Bradley

July 18, 2019

Via CM/ECF
Deborah S. Hunt
Clerk of the Court
United States Court of Appeals for the Sixth Circuit
100 East Fifth Street, Room 540
Cincinnati, Ohio 45202-3988

Re: Case No. 17-4257, *William Andrew Wright v. Stephen Spaulding, Warden*, on Appeal from the United States District Court for the Northern District of Ohio, Case No. 4:17-CV-2097

Dear Ms. Hunt:

This letter responds on behalf of Petitioner William Andrew Wright to the Court's May 28, 2019 request for supplemental letter briefing:

In *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), this court interpreted the savings clause in 28 U.S.C. § 2255(e) to encompass certain challenges to the legality of a federal prisoner's sentence. The court announces the controlling test at page 595 of its opinion: "When seeking to petition under § 2241 based on a misapplied sentence, the petitioner must show (1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." *Hill*, 836 F.3d at 595.

This doctrinal framework governs future sentencing challenges under the savings clause, including this one. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 82–83 (2016).

After announcing this controlling test, the court in *Hill* goes on to apply the third element, asking whether the petitioner's sentencing error, a misapplied career offender enhancement under the then-mandatory sentencing guidelines, constitutes a fundamental defect. *See Hill*, 836 F.3d at 595. The Court begins by noting, "[w]e also agree with the Government's position that a habeas petition may be brought pursuant to § 2241 when a sentence exceeds the maximum prescribed by statute." *Id.* at 596. It then concludes that, like a sentence exceeding the otherwise-applicable statutory maximum, an error under the mandatory guidelines is sufficiently grave to constitute a "fundamental defect." *Id.* at 597–99. Under the court's reasoning, Wright satisfies the savings clause's third element, because he complains of a misapplied sentence enhancement that places his sentence above the otherwise-applicable maximum penalty (a supra-maximum sentence). *Compare* Pet., R.1, Page ID #1, *with* 18 U.S.C. § 924(a)(2).

Later in the court's opinion in *Hill*, it states that its decision "addresses only a narrow subset of § 2241 petitions," those from "prisoners who were sentenced under the mandatory guidelines regime pre-*United States v. Booker*." *Id.* at 599–

600. This final language does not cabin the decision so as to make it irrelevant to Wright, however. The petitioner in *Hill* was sentenced under the mandatory guidelines; Wright was not. Yet the court in *Hill* also has something to say about a petitioner in Wright's position, who is subject to a supra-maximum sentence. *See Hill*, 836 F.3d at 596. The court's announcement that a sentence exceeding the otherwise-applicable statutory maximum constitutes a "fundamental defect" carries precedential weight. The rule arises out of exposition essential to the court's decision. It therefore binds the court here.

I. The court should examine the essential reasoning within a prior opinion to define the scope of the prior decision's precedential impact.

Hill creates binding precedent for Wright's appeal, despite Wright's having been sentenced under the post-*Booker*, non-mandatory guidelines regime. Extracting the controlling rule from *Hill* requires more than applying the facts to the outcome of the case. Instead, the opinion's precedential impact includes, to some extent, the court's exposition of the law.

A bare facts-plus-outcome approach to precedent leaves null the very idea that judicial opinions create binding rules for future cases. To start, identical facts are unlikely to arise again. RICHARD A. POSNER, THE FEDERAL COURTS 378 (1996); Frederick *Precedent*, 39 STAN. L. REV. 571, 577, 596 (1987). More significantly, if only the facts plus the outcome of a prior judicial opinion define its meaning, a

future court is free to manipulate the opinion to the point of losing all meaning. *See* Schauer, *Precedent* at 591 ("If every nonarbitrary variation is open for consideration, then precedent poses only an illusory constraint."); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2035–36 (1994) (citing MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 53 (1988)).

