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# PUBLIC DEFENDER REPORTER

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## UNITED STATES SUPREME COURT: 1997 TERM

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This article summarizes many of the criminal law decisions decided by the United States Supreme Court during the last term.

### SEARCH AND SEIZURE

#### Traffic Stops & Consent Searches

In *Ohio v. Robinette*, 117 S.Ct. 417 (1996), the Supreme Court reversed an Ohio Supreme Court decision, which had required that the officer clearly state when a citizen, validly detained for a traffic offense, was "legally free to go." Robinette had been clocked at 69 mph in a 45 mph zone. After the officer issued a warning and returned Robinette's license, the officer asked if he was carrying any illegal contraband in the car. Robinette answered no and consented to a car search. The officer found marijuana and a pill, which turned out to be MDMA. The officer was on drug interdiction patrol at the time and routinely requested permission to search cars he stopped for traffic violations.

The Supreme Court held that the Fourth Amendment does not require that a lawfully detained defendant be advised that he is "free to go" before his consent be deemed a voluntary consent. "[T]he subjective intentions of the officer did not make the continued detention of [the] respondent illegal under the Fourth Amendment." *Id.* at 420.

The Supreme Court held that the "touchstone of the Fourth Amendment is reasonableness," which is "measured in objective terms by examining the totality of the circumstances." *Id.* at 419. The Court has "eschewed bright line rules, instead emphasizing the fact specific nature of the reasonableness inquiry." *Id.* The Court pointed out that it had previously rejected similar per se rules, and it would be "unrealistic to require officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Id.*

#### Traffic Stops & Passengers

In *Maryland v. Wilson*, 117 S.Ct. 882 (1997), the Supreme Court held that the rule of *Pennsylvania v. Mimms*,

434 U.S. 106 (1977), which states that an officer, as a matter of course, may order a driver of a lawfully stopped car to get out, extends to passengers as well.

Wilson was a passenger in a car lawfully detained for speeding. Before the car pulled over, the officer observed the passengers behaving oddly. After the car was stopped, the officer noticed that Wilson was sweating and appeared "nervous." When the officer asked Wilson to exit the car, crack cocaine fell out of the car. Wilson was arrested, and he moved to suppress the evidence, arguing that ordering him out of the car was an unreasonable seizure.

In *Mimms*, the Supreme Court held that an officer may order "persons" out of an automobile lawfully detained. "The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security" and "that reasonableness 'depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" 117 S.Ct. at 884-85 (citing 434 U.S. at 108-09). In *Mimms*, the Court held that the public interest in the safety of the police officer made it reasonable to ask a driver to step out of the car. The Court concluded that the risk to the officer's safety was even higher when there were passengers in the car. The additional number of people increased the sources of harm to the officer. On the personal liberty side of the balance, the Court conceded that a passenger's personal liberty interest is higher than a driver's because the driver had at least committed a traffic violation. The Court went on to conclude, however, that as a practical matter the passenger was already detained by virtue of the officer pulling over the car and therefore the additional intrusion was minimal.

#### Knock & Announce Rule

In *Richards v. Wisconsin*, 117 S.Ct. 1416 (1997), the Supreme Court granted certiorari to determine whether the Fourth Amendment permits a blanket exception to the knock and announce requirement for felony drug offenses.

The Supreme Court held that the Fourth Amendment does not permit the blanket exception.

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Supreme Court held that "the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. At the same time, . . . [the Court] recognized that the 'flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests' and left 'to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable . . .'" 117 S.Ct at 1418 (citing 514 U.S. at 934-36).

In *Richards*, the Supreme Court conceded that the knock and announce rule can give way under certain circumstances, such as when there is a threat of physical violence or a threat that evidence will be destroyed. However, the fact that felony drug investigations frequently involve these two threats does not justify a *per se* exception. The Court had two concerns. First, the exception contains "considerable overgeneralization" and not every drug investigation will pose these risks. *Id.* at 1421. The Court pointed out that sometimes the only people at the scene are individuals not involved in the criminal activity or the evidence sought is not the type that is easily destroyed. The second concern is that an exception in one category can easily be applied to others. The Court pointed out that armed bank robbery also frequently involves the same threats of violence towards police and the destruction of evidence. "[T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case." *Id.*

Although the Court rejected Wisconsin's *per se* rule, the Court concluded that in *Richards*' case the no-knock entry did not violate his Fourth Amendment rights. *Richards* had slammed the door after he had cracked it open and saw a police officer in uniform. The Supreme Court ruled that the police officers were justified in breaking the door in and were reasonable in their fear that *Richards* might hurt them or destroy evidence.

