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The San Diego skyline and border fence seen from Tijuana, Mexico.

Does 4th Amendment protect non-citizens?

Continued from page 1

co, that runs parallel to the border fence when a CBP agent began shooting at him without warning. Most of the hollow point bullets hit him from behind, killing him. CBP personnel have killed at least 51 people at the U.S. — Mexico border since 2005.

Both boys' families sued the federal agents for using excessive force in violation of the Fourth Amendment, but the cases took very different turns. In *Hernandez*, the 5th U.S. Circuit Court of Appeals upheld dismissal on the ground that, as a Mexican citizen, Hernandez enjoyed no Fourth Amendment protection. In *Rodriguez*, a district court reached the opposite conclusion. Last month, the Supreme Court agreed to review *Hernandez*, while the 9th U.S. Circuit Court of Appeals heard argument in *Rodriguez*.

The Supreme Court should — and likely will — hold that people in the circumstances of Hernandez and Rodriguez enjoy Fourth Amendment rights despite their lack of American citizenship. In confronting the issue, the court will have to reconcile two older decisions in tension with one another.

The first is *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where a Mexican drug lord arrested by the DEA moved to suppress evidence seized from his homes there without a warrant. The majority held that the Fourth Amendment's reference to "the right of *the people* to be secure" from warrantless searches refers in most cases to citizens or at least residents — those "part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." The court also held that extending rights to non-citizens abroad could hamper American legal and military actions and so should come from Congress.

Concurring, Justice Anthony Kennedy offered a different rationale: Fourth Amendment protection would be "impracticable and anomalous" in Verdugo-Urquidez's case because Mexican judges couldn't weigh and apply American law governing search warrants. Unpersuaded that the text's use of the phrase "the people" necessarily walls a Mexican citizen off from the Fourth Amendment, Justice Kennedy proposed a more contextual and case-by-case approach.

> He died on the spot — a Mexican killed in Mexico by an American agent shooting 60 feet away from the U.S.

That approach reached full flower in the other key decision involved here: *Boumediene v. Bush*, 553 U.S. 723 (2008). *Boumediene* granted habeas corpus protection to Guantanamo detainees, and the majority opinion was drafted by — you guessed it — Justice Kennedy. Extraterritorial application of the Constitution turns on "objective factors and practical concerns, not formalism," the court observed. Instead of *de jure* sovereignty, three other issues dictated the outcome in *Boumediene*: Detainees' citizenship and combatant status, where they were detained, and "practical obstacles inherent in resolving the prisoner's entitlement to the writ."

Boumediene likely signals that similar practical and contextual factors will decide the Fourth Amendment question in *Hernandez*. And these mostly argue in favor of protection. Although not citizens, Mexican children in border communities are in close daily proximity to American territory, and citizens of the two countries regularly travel back and forth in dense cities like El Paso-Juarez and Nogales.

More important, CBP agents wield ongoing, extensive and quasi-military control over the area directly adjacent to the border. They can and do shoot to kill with seemingly minimal provocation and no need for prior approval from Mexican authorities. In light of this kind of power over life and death, how important is *de jure* sovereignty?

Nor do other factors make applying the Fourth Amendment's prohibition of excessive force "impracticable and anomalous." U.S. officials needn't seek search warrants in Mexican courts — they only have to follow the same rules that apply when they point their weapons north instead of south.

Likewise, the court in *Boumediene* asked whether enforcing our constitution would cause "friction" with the host government, but Mexico approves of the Fourth Amendment's applicability to Hernandez and Rodriguez and has filed amicus briefs supporting their claims. It did so because a CBP agent would never be extradited for trial in Mexico and because internal and outside reviews have found that agents never face serious internal discipline for even questionable shootings. True, the Justice Department is criminally prosecuting the CBP agent who shot Jose Rodriguez, but that is the vanishingly rare exception.

As in *Verdugo-Urquidez*, the Justice Department argues that applying the Fourth Amendment to non-citizens abroad would hamstring American security and law enforcement operations all over the world, and it is a serious objection. Often this concern would be well-founded. But Justice Kennedy's case-by-case approach distinguishes between circumstances where extending Fourth Amendment protection is unworkable, and those where no practical obstacles really exist — like *Hernandez*.

In the end, accepting the government's blanket view that the Fourth Amendment never applies to non-citizens on the Mexican side of our southern border would create a lawless free-fire zone where children at play steps away from American soil have lesser constitutional status than aliens imprisoned in Cuba as our country's most dangerous enemies. Taking a practical and case-specific view, the Supreme Court is unlikely to agree. Nor should it.

Martin J. Siegel *is an appellate lawyer in Houston and represented UC Irvine Dean Erwin Chemerinsky in filing an amicus brief on behalf of petitioners urging the U.S. Supreme Court to grant certiorari in* Hernandez.

