The Burger Court Opinion Writing Database

United States v. Bailey

444 U.S. 394 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 26, 1979

Re: 78-990 - United States v. Bailey

Dear Bill:

I join. I may have a few modest suggestions but will await the dissents before offering them.

Regards,

Mr. Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 13, 1979

RE: No. 78-990 United States v. Bailey

Dear Harry:

The three of us are in dissent in the above and I understand you are willing to try your hand at the dissent.

Sincerely,

Bill

Mr. Justice Blackmun

cc: Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 18, 1979

RE: No. 78-990 United States v. Bailey

Dear Bill:

I await the dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 4, 1980

RE: No. 78-990 United States v. Bailey and Cogdell

Dear Harry:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 18, 1979

Re: No. 78-990, United States v. Bailey

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 18, 1979

Re: No. 78-990 - U. S. v. Bailey and
U. S. v. Cogdell

Dear Bill,

I shall await the dissent in this case.

Sincerely yours,

Byron

Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 3, 1980

Re: No. 78-990 — United States v. Bailey, et al.

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 17, 1979

Re: No. 78-990 - United States v. Bailey

Dear Bill:

Please show me as not participating in this case.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1979

Re: No. 78-990 - United States v. Bailey

Dear Bill:

I shall try my hand at a dissent and get it around to you in due course.

Sincerely,

HAB

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

2nd DRAFT

Circulated: JAN 3 1980

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 78-990

United States, Petitioner,
v.
Clifford Bailey et al.

United States, Petitioner,
v.
James T. Cogdell.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion, it seems to me, is an impeccable exercise in undisputed general principles and technical legalism: The respondents were properly confined in the District of Columbia jail. They departed from that jail without authority or consent. They failed promptly to turn themselves in when, as the Court would assert by way of justification, *ante,* pp. 17, 20, the claimed duress or necessity "had lost its coercive force." Therefore, the Court concludes, there is no defense for a jury to weigh and consider against the respondents' prosecution for escape violative of 18 U. S. C. § 751 (a).

It is with the Court's assertion that the claimed duress or necessity had lost its coercive force that I particularly disagree. The conditions that led to respondents' initial departure from the D. C. jail continue unabated. If departure was justified—and on the record before us that issue, I feel, is for the jury to resolve as a matter of fact in the light of the evidence, and not for this Court to determine as a matter of law—it seems too much to demand that respondents, in order to preserve their legal defenses, return forthwith to the hell that obviously exceeds the normal deprivation of prison life and that compelled their leaving in the first instance. The Court, however, requires that an escapee's

STYLISTIC CHANGES and pp. 1 & 3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JAN 10 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-990

United States, Petitioner,
v.
Clifford Bailey et al.

United States, Petitioner,
v.
James T. Cogdell.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's opinion, it seems to me, is an impeccable exercise in undisputed general principles and technical legalism: The respondents were properly confined in the District of Columbia jail. They departed from that jail without authority or consent. They failed promptly to turn themselves in when, as the Court would assert by way of justification, *ante,* pp. 17, 20, the claimed duress or necessity "had lost its coercive force." Therefore, the Court concludes, there is no defense for a jury to weigh and consider against the respondents' prosecution for escape violative of 18 U. S. C. § 751 (a).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 17, 1979

78-990 United States v. Bailey

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 6 DEC 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–990

United States, Petitioner,
v.
Clifford Bailey et al.

United States, Petitioner,
v.
James T. Cogdell.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia Jail, crawled through a window from which a bar had been removed, slid down a knotted bed sheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U. S. C. § 751 (a), which governs escape from federal custody.[1] At their trials, each of the

[1] Title 18 U. S. C. § 751 (a) provides:

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representatives, or from an institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years or both; or if the custody

Changes throughout

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 14 DEC 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-990

United States, Petitioner,
v.
Clifford Bailey et al.

United States, Petitioner,
v.
James T. Cogdell.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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PP 15421

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-990

United States, Petitioner,
v.
Clifford Bailey et al.

United States, Petitioner,
v.
James T. Cogdell.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia Jail, crawled through a window from which a bar had been removed, slid down a knotted bed sheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U. S. C. § 751 (a), which governs escape from federal custody.[1] At their trials, each of the

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 4, 1980

Re: No. 78-990 - United States v. Bailey, et al.

