Supreme Court: The Term in Review (2012-2013)

Questions Not Answered During the Program

Question: In light of the fact that Nassar eliminates the mixed motive causation standard in retaliation cases, does it also eliminate the mixed motive defense ie. that the employer would have retaliated in the absence of the employee engaging in the protected activity?

Answer: No, it just changes how that defense will be presented. Now, the employer will argue that the same employment action would have been taken in the absence of the retaliatory goal. After Nassar, the employer will argue that this means that there was not "but for" causation.

Question: In light of the decision in Shelby County, are suits seeking to enjoin an election because the state entity failed to seek judicial or administrative preclearance rendered moot?

Answer: Yes, I believe that suits for not seeking preclearance under Section 5 are moot because no jurisdiction any longer needs to do so because of Section 4(B) being declared unconstitutional. There is still a way in which the Justice Department can try and impose a separate preclearance procedure, under Section 3, on some jurisdictions. But that was not at issue before the Court or in the proceedings to enjoin elections for failure to seek preclearance.

Question: Can Martinez/Trevino be used to excuse not just the failure to raise an IAC claim but also the failure to develop material facts in support of such a claim?

Answer: My understanding is that Martinez v. Ryan held that if there is no ability to raise ineffective assistance of counsel on direct appeal, then a failure to raise it on habeas is ineffective assistance of counsel that can excuse a procedural default. Justice Kennedy's opinion said: "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." This, of course, is limited to situations where a state precludes raising IAC on direct appeal.

Thus, my understanding of the question was that it was a situation where IAC could not be raised on direct appeal and thus my answer to the question was: "yes, in the circumstances of Martinez v. Ryan where there was not the opportunity to present this in the state courts so that the first time to raise IAC was in the habeas proceeding." I understood the question as asking about the ability to challenge IAC at the penalty phase and on habeas, and if it is a state that does not allow IAC to be raised on direct appeal, I think Martinez v. Ryan would allow this. But I also may be misunderstanding the question.