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Judicial Internet Research: Does the First SCOTUS Decision of OT 2015 Bode Ill for Dr. Posner?

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Regular readers likely are familiar with the Seventh Circuit's recent decision in Rowe v. Gibson**,** No. 14-3316 (Aug. 19, 2015), and the considerable controversy that Judge Richard Posner created regarding the propriety of internet factual research by appellate courts. In short, Judge Posner relied on publicly available information on the web concerning the effects and use of Zantac to conclude that the district court should not have granted summary judgment in favor of the defendants in an Eighth Amendment claim.

The parties in *Rowe* currently are briefing the issue of whether the case should be heard *en banc* (see our post here), and we've suggested (here) that this issue might be ripe for review—not only by all judges of the Seventh Circuit in regular active service—but by the nine justices sitting at One First Street.

Lo and behold, yesterday the Supreme Court decided, per curiam, the first case of October Term 2015, Maryland v. Kulbicki, No. 14-848 (Oct. 5, 2015), in which it upbraided the Maryland Court of Appeals for "apparently conducting its own Internet research nearly two decades after the trial." Slip op. at 4.

Kulbicki was an ineffective-assistance-of-counsel case. Maryland's Court of Appeals vacated a murder conviction, reasoning that the defendant's counsel should have found the lone report critical of the sort of ballistics evidence at issue in the case, though the ballistics methodology otherwise was well-accepted at the time. The Supreme Court reversed, noting that the Court of Appeals' internet research only raised more questions.

The Court of Appeals offered a single citation in support of its sweeping statement that the report "was available" to Kulbicki's counsel in 1995—a Government Printing Office Web page accessed by the Court of Appeals, apparently conducting its own Internet research nearly two decades after the trial. The Web page indicates that a compilation of forensic studies that included the report was "distributed to various public libraries in 1994." But which ones? And in an era of card catalogues, not a worldwide web, what efforts would counsel have had to expend to find the compilation? And then, would effective counsel really have brought to the attention of the jury a report whose *conclusion* was that [the ballistics methodology] was a valid investigative technique in cases just like Kulbicki's? Neither the Court of Appeals nor Kulbicki has answers.

Id.

Only time will tell the outcome of this controversy, but *Kulbicki* is further evidence that the Supreme Court is aware of the issue and that, in the not-too-distant future, it might decide to weigh in.

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