### Drug Testing

In *Chandler v. Miller*, 117 S.Ct. 1295 (1997), the Supreme Court held that Georgia's requirement that candidates for designated state offices certify that they passed a urinalysis drug test within 30 days prior to qualifying for nomination did not fit within the closely guarded category of constitutionally permissible suspicionless searches. The drug test had been challenged by Libertarian Party nominees. They claimed that the test violated their rights under the First, Fourth, and Fourteenth Amendment. The Eleventh Circuit had decided that the Georgia law was constitutional, relying on three cases sustaining drug testing programs. *Venonica School Dist.*, 47J v. *Acton*, 115 S.Ct. 2386 (1995), involved random drug testing of athletes who participated in interscholastic sports. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989), upheld drug testing for railway employees involved in train accidents and those who violated certain safety rules. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), allowed testing of customs employees.

The Fourth Amendment prohibits unreasonable searches

and seizures, and it is settled that drug tests are "searches." "This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion. Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in 'certain limited circumstances.'" 117 S.Ct. at 1298. In order to qualify as a "limited circumstance" there must be a showing that the test serves a "special need" other than the "ordinary needs of law enforcement." *Id.* at 1299. After there is a showing of special need, the Court will "balance the individual's privacy expectations against the Government's interests to determine whether it [was] impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* (citing *Von Raab*, 489 U.S. at 656).

The Supreme Court agreed with the Eleventh Circuit that the testing method prescribed by the statute was relatively noninvasive. The Court then went on to answer the question of whether the certification requirement was warranted by a "special need." The Court's "precedents establish that the proffered special need for drug testing must be substantial — important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 1303. The Court concluded that Georgia failed to show a special need.

First, the Court pointed out that the program was not well designed to identify candidates as drug abusers nor was it an effective means of deterrence. The candidate could abstain from drug use in the period prior to the test since he knew when the test would be. The Court did not understand why ordinary law enforcement methods were not sufficient to detect addicted individuals, especially since the officials would be in the public limelight. Georgia relied most heavily on the Court's decision in *Von Raab*, which allowed for drug testing of Customs Service officers prior to promotion or transfer even in the absence of individualized suspicion. There also was no evidence in *Von Raab* of a particular problem among employees like there had been among the railroad workers in *Skinner* and the student athletes in *Vernonia*. Georgia claimed that the reasons for drug testing were closely aligned with the reasons given in *Von Raab*. In *Von Raab*, the Court held that the government had a compelling interest to ensure that the "front line interdiction personnel" were not only fit but of "impeachable integrity and judgment." *Id.* at 1304. Because of their work, customs officials are constantly exposed to organized crime and susceptible to bribery and blackmail. These reasons are similar to the ones that the State used as justification for enacting the statute. The Court pointed out that there was a "telling difference" between *Von Raab*'s and Georgia's drug testing provision. It is not "'feasible to subject employees [required to carry firearms or concerned with interdiction of controlled substances] and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments.'" *Id.* (citing *Von Raab*, 489 U.S. at 674). Candidates in public office are subject to heightened day-to-day scrutiny, and therefore drug abuse is detectable absent a drug testing program.

The Court concluded that Georgia, despite the reasons given, was merely interested in projecting an image of the State's commitment to the struggle against drug abuse. Georgia had no evidence of a particular problem among its officials, and the officials covered by the statute did not perform high risk safety sensitive tasks like the railroad employ-

ees. The certification did not immediately aid any interdiction effort as it did with the customs agents in *Von Raab*. In short, the need was only symbolic and not "special" and was not sufficient to override the privacy interest protected by the Fourth Amendment.

## DOUBLE JEOPARDY

### Sentence Enhancement

In *United States v. Watts*, 117 S.Ct. 633 (1997), two separate cases were filed in a single petition for certiorari. In both cases, the sentencing courts enhanced the defendants' sentences because of conduct for which they had been acquitted and, in both cases, the Ninth Circuit had reversed. The Supreme Court ruled that the lower court's decision conflicted with the clear implications of the Sentencing Guidelines, and the Supreme Court's prior decisions, particularly *Witte v. United States*, 115 S.Ct. 2199 (1995).

