SUPREME COURT OF THE UNITED STATES

No. 98–262

BILL MARTIN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS *v.* EVERETT HADIX ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 21, 1999]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

Our task in this case is to determine the temporal application of that provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U. S. C. §1997e(d)(3) (1994 ed., Supp. III), which prescribes that "[n]o award of attorney's fees in an action [brought by a prisoner in which attorney's fees are authorized under 42 U. S. C. §1988 (1994 ed., and Supp. III)] shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. §3006A (1994 ed., and Supp. III)], for payment of court-appointed counsel."

I agree with the Court that the intended temporal application is not set forth in the text of the statute, and that the outcome must therefore be governed by our interpretive principle that, in absence of contrary indication, a statute will not be construed to have retroactive application, see *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280 (1994). But that leaves open the key question: retroactive in reference to what? The various options in the present case include (1) the alleged violation upon which the fee-imposing suit is based (applying the new fee rule to any case involving an alleged violation that occurred before the PLRA became effective would be giving it "retroactive

application"); (2) the lawyer's undertaking to prosecute the suit for which attorney's fees were provided (applying the new fee rule to any case in which the lawyer was retained before the PLRA became effective would be giving it "retroactive application"); (3) the filing of the suit in which the fees are imposed (applying the new fee rule to any suit brought before the PLRA became effective would be giving it "retroactive application"); (4) the doing of the legal work for which the fees are payable (applying the new fee rule to any work done before the PLRA became effective would be giving it "retroactive application"); and (5) the actual award of fees in a prisoner case (applying the new fee rule to an award rendered before the PLRA became effective would be giving it "retroactive application").

My disagreement with the Court's approach is that, in deciding which of the above five reference points for the retroactivity determination ought to be selected, it seems to me not much help to ask which of them would frustrate expectations. In varying degrees, they *all* would. As I explained in my concurrence in *Landgraf*, 511 U. S., at 286 (opinion concurring in judgments), I think the decision of which reference point (which "retroactivity event") to select should turn upon which activity the statute was intended to regulate. If it was intended to affect primary conduct, No. 1 should govern; if it was intended to induce lawyers to undertake representation, No. 2– and so forth.

In my view, the most precisely defined purpose of the provision at issue here was to reduce the previously established incentive for lawyers to work on prisoners' civil rights cases. If the PLRA is viewed in isolation, of course, its purpose could be regarded as being simply to prevent a judicial award of fees in excess of the referenced amount– in which case the relevant retroactivity event would be the award. In reality, however, the PLRA simply revises the fees provided for by §1988, and it seems to me that the underlying purpose of *that* provision must govern its

amendment as well– which purpose was to provide an appropriate incentive for lawyers to work on (among other civil rights cases) prisoner suits.[1] That being so, the relevant retroactivity event is the doing of the work for which the incentive was offered.[2] All work rendered in reliance upon the fee assurance contained in the former §1988 will be reimbursed at those rates; all work rendered after the revised fee assurance of the PLRA became effective will be limited to the new rates. The District Court's announcement that it would permit future work to be billed at a higher rate operated *in futuro*; it sought to regulate future conduct rather than adjudicate past. It was therefore no less subject to revision by statute than is an injunction. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 436 (1856).

For these reasons, I concur in the judgment of the Court and join all but Part II–B of its opinion.

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[1] Although the fees awarded under §1988 are payable to the party rather than to the lawyer, I think it clear that the purpose of the provision was to enable the civil rights plaintiffs to offer a rate of compensation that would attract attorneys.

[2] I reject the dissent's contention that the retroactivity event should be the attorney's undertaking to represent the civil rights plaintiff. The fees are intended to induce not merely signing on (no time can be billed for that) but actually doing the legal work. Like the Court, I do not think it true that an attorney who has signed on cannot terminate his representation; he assuredly can if the client says that he will no longer pay the hourly fee agreed upon.