

A LITTLE BIT OF SHOOTY FACE

Published in *Flagpole Magazine*, p. 8 (July 2, 2003).

Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.

The Wall Street Journal, citing unnamed government sources, recently revealed that American intelligence agents and law enforcement officials stationed in Afghanistan and at Guantanamo Bay have been authorized to use “a little bit of smacky face” to make prisoners talk during interrogation. “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your duty,” one anonymous U. S. official was quoted as saying. Americans were assured, however, that the face-slapping of prisoners to induce them to talk was nothing to worry about. There would be no revival of the third degree for persons arrested on criminal charges in this country. The prisoners subjected to having their faces smacked as an interrogation technique would be foreigners suspected of terrorist activities held outside the United States, and the technique would be used to obtain intelligence information, not to obtain incriminating statements for use in court. Besides, we were additionally assured, within the United States smacking prisoners in the face to get them to talk is impermissible under the Bill of Rights, and federal and state courts would never tolerate such treatment of criminal suspects in this country.

A recent U. S. Supreme Court decision, however, casts doubt on these assurances. The decision raises troubling questions about whether the Supreme Court now defers too much to law enforcement when police in America interrogate persons in their custody who are suspected of committing crimes punishable in federal or state court. The decision involves a prisoner who was not slapped but shot in the face.

On Nov. 28, 1997, in Oxnard, California, a 29-year old agricultural laborer, Oliverio Martinez, got into a brief altercation with two Oxnard police officers during which one of the officers shot him five times. One bullet struck Martinez in the face and permanently blinded him, while another bullet fractured a vertebra, permanently paralyzing him from the waist down. Three other bullets tore through his leg around the knee joint. The officers then handcuffed Martinez.

A third officer, Benjamin Chavez (a police sergeant and patrol supervisor), arrived at the scene minutes later along with paramedics. Chavez rode to the hospital in the ambulance with Martinez. At the hospital, as emergency room personnel treated Martinez, Chavez began a tape-recorded interrogation of Martinez. The interrogation, which was interrupted several times when Chavez would leave and then return to the emergency room, lasted a total of 10 minutes during a 45-minute interval. In violation of the self-incrimination protections in the Miranda decision, Martinez was at no time advised of his rights. Martinez was never charged with any crime, and the statements he made during his interrogation were never used in court against him in any criminal prosecution.

The printed transcript of Chavez’s tape-recorded interrogation of Martinez is set forth below in the Appendix to this article.

Martinez filed a civil rights lawsuit for damages against Chavez, asserting that the interrogation was coercive and violated Martinez’s rights under both the fifth amendment self-incrimination

clause and the fourteenth amendment due process clause. (The self-incrimination privilege and the right to due process provides separate, independent, overlapping protections against abusive interrogation techniques used by police to extract confessions. The self-incrimination privilege protects criminal suspects under arrest from being compelled to incriminate themselves, and due process prohibits police from coercing suspects to confess, irrespective of whether they are in custody.) Chavez invoked the defense of qualified immunity, under which a policeman is immune from civil liability and entitled to immediate dismissal of the lawsuit against him if he did not violate anyone's rights, or if the rights violated were not clearly established at the time of the violation.

The federal district court where the civil rights action had been filed entered a summary judgment against Chavez on the qualified immunity issue, finding that the interrogation was unconstitutionally coercive and that a reasonable officer would have known that to interrogate Martinez under the circumstances was illegal. The court found that Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police." It further found that "during the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more."

Chavez appealed the district court decision to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit framed the issue before it as "whether a police officer who conducts a coercive, custodial interrogation of a suspect who is being treated for life-threatening, police-inflicted gunshot wounds may invoke qualified immunity in a civil suit." The Ninth Circuit held that the coercive questioning of Martinez violated both the self-incrimination privilege and due process of law. The purpose of those basic rights, it determined, was "to prevent coercive interrogation practices that are destructive of human dignity." It further held that the fact that Martinez's statements had never been used against him in a criminal trial was irrelevant; a policeman violates constitutional rights "when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial." Finally, the Ninth Circuit held that Chavez was not entitled to qualified immunity. "A reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received Miranda warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated pleas to stop violated the suspect's fifth and fourteenth amendment right to be free from coercive interrogation." The Ninth Circuit therefore affirmed the judgment of the district court. *Martinez v. City of Oxnard*, 270 F. 3d 852 (9th Cir. 2001).