18 U.S.C. § 3661 states that "[n]o limitation shall be placed on information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Before the Sentencing Guidelines, it was "well established" that the sentencing judge could consider facts related to other charges even if the defendant had been acquitted of those charges. This discretion did not change with the Sentencing Guidelines. Quoting *Witte*, the Court held that "[r]elevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." The Court pointed to Section 1B1.4 of the Guidelines, which mirrors the language in § 3661. Section 151.3 also contains "sweeping language" as to what a sentencing judge may consider. The commentary to that section states that a judge may consider "conduct not formally charged or is not an element of the offense of conviction." The sentencing court may consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."

The Supreme Court commented that the Court of Appeals position was also based on an erroneous view of double jeopardy jurisprudence. "[S]entencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* at 636 (quoting *Witte*, 115 S.Ct. at 2207-08).

The Court also pointed out that the Ninth Circuit misunderstood the "preclusive effect of an acquittal, when it asserted that a jury 'rejects' some facts when it returns a verdict of not guilty." *Id.* at 637. There are different standards of proof that govern at trial and at sentencing. Acquittal does not necessarily mean that a defendant is innocent but that the prosecution failed to prove an essential element of the case beyond a reasonable doubt. The Court noted that an acquittal is not a finding of fact and does not preclude the Government from relitigating the fact under a lower burden of proof. The Guidelines state that the appropriate standard at sentencing is a preponderance of the evidence.

### CONTEMPT: DEFENSE ATTORNEYS

In *Pounders v. Watson*, 117 S.Ct. 2359 (1997), a criminal defense attorney, Penelope Watson, had been subject to summary contempt by the trial court for asking questions on a subject that had already been forbidden by the judge both in open court and at several bench conferences. The attor-

ney had petitioned for federal habeas relief, alleging that the summary contempt violated due process. The Ninth Circuit held the summary contempt invalid, but the Supreme Court reversed.

Watson's client was on trial for killing a gang member and was being tried with other codefendants. On three separate occasions, the counsel of different codefendants raised in open court the issue of the punishment the defendants might receive if found guilty. On each occasion, the trial judge stated that possible punishment was not a subject that should be discussed in open court. Ms. Watson, though not included in the bench conferences per se, was within six feet of the side bar conferences. She was also present in court when the trial judge stated that the subject would not be explored because it was prejudicial. The judge felt that since the victim was a gang member the jury would refuse to convict if they knew what a harsh penalty could be imposed on someone killing such an unworthy person.

Ms. Watson was questioning her client when she broached the forbidden subject. The prosecutor asked that she be admonished and she was. Immediately following the exchange, she asked the defendant if he knew he was facing life without parole. The judge held her in contempt. The judge gave Watson two opportunities to justify her actions. She stated that she thought her questions were relevant, and she did not think the questions were covered by his previous ruling. The judge found that her questions had permanently prejudiced the jury in favor of her client. The Ninth Circuit reversed, finding that her due process rights were violated because she did not have notice and the trial judge could not have known without a hearing if Watson's conduct was willful.

The Supreme Court stressed that a court needs summary contempt to preserve order in the courtroom. The Court held that the "the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, 'includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority before the public.'" *Id.* at 2362 (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)). The Court of Appeals had required a finding of repeated violations by a contemnor that was sufficiently disruptive to threaten the dignity of the court. The Supreme Court disagreed and pointed out that summary contempt convictions had been upheld after a single violation. The Court of Appeals had "glossed over" the state court findings that the comments had permanently prejudiced the jury. The Supreme Court held that this finding by the trial court, plus the assessment of Watson's clear defiance of a court order, was all that was needed to support a summary contempt conviction. Due process imposes limits but "states must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted." *Id.* at 2363. While the Court would not explore the limits of the states' latitude, the Court held that Watson's conduct fell well within the range of contemptuous conduct.

### DEFENSE OFFERS TO STIPULATE

In *Old Chief v. United States*, 117 S.Ct. 644 (1997), the Supreme Court held that the district court had abused its

discretion by failing to accept the defendant's offer to stipulate. Old Chief was charged with possession of a firearm by anyone with a prior felony conviction. Old Chief's previous conviction was assault causing serious bodily harm. To prove that a defendant has a previous conviction, the prosecution can introduce a record of judgment. To prevent the jury from hearing the nature of the previous offense, Old Chief offered to stipulate that he had been convicted of a felony. He feared undue prejudice if the jury heard the nature of his prior offense, and he claimed that his offer to stipulate rendered evidence of the name and nature of his prior offense inadmissible under Federal Evidence Rule 403. Rule 403 provides that otherwise relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs the evidence's probative value.