A line of Supreme Court cases addressing Congressional control over the President's removal power illustrates this effect. First, in *Myers v. United States*, 272 U.S. 52 (1926), the Court "categorically reject[ed]" a "functional approach" to the removal question. *Dicta and Article III* at 2018. Next, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court *adopted* the "functional approach," casting off the reasoning in *Myers* as dicta, but assuring itself that the results of the two cases were consistent. *Id.* at 2020. "The approach to precedent taken by the *Humphrey's Executor* Court is ultimately self-destructive. For if, as the *Humphrey's Executor* Court says of *Myers*, only the outcome of a case acts as a precedent, then what will prevent a future Court from casting aside the very framework that *Humphrey's Executor* itself erects to explain the outcomes of the relevant cases?" *Id.* Indeed nothing prevented the Court from again abandoning the "functional approach" in *Morrison v. Olson*, 487 U.S. 654 (1988). *Morrison* ultimately adopted a standard ("whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty")

that comports with the outcomes of *Myers*, *Humphreys Executor*, and *Morrison* but "predicts no future" outcomes. *Id.* at 2024; *Morrison*, 487 U.S. at 691. *Cf. id.* at 725–26 (Scalia, J., dissenting). Thus, precedent defined by bare facts plus outcome has the propensity to result in no precedent at all.

A meaningful approach to precedent requires something more. "[A] general rule or standard may be extracted that is broader than that in the holding itself and broad enough to apply to a novel case." THE LAW OF JUDICIAL PRECEDENT at 80. To extract such a rule or standard, the present court must refer to the prior court's exposition of the law. *See* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 830 (2018) ("It is the confluence of reasoning and result that matters."). Only by referring to the prior court's legal reasoning can the present court deduce what was necessary to the first court's decision. *See* THE LAW OF JUDICIAL PRECEDENT at 45 ("Looking at the *general reasons* alleged by the Court for its decisions, and *abstracting those reasons from the modifications which were suggested by the peculiarities of the* cases, we arrive at a *ground* or *principle* of decision." (quoting 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 622 (Robert Campbell ed., 5th ed. 1885))). Thus, the distinction between holding and dicta should not turn on whether particular language in a judicial opinion is necessary to the outcome. What matters is whether the language is "essential to the rationale of [the] case." *Dicta and Article III* at 2049. *See* THE FEDERAL COURTS at 379.

This practice comports with the original meaning of Article III. The Founders often referenced judicial exposition of the law as an essential part of the American system of precedent. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *id.* at 154 ("The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded."); 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 97 (1911) (calling into doubt during the Constitutional Convention whether the judiciary should be involved in a "council of revision," "as they have a sufficient check agst. encroachments on their own department by their exposition of the law"); *id.* at 109 (adding, "the Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them").

Moreover, a system of precedent that gives deference to a prior court's exposition of the law aligns with the fundamental structure and principles built into the Constitution. Drawing inferences from the Constitution's combined text, history, and structure is a well recognized method of constitutional interpretation. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–18 (1995) (holding statute is "repugnant to the text, structure, and traditions of Article III"); *Alden v.*

Maine, 527 U.S. 706, 724 (1999); *Printz v. United States*, 521 U.S. 898, 918 (1997). Giving precedential value to judicial reasoning furthers the rule of law embodied in the Constitution by promoting legitimacy and predictability. *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 378 (2010) ("[The] greatest purpose [of the doctrine of *stare decisis*] is to serve a constitutional ideal—the rule of law.").

First, precedent forms an essential part of the judicial branch's legitimacy under the Constitution. The Founders assumed that the "judicial power" vested in Article III would encompass some form of deference to precedent. Lee J. Strange, *An Originalist Theory of Precedent*, 36 N.M. L. REV. 419, 466 (2006). Both Federalists and Anti-Federalists thought such deference would help cabin the discretion of individual judges. *Id.* at 463–64 (citing Letter from the Federal Farmer III (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing ed. 1981), and THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001)). Limiting individual discretion furthers the legitimacy of the judiciary as an institution. *See id.* at 466 ("The binding nature of federal precedent was also a product of the Framers' and Ratifiers' goal of containing judicial discretion to accord with the judges' limited role in a republic."); *Precedent and Constitutional Structure* at 810–11. A theory of precedent that defers to essential legal reasoning

