

The Harvard Civil Rights-Civil Liberties Law Review
2011 Ames Moot Court Final Round Live Blog
Summaries of the Briefs

Summary of Facts

When Laura Morrison saw Otis Garfield's profile on an Internet dating site, she thought she had found the man of her dreams. An avid traveler, a Peace Corps volunteer, and a decorated war hero, Garfield seemed too good to be true. As it turns out, he was. Garfield's profile contained numerous inaccuracies, the most egregious of which was his claim that he had won a Navy Cross, the second highest honor a naval service member can receive. Garfield had been awarded no such medal, and when Morrison discovered the deceit, she turned Garfield over to the FBI. Federal agents charged Garfield with violating the Stolen Valor Act, which provides:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.

Garfield pleaded guilty, yet reserved his right to appeal. At sentencing, the judge asked Garfield's attorney if she had a presentation, at which point she read a letter Garfield had written to the Court. At the letter's close, the judge sentenced Garfield to three months' imprisonment plus a fine. At no point did the Court address Garfield personally and offer him the opportunity to speak. Garfield did not object to this denial of allocution, though it violated the Federal Rules of Criminal Procedure.

Questions Presented on Appeal

1. Whether the Stolen Valor Act is invalid as applied to the petitioner under the First Amendment.
2. Whether the petitioner is entitled to resentencing because the District Court deprived him of his right to speak at sentencing, in violation of Federal Rule of Criminal Procedure 32(i)(4)(A)(ii).

Summary of Petitioner's Brief

Garfield asserts that his conviction under the Stolen Valor Act violates his First Amendment rights. As a law regulating speech based on content, the Act can stand only if the Government proves one of two things. First, the Government could prove that Garfield's representations about his receipt of a medal fall into a preexisting category of "unprotected speech." Once this is established, the Government must further prove that the Act did not single out Garfield's speech based its on content. As an alternative, the Government could prove that the Act satisfies strict scrutiny – it is narrowly tailored to serve a compelling state interest. Under either theory, the Government's case must fail.

Garfield's remarks regarding the medal do not fall within a category of unprotected speech. As set forth in *United States v. Stevens*, 130 S. Ct. 1577 (2010), these pre-existing categories include defamation, fraud, incitement, and speech integral to criminal conduct. To hold Garfield's comments unprotected, the Court would have to create a new category of constitutionally immune speech: knowingly false statements of fact. The Court has never recognized such a category, and indeed, has arguably rejected

the invitation on a prior occasion. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The First Amendment requires that we protect some falsehood.”).

Even if knowingly false statements of fact comprise a category of unprotected speech, the Stolen Valor Act still violates the Constitution because it impermissibly discriminates on the basis of content. Laws that selectively punish discussion of “specified disfavored topics” must pass strict scrutiny. *R.A.V. v. City of St. Paul*, 506 U.S. at 391. By singling out a particular category of falsehood – false statements about military medals – the Stolen Valor Act propagates content discrimination. As the petitioner puts it: “a Navy Cross winner could falsely claim to have won a Nobel Peace Prize, but a Nobel Peace Prize winner would be jailed for falsely claiming to have won the Navy Cross.”

The Act fails strict scrutiny because it fails to further a compelling state interest. The petitioner analogizes to *Texas v. Johnson*, 491 U.S. 397 (1989), in which the Court infamously struck down Texas’s flag-burning statute, claiming that the law’s protection of the flag’s symbolism was insufficiently important to support First Amendment infringement. The “reputation and meaning” of military medals, the petitioner claims, is equally un compelling.

Even if the Court finds a compelling interest, the Act is not narrowly tailored. Less restrictive means are available to combat misinformation about military service, such as a national database listing medal recipients. The Stolen Valor Act, as applied to Garfield, fails the strict scrutiny test, meriting the vacatur of the petitioner’s prison sentence.

In the alternative, the petitioner argues that the Court should vacate his sentence because the district court denied his right to allocution. According to *Green v. United States*, 365 U.S. 301 (1961), such denial requires resentencing without any inquiry into individual prejudice. The Government, in contrast, argues that the sentencing must be reviewed for plain error, as Garfield did not object to the error at resentencing. See *United States v. Reyna*, 358 F.3d 344 (5th Cir. 2004). The petitioner contests the application of the *Reyna* standard, but contends that vacatur is nonetheless merited under plain error review.

Under the plain error standard, a court must correct an error that affects a defendant's "substantial rights" if and when the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (quoting Fed. R. Crim. P. 52(b)). The district court's plain error is uncontested. The Government claims, however, that such error did not affect Garfield's "substantial rights" or the fairness of the proceedings.