The prosecution refused to stipulate and introduced the judgment. The jury found Old Chief guilty. The Ninth Circuit ruled that the government was entitled to prove the prior conviction element using probative evidence and that a stipulation has no place in the Federal Rules of Evidence balancing act.

The Supreme Court held that Old Chief's argument that the name of his prior conviction as contained in the documentary evidence was irrelevant under FRE 401 and therefore inadmissible under FRE 402, was erroneous. "[E]videntiary relevance under Rule 401 [is not] affected by availability of alternative proofs of the element, [such as stipulation], to which it went . . . ." *Id.* at 649. "Exclusion must rest not on the ground that the other evidence rendered it 'irrelevant,' but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding." *Id.* at 650.

The Supreme Court saw the principal issue as the scope of a trial judge's discretion under FRE 403. The Court described unfair prejudice as the "capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific of the offense charged." *Id.* The danger in this case was that the jury, on hearing the nature of Old Chief's previous conviction, would assume that he had a propensity for this type of behavior and judge him as acting in the present situation in conformity with this type of character. FRE 404(b) addresses propensity reasoning directly by making evidence of other crimes, wrongs, or acts inadmissible to prove conformity with character.

Evidence of a prior conviction can have a legitimate purpose as well as an illegitimate one. It can be introduced, as the state did here, to prove an element of a crime. But when a single piece of evidence has two purposes, the evidence is subject to analysis under FRE 403, and its balancing between unfair prejudice and probative value. The prosecution is entitled to prove its case by admissible evidence of its own choice, and a "defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Id.* at 651. While conceding that the prosecution's burden needs "evidentiary depth," the Supreme Court held that this need had no application when the point at issue was the defendant's legal status. Congress did not distinguish between what types of felonies a person charged under § 922(g)(1) had to be convicted of, only that he had been convicted. The prosecution lost nothing in accepting the stipulation, while the Government's use of the judgment with the name of the offense did risk unfair prejudice by the jury. The Court reversed, concluding that the "risk of unfair prejudice did sub-

stantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available."

## WITHDRAWAL OF GUILTY PLEA

In *United States v. Hyde*, 117 S.Ct. 1630 (1997), Hyde had plead guilty to several fraud counts pursuant to a plea agreement that involved dismissal of four other charges. The District Court accepted the plea after an evidentiary hearing to determine whether Hyde was pleading guilty knowingly, voluntarily, and intelligently. The District Court deferred accepting the plea agreement until after the completion of the presentence report. The defendant attempted to withdraw his plea after its acceptance but before the court accepted the plea agreement. The District Court denied the motion, but the Court of Appeals reversed, holding that the defendant had "an absolute right" to withdraw his guilty plea before the District Court accepted the plea agreement. The Supreme Court held that the Court of Appeals' ruling not only contradicted the language of Federal Criminal Rules 11 and 32(e) but also would "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess." *Id.* at 1634.

Criminal Rule 32(e) provides that if a motion to withdraw a guilty plea is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows "any fair and just reason." Rule 11, the principal provision dealing with guilty pleas and plea agreements, does not preclude a district court from accepting a guilty plea without first accepting the plea agreement. Also, Rule 11(e) divides plea agreements into three types based on what the Government agrees to do. Hyde's plea was a type A agreement, where the Government agrees to move for dismissal of other charges. Rule 11(e)(2) explicitly states that, as to a type A agreement, the court may accept, reject, or defer acceptance/rejection of the plea agreement until after the presentence report. If the court rejects the plea, then Rule 11(e)(4) becomes significant. This section states that after rejection the court shall afford the defendant an opportunity to withdraw his plea for any reason without complying with Rule 32(e)'s "fair and just requirement." If a defendant may withdraw for any reason prior to acceptance of the plea agreement, then the rejection of an agreement as laid out in Rule 11(e)(4), with its explicit opportunity to withdraw, would have no significance.