in a prior court's opinion is particularly effective at limiting individual discretion, because it avoids the results-oriented manipulation innate to the facts-plus-outcome approach. *See Dicta and Article III* at 2009–24. Additionally, the reasons a court gives for its decisions provide the foundation for the court's legitimacy. *Id.* at 2029–30 ("Legal and judicial culture play a critical role in checking abuses of the judge's countermajoritarian power. Central to that culture is the notion that any judicial decisions must be justified by the giving of reasons." (footnote omitted)). It follows that any workable practice for defining a decision's precedential value should incorporate the decision's rationale.

Second, a system of precedent based in judicial reasoning promotes continuity and predictability in the law. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). *See* THE LAW OF JUDICIAL PRECEDENT at 67. By using the prior court's reasoning to discern the controlling rule, the present court better promotes predictability than it would by using a facts-plus-outcome approach, which "permit[s] the construction of almost numberless rules from any single precedent." THE NATURE OF THE COMMON LAW at 63. *See id.* at 53; *Dicta and Article III* at 2035–36.

The doctrine of precedent is therefore ingrained into the structure of the Constitution. *See An Originalist Theory of Precedent* at 466 ("[S]tare decisis was part of the background of [the Framers'] lawyerly understanding of judicial power."). A methodology for determining what is binding from a prior decision cannot arise strictly by examining the original meaning of the text in Article III. *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution*, 76 N.Y.U. L. REV. 570, 588 (2001) ("It is crucial that stare decisis can be seen as an authorized aspect of the 'judicial Power' conferred by Article III, even though—what is equally crucial—the norms defining the 'judicial Power' are themselves largely unwritten and owe their status to considerations going well beyond the 'plain meaning' of the Constitution's language . . . ."). Thus, Brigham Young's Corpus of Founding Era American English, while potentially helpful to answer other legal questions, has limited utility here. *See* Michael C. Dorf, *Dicta and the Original Meaning of Article III*, DORF ON LAW (June 3, 2019, 7:00 AM), http://www.dorfonlaw.org/2019/06/dicta-and-original-meaning-of-article.html.

II. The statement in *Hill* that a supra-maximum sentence constitutes a fundamental defect is binding here.

This court's statement in *Hill* that a sentence exceeding the statutory maximum constitutes a "fundamental defect" for purposes of the savings clause is binding. A prior panel's statement is "binding holding" if it is "essential to [the

court's] decision." *United States v. Mateen*, 739 F.3d 300, 304 (6th Cir.), *rev'd en banc*, 764 F.3d 627 (6th Cir. 2014). The court can provide meaning to this general rule by recognizing that deducing the controlling rule from a prior decision requires the court to respect the decision's rationale. *See* Section I, *supra*. *Cf. Mateen*, 739 F.3d at 309 (McKeague, J., dissenting) ("I acknowledge the present case tests the murky boundaries between dictum and holding . . . ."). A statement in a prior opinion need not be "essential" or "necessary" to the decision in the logical sense to bind the future court. *See Dicta and Article III* at 2044. What matters instead is whether the statement "forms an essential ingredient in the *process* by which the court decides the case, even if, viewed from a post hoc perspective, it is not essential to the *result*." *Id.* at 2045.

The statement in *Hill* regarding supra-maximum sentences is binding because it forms an essential component of the court's decision. The opinion begins its analysis of the third element of the savings clause with a pronouncement "that a habeas petition may be brought pursuant to § 2241 when a sentence exceeds the maximum prescribed by statute." *Hill*, 836 F.3d at 596. This is a reasoned part of the court's opinion. *See id.* (noting, "[t]o deny relief where a sentence enhancement exceeds the statutory range set by Congress would present separation-of-powers concerns"). Only by analogizing back to this starting premise, the opinion ultimately concludes that a petitioner sentenced pre-*Booker*

may proceed under the savings clause: "Serving a sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court precedent) shares similarities with serving a sentence imposed above the statutory maximum. Both sentences are beyond what is called for by law, and both raise a fundamental fairness issue." *Id.* at 599 (citation omitted). Without the starting premise, the remainder of the court's opinion is meaningless. *Hill*'s statement regarding supra-maximum sentences is therefore binding.