The Ninth Circuit decision was handed down on Oct. 30, 2001. Thereafter, Chavez asked the U. S. Supreme Court to review the Ninth Circuit decision, and on June 3, 2002, the Supreme Court agreed to do so. A few weeks ago, on May 27, 2003, the Supreme Court issued its ruling in *Chavez v. Martinez*, 538 U.S. 760 (2003), overturning the Ninth Circuit decision.

Six Supreme Court justices filed opinions in the case, with no single opinion representing the holding of the Court on all the issues before it.

The lead opinion was by Justice Clarence Thomas. Whereas both the district court and the Ninth Circuit were appalled by Chavez's interrogation of Martinez, Thomas, who is famous for peppering his opinions with sarcastic or ironical jabs at conduct he dislikes, betrays not a whiff of concern about, much less disapproval of, Chavez's relentless interrogation of Martinez. In setting out the facts of the case Thomas carefully omits mentioning various material facts which had been brought out in the lower court rulings and tended to evoke sympathy for Martinez. Thomas does not tell us that Martinez was shot in the face, and rather than saying that Martinez was shot five times Thomas says Martinez was shot "several times;" Thomas does not point out that after Martinez had been shot he was handcuffed, only that he was "arrested;" Thomas never mentions that during the interrogation Martinez was drifting in and out of consciousness and at times screaming with pain; and Thomas's recitation of the facts fails to mention that the medical staff at the emergency room several times asked Chavez to leave the room, but that he kept returning to resume the questioning. In referring to the questioning of Martinez, Thomas consistently uses the word "interview" rather than "interrogation," except on one occasion when he meekly speaks of "Chavez's allegedly coercive interrogation of ... Martinez." Thomas is also careful to bring to our attention facts, not mentioned by the courts below, which reflect adversely on Martinez. We learn, for example, from Thomas's opinion that during the interrogation Martinez admitted being a regular heroin user.

Turning to the legal issues, Justice Thomas concluded that police who conduct custodial interrogations of suspects without first administering the Miranda warnings cannot, without more, be sued for damages. Five other justices—Chief Justice Rehnquist, and Justices Scalia, O'Connor, Souter, and Breyer—agreed with Thomas's disposition of this issue, making it the majority holding of the Court.

With the same five justices concurring with him, Thomas also concluded that a violation of the self-incrimination privilege can never occur unless the suspect's compelled confession is introduced into evidence at the suspect's criminal trial; therefore, no matter what techniques of compulsion are used to obtain a confession, the self-incrimination privilege is not violated if the confession is not introduced in a criminal proceeding. Thomas's reasoning consisted of formalistically categorizing the privilege against self-incrimination as a trial right which can be violated only when compelled statements are used at trial.

The three dissenting justices on this self-incrimination issue were less concerned with technicalities. In an opinion in which Justices Stevens and Ginsburg concurred, Justice Kennedy argued: "A constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place.... To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the self-incrimination privilege can only diminish a celebrated provision in the Bill of Rights.... In my view the self-incrimination clause is applicable at the time and place police use compulsion to extract a statement from a suspect.... [T]he use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to

liberty of the person.... The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation.”

These three dissenting justices also concluded that the interrogation of Martinez violated his right against self-incrimination, which necessarily means that Martinez’s statements would have been inadmissible in court. Justice Souter, joined in by Justice Breyer, concluded that Martinez’s confession “would clearly be inadmissible if offered in evidence against him,” while Justice O’Connor refused to express a view on the matter. Thus, a total of five justices agreed that the statements Chavez extracted from Martinez could not, under the fifth amendment, have been admitted against him in court.

By a 6-3 vote, therefore, the Supreme Court held that in conducting the interrogation and obtaining the unused confession Chavez had not violated Martinez’s self-incrimination privilege, although by a 5-3 vote the Court simultaneously determined that under the self-incrimination clause the confession could not have been admitted in evidence against Martinez in court. Accordingly, the Supreme Court reversed the decision of the Ninth Circuit.

The remaining issue before the Court was whether, despite being precluded from suing Chavez on self-incrimination grounds, Martinez would nonetheless to be permitted to continue with his lawsuit against Chavez insofar as it was based on due process grounds. It is well-established that the constitutional right to due process of law is a right which may be violated even though the victim of the violation is never prosecuted. In the pretrial setting due process prohibits police from using criminal investigation techniques that are shocking to conscience, especially where they involve brutality and offend human dignity. The seminal Supreme Court cases are *Brown v. Mississippi*, 297 U.S. 278 (1936), which involved confessions extorted from murder suspects by police brutality, and *Rochin v. California*, 342 U.S. 165 (1952), where police subjected a drug suspect to stomach pumping to retrieve swallowed drugs. In both cases the Supreme Court reversed the state criminal convictions on the due process ground that the police conduct had been shocking to the conscience.