The Supreme Court also concluded that it would be difficult to see any purpose for Rule 32(e), and its requirement to show a "fair and just reason" for withdrawing a plea if the Court of Appeals' holding were correct. Under the Court of Appeals' interpretation, there would be little time during which the "fair and just reason" standard would apply. It would be applicable only between the time the plea agreement was accepted and sentence was imposed and both acceptance and sentencing usually took place at the same time. The Supreme Court saw "no indication in the Rules to suggest that Rule 32(e) can be eviscerated in this manner, and the Court of Appeals did not point to one." *Id.* at 1635.

## SEXUAL PREDATOR STATUTES

In *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997), the Supreme Court upheld the Kansas Sexually Violent Predator Act in face of challenges on substantive due process, double jeopardy, and ex post facto grounds. The Court held that the Act's definition of "mental abnormality" satisfied the substantive due process requirements for civil commit-

ment and because the Act did not establish criminal proceedings, challenges on double jeopardy and ex post facto grounds were precluded.

Hendricks was the first to be committed under the Kansas procedures for civil involuntary commitment of persons who, due to a "mental abnormality or personality disorder" are likely to engage in "predatory acts of sexual violence." The legislature passed the Act to deal with repeat sex offenders because it believed that the civil commitment procedures were inadequate to cope with this subclass of mentally ill persons. Because the likelihood of repeated acts is high and the prognosis for rehabilitation in general and particularly in a prison setting is poor, the legislature established a special civil commitment procedure for sexually violent predators. A sexually violent predator is defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." The Act defined "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offense in a degree constituting such person as a menace to the health and safety of society."

The prosecutor files the petition for involuntary commitment. The court determines if probable cause exists to support a finding that the soon-to-be-released prisoner is a sexually violent predator. If the court makes such a determination, the individual is evaluated and then a trial is held. If the prosecutor proves beyond a reasonable doubt that the individual is a sexually violent predator, he is committed for control and treatment until he is no longer a danger to society. The Act has a number of procedural safeguards. The burden of proof is on the State and indigents are provided counsel and an examination by a mental health expert. A person may present and cross-examine witnesses and review documentary evidence. Once confined, an individual can, at any time, file a release petition or the State may file one if he is cured. The individual is afforded an annual review, with a court determining beyond a reasonable doubt that the individual still qualifies for confinement.

Hendricks was a repeat sex offender, and he admitted at his commitment hearing that he was not cured. The jury found beyond a reasonable doubt that he qualified as a sexually violent predator, and he was ordered committed.

The Supreme Court ruled that a finding of "mental abnormality" satisfied due process requirements. "Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from governmental action,' . . . that liberty interest is not absolute." *Id.* at 2079 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). In certain narrow circumstances, the courts have upheld involuntary civil commitment when a person's behavior threatens the public welfare. The Act requires more than a finding of dangerousness, which standing alone is not sufficient grounds for confinement. The Act also requires a "mental abnormality or personality disorder" with substantial evidence that the individual will commit the acts again if not confined. The Court found that the Act's requirements served to adequately limit confinement to those who were dangerous beyond their own control. The Court did not accept Hendricks' argument that mental abnormality did not mean the same thing as mental illness. The Court noted that psychiatrists and even the Court itself has used different expressions to mean the same thing. Although

substantive due process requires a finding of "mental illness," the Court has never required States to adopt any "particular nomenclature" when drafting civil commitment statutes. The Court held that Hendricks met the criteria relating to a person's inability to control his dangerousness set forth in this act and other valid civil commitment statutes.

On Hendricks' double jeopardy and ex post facto claims, the Court held that without the establishment of a criminal proceeding by the statute and confinement that amounts to punishment, these two prohibitions do not come into play. The Court concluded that the commitment was civil in nature. The Court did not accept the civil label as dispositive but rather looked at the intent of the confinement. Criminal confinement is meant to punish or serve as a deterrence. This type of confinement was meant to do neither. The Court remarked that Hendricks' focus on the confinement's potentially indefinite duration was misplaced since the Act tied duration to the stated purpose of confinement. Once cured, a person was free to leave. Confinement without some type of review was, at the most, for one year. If the State wishes to hold a person longer, the court must once again determine beyond a reasonable doubt that confinement is warranted.

Hendricks also argued that because there is no known treatment for his illness, the involuntary confinement really amounts to punitive treatment. The Court stated that the fact that a legislature's overriding concern is to keep the offender from the public and the goal of rehabilitation is incidental because treatment is almost nonexistent does not, in itself, turn the confinement into punishment. Hendricks' double jeopardy claim also failed because the Act did not impose punishment.