Garfield rebuffs the Government's claims. First, Garfield asserts that the denial of allocution was sufficiently prejudicial as to affect his substantial rights. Prejudice should be presumed, he claims, because the denial of allocution disadvantaged him, though its occurrence is hard to prove. See *Olano*, 507 U.S. at 732 (prejudice should be presumed when (1) an error tends to cause significant prejudice that (2) is nevertheless extremely difficult to prove in any particular case, and when (3) presuming prejudice will not strain judicial resources). Even if prejudice is not presumed, the record demonstrates its existence. The sentencing judge made comments during the proceeding suggesting that

he did not know what to make of Garfield's written apology. By asking Garfield to explain, the judge could have resolved these ambiguities.

Finally, Garfield contends that the prejudice wrought by his denial of allocution affected the fairness of the proceedings. Garfield's inability to speak at his sentencing interfered with his opportunity to present mitigating information of individualized circumstances, such as his feelings of remorse. Garfield's muzzling also had important symbolic implications, undermining perceptions of equity in the judicial process. For the foregoing reasons, he asserts that his sentence should be vacated.

Summary of Respondent's Brief

The Government asserts that Garfield's lie about receiving a Navy Cross merits no constitutional protection. The Government invites the Court to carve out a new category of unprotected speech: knowingly false statements about receiving military medals. This extremely narrow category accords with the Court's longstanding tradition of proscribing various falsehoods, including defamation, fraud, false light, false commercial speech, and knowingly false statements inflicting emotional distress. Though the Government concedes that the Court has protected falsehoods in the past, falsities merit constitution protection only if (1) such protection is necessary to provide breathing space for constitutionally protected speech, and (2) the proscription proves unrelated to a legitimate state interest. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Neither factor is implicated here. Because lies about military medals are intentional (and thus avoidable), prohibiting them has no chilling effect with respect to constitutionally protected speech. Moreover, proscribing knowing falsehoods about

military medals furthers a legitimate state interest: the recognition of service members' accomplishments and the motivation of others to high levels of performance. Because banning lies regarding military medals would have a minimal chilling effect with respect to constitutionally protected speech and serves a legitimate state interest, Garfield's falsehood should not be protected.

Alternatively, should the Court fail to recognize a new category of unprotected speech, Garfield's lie is still proscribed because it was integral to the criminal act of impersonation – a pre-existing category of speech outside the bounds of the First Amendment. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

As a last resort, the Stolen Valor Act passes constitutional muster as applied to the petitioner because it passes strict scrutiny. The Government has a compelling interest in preserving the integrity of the military honor system, which, in addition to fostering a sense of patriotism within the general populace, furthers concrete aims, including discipline and excellence within the military. Moreover, the Act is narrowly tailored. Though the petitioner points to a database as less restrictive means to avoid individuals' impersonation of war heroes, the mechanism would not be as effective as the Act in preventing misinformation about the military. The existence of other, less effective means of accomplishing a goal does not thwart compliance with strict scrutiny.

With respect to the allocution claim, the Government argues that the issue should be analyzed under the plain error standard as Garfield did not object to the district court's failure to address him personally during sentencing. The Government disagrees with the petitioner's assertion that allocution claims merit automatic reversal. Though that may

have been the rule at one time, such precedent was overruled by *United States v. Olano*, 507 U.S. 725 (1993).

Under the plain error standard, a court may correct a forfeited error only if the defendant proves that (1) there was an “error”; (2) such error was “plain”; (3) the error affected the defendant’s “substantial rights”; and (4) the error “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 732. Here, prongs one and two are uncontested. The Government contends, however, that Garfield is unable to prove that the denial of allocution affected his substantial rights or undermined the fairness or integrity of the sentencing.

With respect to the former, Garfield cannot prove that he was prejudiced by the error. The Government categorically rejects Garfield’s contention that prejudice should be presumed because it would be hard to prove. In any event – presumed or not – prejudice did not result from the sentencing judge’s error because a personal invitation to speak would not have reduced the sentence. A letter Garfield wrote was read aloud at sentencing and was “structured much as an allocution would have been.” *United States v. Noel*, 581 F.3d 490, 504 (7th Cir. 2009). Moreover, the judge’s comments at sentencing suggest that the punishment he selected was based on the nature of the crime and Garfield’s history of lying – factors that could not have been changed by the petitioner’s speech at the proceeding.

Nor can Garfield prove that the denial of allocution undermined the fairness or integrity of the sentencing. Vacatur is appropriate only when a “miscarriage of justice” would result in its absence. *See, e.g., Johnson v. United States*, 520 U.S. 461, 470 (1997).

An allocation error simply does not rise to this level. *Hill v. United States*, 368 U.S. 424 (1962).

For the aforementioned reasons, Garfield's sentence should be upheld.

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