In his opinion Justice Thomas conceded that “police torture or other abuse that results in a confession ... not used at trial” could constitute a due process violation. He also announced, however, that he was “satisfied that Chavez’s questioning did not violate Martinez’s due process rights,” and that he entirely rejected “Martinez’s characterization of Chavez’s behavior as ‘egregious’ or ‘conscience shocking.’” As far as Justice Thomas was concerned, therefore, Martinez’s statements would have been admissible in evidence against him if he had been tried for a crime.

It is doubtful that all the power plants in the world are capable of generating enough current to shock Justice Thomas’s conscience with respect to criminal suspects invoking due process rights. In Thomas’s view, police conduct cannot be shocking to the conscience unless it is “intended to injure in some way unjustifiable by any government interest,” and there was no such intention in this case. Here, Thomas asserted, “there is no evidence that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment,” and “[m]edical personnel were able to treat Martinez throughout the interview.” Furthermore, “Chavez ceased his questioning to allow tests and other procedures to be performed,” and there

was no “evidence that Chavez’s conduct exacerbated Martinez’s injuries or prolonged his stay in the hospital.” “Moreover, the need to investigate whether there had been police misconduct constituted a justifiable governmental interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.” To bolster his amazing conclusion that Chavez’s interrogation of Martinez did not violate due process, Thomas (with spectacular inappositeness) inserted into his opinion this sentence from Chief Justice Warren’s opinion in *Miranda*: “It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”

Under Justice Thomas’s crabbed view of what it takes for egregious misbehavior by police to constitute a due process violation, a view which requires proof that police intended to inflict injury not justified by a legitimate government interest, it would be almost impossible for outrageous police activities connected with a criminal investigation to ever violate due process, and the essential principle that due process forbids police from using shocking methods of criminal investigation would have no practical significance. A criminal suspect faces enormous difficulties when he tries to prove what the police actually intended when they engaged in certain conduct. Police investigating criminal activity can almost always plausibly claim that what they did was intended to obtain the truth about criminal activity and therefore was intended to serve the governmental interest in suppressing crime. Furthermore, virtually all police criminal investigation techniques, no matter how offensive, actually directed at solving crime are, under Thomas’s standard, permitted by due process, since they are, per se, intended to satisfy the government’s interest in suppressing crime. In determining that Chavez interrogated Martinez and obtained the confession in conformity with due process requirements, Justice Thomas simply confirms that under his view due process requirements are nearly meaningless. In fact, under Thomas’ toothless conception of due process the landmark decisions in *Brown v. Mississippi* and *Rochin v. California* were wrongly decided because the coercing of the confessions from Brown and his codefendants was intended to discover who had committed an unsolved murder, and the pumping of Rochin’s stomach was intended to discover the truth about the capsules police had seen Rochin ingest.

Justice Thomas’s view, that Martinez’s statements were obtained in compliance with due process protections and would have been admissible in court, is as weird as it is fantastic. It is also indicative of an anti-human rights mentality that borders on the pathological, rendering Thomas incapable of comprehending the patent coerciveness of the interrogation and unable to grasp the key point that, in the words of Justice Kennedy, “the officer [Chavez] acted with the intent of exploiting Martinez’s condition for purposes of extracting a statement.” Shot in the face, blinded, screaming with severe pain, believing he was dying, begging for treatment, suffering mental anguish, losing consciousness periodically, Martinez was nonetheless repeatedly questioned by Chavez, despite his pleas to desist and his requests for treatment. As both Justices Kennedy and Ginsburg noted, it is “hard to imagine a situation less conducive to the exercise of rational intellect and a free will” than the circumstances in which the confession was elicited.