#### PHYSICIAN ASSISTED SUICIDE

In *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997), the Supreme Court considered a state statute making it a felony to assist a suicide. Four physicians, three terminally ill patients, and a nonprofit organization had sought declaratory judgment that the statute was unconstitutional because it burdened a liberty interest protected by the Constitution. The Supreme Court held that the right to assistance in committing suicide was not a fundamental liberty. The Court also concluded that the Washington statute was rationally related to a legitimate governmental interest.

The opinion provides a lengthy analysis of the Nation's history, legal traditions, and practices. Almost every State makes it a crime to assist suicide. For over 700 years the Anglo American common law tradition has been to punish suicide and the assistance in suicide. Suicide has been referred to as "self murder" and although the Nation has abolished some of its more harsh common law penalties, there has not been a widespread acceptance of suicide or the assistance in suicide. More importantly, the prohibitions against assisting suicide have never contained exceptions for those near death, hopelessly diseased, or unduly suffering. In recent years, because of improved medical technology, the assisted suicide prohibitions have been reexamined. The public focus has been on how best to protect one's dignity and independence in end of life decision making. While there has been acceptance of provisions for refusal of life sustaining medical treatment, most people have rejected any move toward assisted suicide.

"The Due Process Clause guarantees more than fair

process, and the 'liberty' it protects includes more than the absence of physical restraint." Id. at 2267 (quoting *Collins v. Harker Heights*, 503 U.S. 115 (1992)). Not only are the freedoms listed in the Bill of Rights protected, but also the right to marry, to have children, to direct the upbringing of one's children, to enjoy marital privacy, to use contraception, to enjoy bodily integrity, and to have an abortion. But the Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." Id. (quoting *Collins*, 503 U.S. at 125).

The Court's "established method of substantive-due-process analysis has two primary features: First, . . . [the Court has] regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Id. at 2268. Next, the Court has required a "careful description" of the asserted fundamental liberty interest. Id. (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The Court concluded that the asserted right, assisted suicide, had no place in the Nation's tradition and to embrace this right would be to reverse centuries of legal doctrine and practice. Although the Court had upheld the right to refuse lifesaving hydration and nutrition in *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990), this right was not grounded in abstract concepts of personal autonomy extending to a "right to die" but rather in long standing concepts and common-law rules that forced medication was battery and one had a right to refuse medical treatment. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court held that although protected liberties are referred to as "personal autonomy" rights, it does not necessarily follow that all important, personal and intimate decisions are constitutionally protected.

The Court found that the Washington statute easily complied with the constitutional requirement that a prohibition be rationally related to a legitimate governmental interest. The government could legitimately seek to preserve human life and prohibit intentional killing. Suicide was viewed as a serious public health problem especially among the more vulnerable in society like the young, the elderly, the poor, the disabled and those suffering from mental disorders and depression caused by untreated pain. It is necessary to protect these vulnerable groups from psychological and financial pressures to end their lives and thus avoid a slippery slope towards voluntary or even involuntary euthanasia. The Government has an interest in protecting the integrity of the medical profession. The Court concluded that these interests were "unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection." 117 S.Ct. at 2275.

### Equal Protection

In *Vacco v. Quill*, 117 S.Ct. 2293 (1997), the Supreme Court determined that New York's prohibition on physician assisted suicide did not violate the Equal Protection Clause. In New York it is a crime to intentionally cause or aid another to commit or attempt suicide. A patient may, however, refuse even lifesaving medical treatment, and the physician who honors that request is free from punishment. Physicians sued the State's Attorney General, claiming that honoring a request for refusal of treatment and physician assisted suicide were essentially the same thing and since the State allowed one and not the other the State was treat-

ing similarly situated patients differently.

The Supreme Court recognized that the Equal Protection Clause, while requiring that States must treat like cases alike, does not require the States to treat unlike cases accordingly. Since the statute does not involve a fundamental right or a suspect class, it is entitled to a strong presumption of validity. The Court found that New York was treating all competent patients evenhandedly. All could refuse medical treatment, and no one was permitted to be assisted in the act of suicide. The Court of Appeals saw the class as terminally ill patients, all similar except one class was allowed to "hasten death" and one was not. In contrast, the Supreme Court saw a distinction between the class of persons refusing life sustaining treatment and those asking for physician assisted suicide. The Court said that this distinction was rational and supported by most States and the A.M.A.