If it were not, the effect would be untenable. A federal prisoner within the Sixth Circuit who was erroneously sentenced pre-*Booker* could file a petition under the savings clause because he resembles a federal prisoner who is subject to a supra-maximum penalty. Yet a federal prisoner within the Sixth Circuit who is subject to a supra-maximum sentence could not proceed under the savings clause. This result balks the predictability that the doctrine of precedent exists to promote.

The Government's agreement while litigating *Hill* that a supra-maximum sentence constitutes a "fundamental defect" does not negate *Hill*'s precedential value. A rule need not always arise out of adversarial positions in order to bind a future court. *Cf. Dicta and Article III* at 2034 ("The fact that a court may be criticized for deciding more than it needed to decide in a given case does not mean . . . that it did not actually decide what it did."). If a court "accept[s] the

issue . . . as being involved in the case, discusse[s] it at length, and decide[s] it" within the greater context of an adversarial proceeding, it is not dictum. *Cold Metal Process Co. v. E. W. Bliss Co.*, 285 F.2d 231, 236 (6th Cir. 1960). In fact, "a court's disposition of an issue is not dicta merely because the parties failed to raise it." *Mateen*, 739 F.3d at 305–06. It follows that the court's acceptance of an agreed-upon point does not categorically constitute dictum.

The best evidence that this view comports with the original meaning of Article III comes from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Whether the Judiciary Act of 1789 empowered the Supreme Court to issue a writ of mandamus to the Secretary of State and, if so, whether that power aligns with Article III was at the heart of the dispute in *Marbury*. *See Marbury*, 5 U.S. (1 Cranch) at 173–79. Former Attorney General Charles Lee argued on behalf of Marbury, the petitioner, that the Judiciary Act granted the Supreme Court original jurisdiction to issue the writ, regardless of Article III. William H. Pryor Jr., *The Unbearable Rightness of* Marbury v. Madison, ENGAGE, Sept. 2011 at 94, 95, 96. No one presented a contrary argument. *Id.* at 95, 96. In the historical setting underlying the famous opinion, the newly elected Jefferson administration had just taken over following the defeat of President John Adams and the Federalists. *Id.* at 94. Jefferson and his attorney general "refused to show respect for the Supreme

Court" by "declin[ing] to take any position on behalf of Madison," the Secretary of State. *Id.* at 95.

Thus, *no party* in *Marbury v. Madison* advocated for the position ultimately adopted by the Court—that the Judiciary Act's jurisdictional grant was unconstitutional. *See Marbury*, 5 U.S. (1 Cranch) at 173–79. The lack of adversarial argument on the constitutional issue did not somehow transform the Court's exposition on the power of judicial review into dictum; *Marbury* is still the pinnacle of lessons on Article III today. *See The Unbearable Rightness* at 94. Similarly, the Government's agreement with the statutory interpretation adopted in *Hill* makes the court's reasoning about supra-maximum sentences no less essential to its decision. The rule is binding here.

Taking the essential components from the court's reasoning in *Hill* as binding precedent, a sentence that exceeds the statutory maximum is a fundamental defect. *Hill*, 836 F.3d at 596. Future panels, including the court here, must follow this rule unless the court sitting en banc modifies it. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009). Because Wright was sentenced above the otherwise applicable statutory maximum for his crime (*compare* Pet., R.1, Page ID #1, *with* 18 U.S.C. § 924(a)(2)), he satisfies the third element of the savings clause

test. The Court should reverse the District Court's judgment and remand with instructions to proceed with the merits of Wright's petition.

Respectfully submitted,

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