SIEGEL

Ruling will have a broad impact on False Claims Act cases

By Tom McConville and Warrington Parker

Much has been written about the U.S. Supreme Court's recent decision in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), dealing with the False Claims Act (FCA) 31 U.S.C. Sections 3729 et seq. and the "implied false certification" theory of liability under the FCA. But the *Escobar* decision includes language that should have broader implications beyond implied certification cases. This article analyzes *Escobar* in the context of contractual non-compliance and government knowledge.

In *Escobar*, the relators sued a health care provider over claims submitted to the Massachusetts Medicaid program for mental health treatment of a teenager, who died while being treated by those who were not properly licensed or supervised. The relators' alleged that the submittal of claims for Medicaid reimbursement implied that the defendant complied with the state's requirements for licensing, qualifications and supervision, and were thus false under 31 U.S.C. Section 3129(a)(1).

The Supreme Court took up *Escobar* to assess the viability of implied false certification theory of liability. The court held that "implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."

The court stated that "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act," and that "[t]he materiality standard is demanding." In discussing materiality, the court explained that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material."

Although *Escobar* arose in the context of implicit certifications related to Medicaid regulations, the Supreme Court's holding extends to failure to disclose noncompliance with contractual requirements as well, including "misleading half-truths" about performance. The opinion also explains how government knowledge affects the materiality requirement under the FCA. The *Escobar* opinion therefore can be useful to contractors when confronted with FCA claims — even if not the implied certification variety — if the underlying facts relating to contract performance are known to the government.

In past FCA cases, courts have assessed government knowledge in different ways. Some courts have held that government knowledge negates the intent required for an FCA violation. For example, in *U.S. ex rel. Butler*, 71 F. 3d 321 (9th Cir. 1995), McDonnell Douglas contracted with the Army to develop the Apache helicopter. During performance, the Army and McDonnell Douglas engaged in dialogue about resolving various technical challenges. In affirming the directed verdict for McDonnell Douglas, the 9th U.S. Circuit Court of Appeals found that the Army knew that the test results were "not strictly accurate" because they were "the subject of dialogue between the Army and MDHC. The only reasonable conclusion is that this was not a 'knowingly' false statement, as the noncomplying tests were known to and approved by the Army."

In another government knowledge case, *U.S. ex rel. Oseas v. First Kuwaiti*, 612 F.3d 724 (4th Cir. 2010) the court found that such knowledge negated fraud or falsity. In *Oseas*, First Kuwaiti contracted to build the U. S. embassy in Baghdad. The relator alleged, among other things, that First Kuwaiti falsely billed for substandard work. As part of the construction work, government inspectors routinely examined the work and conferred with First Kuwaiti. The court analyzed this course of conduct, and said that, through inspections, "government officials were aware of any alleged defects and accepted First Kuwaiti's work anyway 'effectively negat[ing] the fraud or falsity required by the FCA.'" (Citation omitted).

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The 7th U.S. Circuit Court of Appeals in *U.S. ex rel. Marshall v. Woodward*, 812 F.3d 556 (7th Cir. 2015) took a different approach to government knowledge, and focused on materiality. In *Woodward*, relators alleged that Woodward falsely certified the quality of certain helicopter parts sold to the government. The relators' allegations were investigated, including by the Defense Contract Management Agency, which concluded that the parts were fine. After its investigation, the government continued to purchase the parts at issue. In affirming the grant of summary judgment for Woodward, the 7th Circuit stated: "The government learned of plaintiffs' concerns, thoroughly investigated them, and determined they were meritless. To this day, the government continues to pay for and use the T2 sensor. Therefore, the government's actual conduct suggests that the allegedly false statements were immaterial."

The cases discussed above are just examples of cases wherein different courts have taken different approaches to FCA fact patterns that involve government knowledge. Courts have said government knowledge defeats: falsity (*Oseas*); intent (*Butler*); or materiality (*Woodward*). *Escobar* can be used to apply uniformity to government knowledge fact patterns.

Escobar highlights that misrepresentations about contractual requirements "must be material to the government's payment decision in order to be actionable under the False Claims Act." If the government knows the contractor is not complying with all contract terms, and pays the claim that incorrectly certifies compliance, *Escobar* tells us "that is very strong evidence that those requirements are not material." Likewise, if a contractor keeps the government informed regarding performance, government knowledge would rebut potential liability for omissions and misleading half-truths discussed in *Escobar*.

This isn't to suggest that government knowledge can't also defeat an FCA claim by disproving falsity or intent. But *Escobar*'s focus on materiality, and how it is a "demanding" standard, signals to contractors where their best arguments may lie when contractors and the government work closely together. When the government knows of these difficulties, and pays a claim, *Escobar* says that the actions of the government render any errors immaterial. While prior case law has looked at government knowledge through varying lenses, *Escobar* makes the focus clear: government knowledge should be tied to materiality.

MCCONVILLE

PARKER

Thomas McConville *is a partner in the Orange County office of Orrick, Herrington & Sutcliffe LLP.*

Warrington Parker *is a partner in the San Francisco office of Orrick, Herrington & Sutcliffe LLP.*