier v. Katz*, 533 U.S. 194 (2001), the court held that a lower court has to decide the constitutional issue before deciding a qualified immunity issue. In *Pearson v. Callahan*, 555 U.S. 223, 77 U.S.L.W. 4068 (2009), however, the court said that lower courts, in certain circumstances, can address only the immunity question. Scalia, however, seems to be saying that lower courts should not be allowed to address the constitutional issue when qualified immunity exists. His concurrence is an open invitation for lawyers in some other case to bring the issue to the Supreme Court, Leong said.

Scalia’s approach to the qualified immunity issue will cause the law to stagnate, Leong said. Some constitutional questions simply will not be resolved if the parties cannot get beyond the qualified immunity question, she said. She also explained that following this approach creates missed opportunities for courts to clarify the law in the future, and will make it harder for plaintiffs to recover.

Leong observed that while the court clarified that defendants entitled to qualified immunity can seek review of an adverse constitutional issue, the instruction came in an advisory opinion in a case that is moot.

More Guidance Would Have Been Nice. Morgan said that NASW was not surprised that the court focused on the reviewability issues, but added that “NASW would have liked for the court to provide more guidance to child protection workers and to give insight as to when a warrant would be required.” She added that based on the ruling and the tenor of the questions at oral argument the court seemed to signal that it “would not necessarily agree with the 9th Circuit on the merits.”

Addressing the merits, Morgan said that “NASW’s position is that neither a warrant nor parent consent are required for a social worker or child welfare worker to investigate child abuse or interview a child at school outside of the presence of their parent(s), depending on the circumstances of the case.” She explained that “[t]he concepts of joint interviews and interviewing children away from their parents have been well considered among child protection experts, as ‘best practices’ have been developed.”

“The problems of child abuse and investigating child abuse are extremely complex and it is important in any analysis to realize that the central purpose of the child protection laws and programs is the safety of children, not prosecution,” Morgan said. “The ‘reasonableness’ standard should apply to decisions whether to conduct an interview of a minor child without parental consent or a warrant,” she said. Furthermore, she said “what is reasonable within the context of a child abuse investigation depends on a number of factors, including whether the alleged perpetrator is a family member (which may create a conflict of interest for the parent(s) as to protecting the child or the family member or the economic interests of the family).”

Morgan concluded that while NASW supports the ability of caseworkers and social workers “to make discretionary decisions based on children’s safety needs . . . this does not mean that NASW believes caseworkers have unfettered authority or that parental consent should not be sought ordinarily.” She added, however, that “a standard that routinely involves the courts (such as a warrant requirement) will not serve to protect children and is likely to overburden the system.”

Kroger argued for the employees. Acting Principal Deputy Solicitor General Leandra R. Kruger argued for the United States as amicus curiae. Kubitscheck argued for S.G. and her mother.

BY BERNARD J. PAZANOWSKI

Full text at <http://pub.bna.com/lw/091454.pdf> and 79 U.S.L.W. 4382.