Dear Harry:

In response to your dissent, I propose to add the following footnote, number 11, at the end of the paragraph preceding "III" on page 20 of the third draft:

> "Contrary to the implication of Mr. Justice BLACKMUN's dissent describing the rationale of the necessity defense as 'a balancing of harms', post, page 9, we are construing an Act of Congress, not drafting it. The statute itself, as we have noted, requires no heightened mens rea that might be negated by any defense of duress or coercion. We nonetheless recognize that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, see Morisette v. United States, supra, and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted § 751(a). But since the express purpose of Congress in enacting that section was to punish escape from penal custody, we think that some duty to return, a duty described more elaborately in the text, must be an essential element of the defense unless the congressional judgment that escape from prison is a crime be rendered wholly nugatory. Our

principal difference with the dissent, therefore, is not as to the existence of such a defense but as to the importance of surrender as an element of it. And we remain satisfied that, even if credited by the jury, the testimony set forth at length in Mr. Justice BLACKMUN's dissenting opinion could not support a finding that respondents had no alternative but to remain at large until recaptured anywhere from one to three and one-half months after their escape. To hold otherwise would indeed quickly reduce the overcrowding in prisons that has been universally condemned by penologists. But that result would be accomplished in a manner quite at odds with the purpose of Congress when it made escape from prison a federal criminal offense."

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqui

Circulated: _____

Recirculated: 7 JAN 1980

PP 17, 19, 20

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-990

United States, Petitioner,
v.
Clifford Bailey et al.

United States, Petitioner,
v.
James T. Cogdell.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia Jail, crawled through a window from which a bar had been removed, slid down a knotted bed sheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U. S. C. § 751 (a), which governs escape from federal custody.[1] At their trials, each of the

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: 78-990 - United States v. Bailey and United States v. Cogdell

In the opinion for the Court in this case, issued today, we reverse the judgments of the Court of Appeals and remand for reinstatement of the judgments of the District Court. Mike Rodak has pointed out that the Court of Appeals apparently found it unnecessary to decide certain issues raised by respondents because of its remand to the District Court for a new trial. See Petition for Writ of Certiorari at 35a, nn. 67 & 68. In order to allow the Court of Appeals to consider whatever issues it reserved, I propose to amend the opinion by deleting the words "and remand for reinstatement of the judgments of the District Court" at the end of the last paragraph on page 22. The revised paragraph would read:

> Because the juries below were properly instructed on the mens rea required by § 751 (a), and because the respondents failed to introduce evidence sufficient to submit their defenses of duress and necessity to the juries, we reverse the judgments of the Court of Appeals.

Absent objection, I will arrange for the necessary change.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 12, 1980

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 78-990 - United States v. Bailey

The only case being held for Bailey is No. 78-6798, Bryan v. United States. In that case, petitioner escaped from a prison hospital, allegedly because of threatened homosexual attacks, and remained at large for six months before he was recaptured. At his trial for violation of 18 U.S.C. § 751(a) he sought to introduce testimony as to the alleged attacks. He also claimed that he remained at large because he was afraid of being returned to his original place of confinement. The District Court rejected his offer of proof because he had failed to turn himself in. The CA 5 affirmed petitioner's conviction, holding that petitioner was obligated to surrender "once he had attained a position of safety" and that, in addition, petitioner was in no "immediate danger" at the time he escaped from the hospital.

Petitioner also challenged the District Court's decisions to admit evidence of past crimes for impeachment purposes, to charge the jury that they should consider "the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case," and to deny his motion for a mistrial when a testifying FBI agent allegedly commented on petitioner's post-arrest silence. The CA 5 rejected each of these contentions.

In Bailey we held that an escaped prisoner must offer evidence of "a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force." Because the CA 5 found petitioner's offer inadequate under a very similar standard, and because I do not believe that petitioner's other contentions merit certiorari, I will vote to deny the petition.

Sincerely,

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 11, 1979

Re: 78-990 - United States v. Bailey et al.

Dear Bill:

Your opinion is most persuasive. Although I voted the other way and therefore will wait to see what is written in dissent, I am inclined to think I'll end up by joining you. I should say that as I read the opinion the Court does not hold that the coercive force of any claimed duress or necessity automatically ends as a matter of law at the moment a prisoner departs from custody in every case.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

78-990 - United States v. Bailey et al.

From: Mr. Justice Stevens

Circulated: JAN 17 '80

Recirculated: _____

MR. JUSTICE STEVENS, concurring.

The essential difference between the majority and the dissent is over the question whether the record contains enough evidence of a bona fide effort to surrender or return to custody to present a question of fact for the jury to resolve. On this issue, I agree with the Court that the evidence introduced by defendants Cooley, Bailey and Cogdell was plainly insufficient. Vague references to anonymous intermediaries are so inherently incredible that a trial judge is entitled to ignore them. With respect to Walker, however, the question is much closer because he testified that he personally telephoned an FBI agent three times in an effort to negotiate a surrender.1/ But since he remained at large for about two months after his last effort to speak with the FBI, I am persuaded that even under his version of the facts he did not make an adequate attempt to satisfy the return requirement.

1/ The rebuttal testimony described by the Court, ante, at 4, n. 2, indicates that Walker was probably not telling the truth; but in deciding whether Walker's testimony was sufficient, I assume its veracity.