The Court concluded that the purpose of allowing a patient to refuse treatment was not to allow the patient to "hasten death" but rather to respect his wishes concerning futile treatment. A person refusing treatment may not have the intent to die but a person asking for help in committing suicide must necessarily have that intent. The Court held that if a classification is rationally based it was of no constitutional concern that particular groups (such as those terminally ill who are not on life support) receive uneven treatment. The Supreme Court also found that the legislative classification in the statute's ban on assisted suicide while permitting refusal of treatment was rationally related to valid State interests such as preserving life, preventing suicide, physician integrity, and protection of vulnerable persons.

### CONCURRENT SENTENCING

In *United States v. Gonzales*, 117 S.Ct. 1032, (1997), three respondents had been convicted under state laws for drug trafficking and the use of firearms during drug trafficking crimes. They had begun to serve their state sentences when they were also convicted on various similar federal drug charges and, in particular, 18 U.S.C. § 924(c), which covers the use of firearms during drug crimes. The District Court had concluded that the portion of their federal sentences attributable to their drug convictions could run concurrently with their state sentences, but the plain language of § 924(c) required that the remaining five year sentence, attributable to the use of firearms, would run consecutively. Section 924(c) states that "the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the . . . drug trafficking crime in which the firearm was used or carried." (emphasis added).

The Tenth Circuit vacated the firearms sentences and held that the sentences could run concurrently, finding section 942(c)'s language ambiguous. The Supreme Court granted certiorari to determine if the phrase "any other term of imprisonment" means what it says or only applies to federal sentences. The Court held that the word "any" had an expansive meaning and the statute did not refer only to federal sentences. The Court pointed out that the legislature had expressly limited "any crime" to federal crimes and had not chosen to place a similar restrictive modifier when it spoke of "any sentence." The Supreme Court found nothing remarkable or ambiguous about Congress' choice of words in the statute. The Court held that a federal court may not direct that a prison sentence under § 924(c) run concurrently with a state imposed sentence because the plain meaning of the statute makes it clear that it "shall not" do so.

## PAROLE REVOCATION

In *Young v. Harper*, 117 S.Ct. 1148 (1997), the Supreme Court ruled that Oklahoma's Preparole Conditional Supervision Program was sufficiently similar to parole to require the same due process protections set forth in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

Oklahoma has two programs under which an inmate can be conditionally released before the end of his sentence, parole and preparole. Preparole becomes an option when the prisons exceed a certain percentage over capacity. Harper, who had served 15 years of a life sentence for two murders, was simultaneously recommended for parole and released under the preparole program. While the Pardon and Parole Board decides who will be released under the preparole program, the Governor has the final say on parole. After Harper had been out for five months, the Governor denied his petition for parole and Harper was ordered back to prison.

The essence of parole is the early conditioned release from prison before the end of one's sentence, and the nature of the interest of the parolee is continued liberty. The Court found that the preparole program served the same purpose and involved the same liberty interest. The petitioners tried to distinguish preparole from parole, but the Court found these differences to be merely "phantom differences" or too insignificant to place removal from the preparole program beyond due process procedural protections. The Court saw three real differences in the program: (1) the Pardon and Parole Board decides who is eligible for the preparole program and the Governor has the final say on parole, (2) escaped parolees are treated as if they escaped from prison and escaped parolees are subject only to parole revocation, and (3) parolees can not leave the state for any reason and parolees may leave at the discretion of the parole officer. The Court concluded that these differences only set the preparole program apart from the specific terms of parole in Oklahoma, but not apart from the more general class of parole identified in *Morrissey*, and therefore removal from either program required due process protection.

## EX POST FACTO

In *Lynce v. Mathis*, 117 S.Ct. 891 (1997), the Supreme Court considered an ex post facto claim arising from the retroactive cancellation of a prisoner's provisional early release credits, which had been awarded to alleviate prison overcrowding. In 1983, the Florida Legislature established the early release program, and Lynce was released in 1992. Subsequently, the state Attorney General interpreted a 1992 statute as canceling retroactively credits for those who had committed murder or attempted murder. Because Lynce fell into this category, he was rearrested and returned to prison.

