R. Bartlett

October 11, 1983

Mr. Justice:

Re: Migra v. Warren City School District, No. 82-738,

I would like to offer some post-argument thoughts on Migra. More specifically, I would like to discuss the ambiguity in the DC opinion concerning which law of res judicata, federal or state, was applied in this case. I did not discuss fully this issue in my bench memo because it is peripheral to the important legal question in the case. Because some members of the Court seem to be worried about it, I think I should outline it more fully.

The important issue in this case is whether and under what circumstances §1738 requires a federal court to give preclusive effect to a state court judgment in a subsequent §1983 suit. It was my recommendation, and it seems to be the sense of the Court, that at least in this case a federal court should apply §1738 to accord the state court judgment whatever preclusive effect it would have in state court.

Because of a somewhat ambiguous DC opinion, however, it is unclear what law the DC in fact applied. See App. to cert. petn, at C-27. The opinion mentions Allen v. McCurry several times, and Allen makes it clear that the general rule under §1738 is that state law governs the preclusive effect to be given state law judgments. In addition, the principal case on which the DC relies to find that petr's suit is precluded is Coogan v. Cincinnati Bar Association, a CA6 case determining the preclusive effect of an Ohio judgment in a subsequent suit in federal court.

On the other hand, the DC opinion also refers to "a split of authority among the circuits over the issue." App. to cert. petn C-27. Such a conflict could not really exist if the DC was attempting to apply Ohio law. Moreover, aside from Coogan, the DC cited Mayer v. Distel Tool and Machine Co., a case having nothing whatsoever to do with Ohio preclusion law. It is curious that the DC did not cite any Ohio state court cases when it should have been applying Ohio preclusion law.

This confusion is really of interest only to these litigants. This Court presumably granted ~~this~~ cert in this case to determine whether state preclusion law was applicable to this case. Assuming that the Court will say that state law does apply, the Court has three choices: 1) it could simply assume that the DC applied state law and therefore affirm; 2) it could say that state law should have been applied, and remand to the DC to apply it if it did not do so in the first instance; or 3) it could say that state law applies, and then determine whether the DC applied state law correctly. The third option would, I think, be undesirable simply because the local federal court may be better at interpreting state preclusion law. I have no strong feelings as between the other choices, because with either outcome this Court will make clear that §1738 is applicable in this case. Because of the ambiguity in the DC opinion, however, it seems that a remand to the DC may be the more technically correct result.

A related issue that surfaced at the argument concerns BRW's suggestion that perhaps §1738 requires only that federal courts

gave at least as much preclusive effect to a state court judgment as the judgment would have in other state courts. BRW's questioning seemed to suggest that it would not be inconsistent with §1738 for federal courts, as a matter of federal law, to accord state court judgments even greater preclusive effect than they would be given in state courts. Under this view, a subsequent §1983 suit might be precluded in a federal court even where a subsequent state court suit would not be. This is a novel idea that was not argued by resp, and therefore has not been briefed by the parties. Although I do not think that §1738 necessarily rules out development of such a federal law, I am not aware of any support for the idea, and I think that it would be a mistake for this Court to consider the issue in this case. The issue would be more squarely presented in a case in which a lower federal court has determined that the applicable state law does not preclude a subsequent suit.

BRW may want to reach the issue in this case instead of remanding to the DC for reconsideration of Ohio law. The Court could do so by holding, in effect, that it doesn't matter whether the DC in this case applied federal or state law, because petr's suit is precluded if it is barred by <u>either</u> federal or state law. I think that such a holding would be unwise since the issue has not been briefed, and because it can be avoided if the DC on remand determines that Ohio law precludes petr's suit. Even if the Court even wants to consider the question suggested by BRW, I think that it would be best accomplished in a remand instructing the DC to consider the question if it concludes that petr's suit

is not precluded by Ohio law.