Only two justices, Chief Justice Rehnquist and Justice Scalia, concurred in the portion of Justice Thomas’s opinion concluding that Chavez’s interrogation of Martinez satisfied due process requirements, and therefore Thomas’s opinion represents the minority view of the Court on the

due process issue. Part II of Justice Souter's opinion, in which Justices Stevens, Kennedy, Ginsburg, and Breyer concurred, constitutes the Court's majority opinion on the due process issue; in that part of his opinion, Justice Souter expressed the view that the due process issue should be addressed by the Ninth Circuit on remand. Justice O'Connor was the only member of the Court to decline to address the due process issue at all. Thus, despite having reversed the Ninth Circuit by a 6-3 vote on the self-incrimination privilege issue, the Court also, by a 5-3 vote, authorized the Ninth Circuit, on remand, to address the due process issue. One of the five justices voting to remand the due process claim, Justice Stevens, speaking for himself alone, stated in his opinion that a due process violation had been proved, describing Chavez's interrogation of Martinez as "a classic example of a violation of a constitutional right implicit in the concept of ordered liberty."

The Supreme Court's decision "is a good win for the law enforcement community," crowed an attorney with the right-wing Criminal Justice Legal Foundation, which filed a brief in the Supreme Court in support of Chavez. "It will be the rare case where an officer is ever held liable for questioning," he triumphantly added. (The Foundation's press release commenting glowingly on the Supreme Court decision is, incredibly, entitled "Police Officers Cannot be Sued For Asking Questions".)

The Supreme Court decision in *Chavez v. Martinez* may be a victory for the gendarmerie, but it is a defeat for Americans and the Bill of Rights. The decision is simply another in a series of decisions stretching over the past three decades in which the Court has inexorably relaxed constitutional restrictions on police criminal investigation activities, especially in regard to custodial interrogation of suspects and search and seizure practices. Not only did the Court in *Chavez v. Martinez* exempt police from civil liability for failing to give the Miranda warnings, but it eliminated the self-incrimination privilege as a protection against the coercing of a confession where the confession is not used in court. Only a bare majority of the Court thought Martinez's confession would have been inadmissible in court under the fifth amendment self-incrimination clause, and only by the same bare majority vote did the Court decide that the issue of whether the interrogation of Martinez contravened due process could even be addressed by the lower courts. Justice Stevens alone openly announced that the interrogation violated due process, while three members of the Court (Chief Justice Rehnquist and Justices Scalia and Thomas), took the unbelievable position that the interrogation met all due process requirements.

Chavez v. Martinez will have baleful effects. It will encourage police to continue or even expand their use of aggressive interrogation techniques on prisoners, and it will reduce the role of the judiciary in the monitoring of custodial interrogation practices. If the highest court in the land, in a case involving an interrogation as coercive and abusive as that of Martinez, is incapable of strongly and forthrightly condemning what happened, what message does that send to the American judiciary? If three of the Court's justices in a case such as this, where the prisoner interrogated had been shot in the face, boldly announce that they see no constitutional problem with the interrogation, and a fourth justice declines even to decide whether the confession was admissible in court under the fifth amendment or whether the interrogation violated due process, is it likely that this country's judges will conclude that they have been commissioned by the Court to be alert and sensitive to the plight of prisoners interrogated by the police? Does not the Court's decision possibly portend an America where, from now on, not only might a little bit of

smacky face be lawful in police custodial interrogations under some circumstances, but even a little bit of shooty face?

Bereft of humanity, strangely endeavoring to excuse or minimize police officer Chavez's treatment of suspect Martinez, Justice Thomas's lead opinion in *Chavez v. Martinez* will accelerate the growing realization that his voting record on human rights issues is abominable. Justice Thomas's opinion did not, however, surprise persons who have studied his career. The truth is that anyone familiar with his voting pattern in cases involving criminal procedure, civil rights, and civil liberties could have predicted how Thomas would cast his vote in the case.

Indeed, Justice Thomas's vote was not merely predictable; it was in fact predicted—by me. On May 17, when *Chavez v. Martinez* was still pending in the Supreme Court, I delivered a speech (Embarrassing Justice, printed in full in Flagpole May 28) in which I summarized the case and predicted that when the Supreme Court handed down its decision “Justice Thomas will vote to deny damages and dismiss this civil rights action.” In his lead opinion in the case Justice Thomas, as I have shown above, concluded that Chavez had violated no rights of Martinez and was entitled to qualified immunity. In Thomas's view, Martinez was not entitled to any relief and his lawsuit should have been dismissed in its entirety. This is just what I predicted. This may not make me a Nostradamus, but it does authorize me to say to all those who undergo the unpleasant experience of reading Thomas's noisome opinion in the tragic *Chavez v. Martinez* decision: I told you so!