The Supreme Court ruled that this action violated the Ex Post Facto Clause. The Clause is violated when the state increases punishment of an offense after it has been committed. The prohibition applies when the law is (1) retrospective and (2) disadvantages the offender. The Court stated that the motivation of the legislature was irrelevant. For the Court, the critical issue was the effect of the legislation — here, the cancellation of 1,869 days of accumulated provisional credits and whether the cancellation lengthened the petitioner's incarceration. "[R]etroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern the initial sentencing, impli-

cates the Ex Post Facto Clause because such credits are 'one determinant of petitioner's] prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed.'" Id. at 898 (quoting *Weaver v. Graham*, 450 U.S. 24, 32 (1981)). The Court distinguished a prior case, *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597 (1995). "Unlike the California amendment at issue in *Morales*, the 1992 Florida statute did more than simply remove a mechanism that created an opportunity for early release for a class of prisoners whose early release was unlikely; rather it made ineligible for early release a class of prisoners who were previously eligible — including some, like petitioner, who had actually been released." 117 S.Ct. at 898.

## RETROACTIVITY

In *Lambrix v. Singletary*, 117 S.Ct. 1517 (1997), the Supreme Court granted certiorari to determine whether the Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), announced a "new rule" as defined in *Teague v. Lane*, 489 U.S. 288 (1989), and therefore could not be applied retroactively to petitioner's federal habeas proceeding.

Lambrix was given a death sentence in Florida, a "weighing state," and sought post conviction relief. Florida has a three part sentencing procedure. First, the jury renders an advisory opinion by weighing statutorily specific aggravating circumstances against any mitigating factors. Second, the trial court does an independent weighing of the aggravating and mitigating factors and enters a sentence of life imprisonment or death. Third, the Florida Supreme Court reviews all cases in which the defendant is sentenced to death. Lambrix contended that the jury instruction concerning the "especially heinous and atrocious" aggravating circumstance failed to provide sufficient guidance to limit the jury's discretion and therefore violated the Eighth Amendment. The State had contended that Lambrix was not entitled to relief because the trial court had properly used a narrower aggravator.

In *Espinosa*, decided after Lambrix's conviction, the Supreme Court held that if "a 'weighing state' requires the sentencing trial judge to give deference to a jury's advisory recommendation, neither the judge *nor the jury* is constitutionally permitted to weigh invalid aggravating circumstances." 117 S.Ct. at 1524. Lambrix was seeking to apply this principle retroactively, and the State contended that the holding in *Espinosa* is a "new rule" under *Teague* and could not be relied on in a federal habeas proceeding.

In *Teague*, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. (citing 489 U.S. at 310). To apply *Teague*, a federal court must: (1) determine the date on which conviction became final, (2) survey the legal landscape as it then existed and determine whether a state court, considering the defendant's claim at the time the conviction became final, would have felt compelled by existing precedent to conclude that the rule was required by the Constitution, and (3) if the announced rule is considered a new rule, determine whether the relief sought falls within two narrow exceptions.

The Supreme Court concluded that the holding in *Espinosa* was not dictated by then existing precedent and therefore was a "new rule" as defined by *Teague* and not to apply retroactively. *Espinosa* did not rely on any controlling

precedent and only cited one case using a "cf.," which shows that the supporting authority is dictum or analogy and not controlling. The three cases that Lambrix relied on to define the legal landscape were distinguished by the Court. All three cases dealt with impermissibly vague aggravators and supported the proposition that aggravators must be narrowed to prevent arbitrary imposition of the death sentence. But, a sentencing jury's consideration of a vague aggravator can be cured on appeal and the Court was more concerned, in these cases, by the failure of the appellate court to cure the error and not necessarily concerned with the jury's consideration of a vague aggravator standing alone. The Supreme Court, after reviewing the legal landscape at

the time of Lambrix's conviction, was persuaded that a "reasonable jurist considering Lambrix's sentence in 1986 could have reached a conclusion different from the one *Espinosa* announced in 1992." *Id.* at 1527.

Even though *Espinosa* is a new rule, the petitioner's claim could fall under two exceptions to the non-retroactivity doctrine. The Supreme Court held that neither exception applied. *Espinosa* does not decriminalize a class of conduct nor prohibits the imposition of the death sentence on a particular class of individuals, nor does *Espinosa* stand for a watershed rule of criminal procedure that implicates the criminal proceeding's fundamental fairness and accuracy.