Note: On July 30, 2003, on remand from the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit held that police sergeant Chavez's alleged conduct of brutally and incessantly questioning suspect Martinez, after he had been shot in the face, back, and leg, interfering with Martinez's medical treatment while he was screaming in pain and going in and out of consciousness, and continuing the “interrogation” over Martinez's pleas for him to stop so that he could receive treatment, if proven, violated Martinez's clearly established due process rights, and that thus Chavez was not entitled to qualified immunity in civil rights action brought by Martinez. *Martinez v. Chavez*, 337 F.3d 1091 (9th Cir. 2003), cert. denied, 542 U.S. 953 (2004).

See also *Martinez v. City of Oxnard*, 229 F.R.D. 129 (C.D. Cal. 2005) (in 42 U.S.C. § 1983 action for damages by Martinez against municipality, chief of police Lopez, and senior police officer Salinas, court granted plaintiff Martinez's motion to allow intervention of another individual who was allegedly injured in an unjustified shooting and had sued defendant Salinas).

APPENDIX

Here, reproduced verbatim and in its entirety from the Supreme Court's *Chavez v. Martinez* decision, is the English translation of portions of the tape-recorded interrogation in Spanish that occurred in the hospital emergency room.

Chavez: What happened? Olivero, tell me what happened.

O[liverio] M[artinez]: I don't know

Chavez: I don't know what happened (sic)?

O. M.: Ay! I am dying.

Ay! What are you doing to me?

No, ... ! (unintelligible scream).

Chavez: What happened, sir?

O. M.: My foot hurts ...

Chavez: Olivera. Sir, what happened?

O. M.: I am choking.

Chavez: Tell me what happened.

O. M.: I don't know.

Chavez: "I don't know."

O. M.: My leg hurts.

Chavez: I don't know what happened (sic)?

O. M.: It hurts ...

Chavez: Hey, hey look.

O. M.: I am choking.

Chavez: Can you hear? look listen, I am Benjamin Chavez with the police here in Oxnard, look.

O. M.: I am dying, please.

Chavez: OK, yes, tell me what happened. If you are going to die, tell me what happened. Look I need to tell (sic) what happened.

O. M.: I don't know.

Chavez: You don't know, I don't know what happened (sic)? Did you talk to the police?

O. M.: Yes.

Chavez: What happened with the police?

O. M.: We fought.

Chavez: Huh? What happened with the police?

O. M.: The police shot me.

Chavez: Why?

O. M.: Because I was fighting with him.

Chavez: Oh, why were you fighting with the police?

O. M.: I am dying ...

Chavez: OK, yes you are dying, but tell me why you are fighting, were you fighting with the police?

.....

O. M.: Doctor, please I want air, I am dying.

Chavez: OK, OK. I want to know if you pointed the gun [to yourself] at the police.

O. M.: Yes.

Chavez: Yes, and you pointed it [to yourself]? (sic) at the police pointed the gun? (sic) Huh?

O. M.: I am dying, please ...

Chavez: OK, listen, listen I want to know what happened, ok?

O. M.: I want them to treat me.

Chavez: OK, they are do it (sic), look when you took out the gun from the tape (sic) of the police

...

O. M.: I am dying ...

Chavez: Ok, look, what I want to know if you took out (sic) the gun of the police?

O. M.: I am not telling you anything until they treat me.

Chavez: Look, tell me what happened, I want to know, look well don't you want the police know (sic) what happened with you?

O. M.: Uuuggghhh! my belly hurts ...

.....

Chavez: Nothing, why did you run (sic) from the police?

O. M.: I don't want to say anything anymore.

Chavez: No?

O. M.: I want them to treat me, it hurts a lot, please.

Chavez: You don't want to tell (sic) what happened with you over there?

O. M.: I don't want to die, I don't want to die.

Chavez: Well if you are going to die tell me what happened, and right now you think you are going to die?

O. M.: No.

Chavez: No, do you think you are going to die?

O. M.: Aren't you going to treat me or what?

Chavez: Look, think you are going to die, (sic) that's all I want to know, if you think you are going to die? Right now, do you think you are going to die?

O. M.: My belly hurts, please treat me.

Chavez: Sir?

O. M.: If you treat me I tell you everything, if not, no.

Chavez: Sir, I want to know if you think you are going to die right now?

O. M.: I think so.

Chavez: You think (sic) so? Ok. Look, the doctors are going to help you with all they can do, Ok? That they can do.

O. M.: Get moving, I am dying, can't you see me? Come on.

Chavez: Ah, huh, right now they are giving you medication.