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THE UNITED STATES SUPREME COURT: THE 1987-1988 TERM (PART I)

Paul C. Giannelli

*Albert J. Weatherhead III & Richard W. Weatherhead
Professor of Law Case Western Reserve University*

The 1987-1988 Term of the United States Supreme Court ended in June. This is the first of two articles reviewing the major decisions involving criminal procedure decided this Term.

SEARCH AND SEIZURE

Expectation of Privacy

California v. Greenwood, 108 S.Ct. 1625 (1988), involved the search of a narcotic suspect's trash. After receiving a tip and observing suspicious activity at Greenwood's house, the police requested the regular trash collector to pick up and turn over Greenwood's garbage. A search revealed items indicative of narcotics use. Based on this information, a warrant was issued, and cocaine and hashish were discovered in Greenwood's house. The California courts suppressed the evidence because the warrantless search of the trash was not based on probable cause.

On review, the U.S. Supreme Court reversed. The threshold question that must be asked when analyzing search and seizure issues is whether the Fourth Amendment applies. If the Amendment is not applicable, neither probable cause nor a search warrant is required. In a series of cases the Court has held the Amendment applicable only to certain governmental activities, that is, those activities that intrude upon a citizen's justifiable expectations of privacy. *Katz v. United States*, 389 U.S. 347 (1967). Searches of homes, offices, cars, and containers are covered by the Fourth Amendment, as is electronic surveillance. In contrast, the police use of informants, beepers, or pen registers is not protected by the Amendment. *United States v. White*, 401 U.S. 745 (1971); *United States v. Knotts*, 460 U.S. 276 (1983); *Smith v. Maryland*, 442 U.S. 735 (1979). Similarly, searches of jail cells, open fields, and bank records also fall outside Fourth Amendment protection. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Miller*, 425 U.S. 435 (1976). In all these situations, the Court has found no justifiable expectation of privacy.

In *Greenwood* the Court held that the inspection of trash was not a "search" within the meaning of the Fourth Amendment. The warrantless search of trash left on the curb would be protected by the Fourth Amendment only if the defendant manifested a subjective expectation of privacy in his garbage that society accepted as objectively reasonable. According to the Court, Greenwood's subjective expectations were not determinative because society was not prepared to accept that expectation as reasonable.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public . . . Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondent's trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," . . . respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded. 108 S.Ct. at 1628-29.

Stop and Frisk

Michigan v. Chesternut, 108 S.Ct. 1975 (1988), raised the issue of whether an investigatory pursuit by the police constituted a seizure of the person within the meaning of the Fourth Amendment. Four policemen in a marked car were on a routine patrol when they observed Chesternut and another man. As soon as Chesternut saw the police, he began to run. The officers followed and soon caught up to him. As they drove alongside of Chesternut, he began to discard a number of packets. One officer got out of the car and examined the packets, finding pills which he believed contained cocaine. Chesternut was arrested, taken to the stationhouse, and

Public Defender Hyman Friedman
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113

Telephone (216) 443-7223

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searched. Additional drugs and a hypodermic needle were discovered. Chesternut moved to suppress the evidence, and his motion was granted based on prior state precedents, which had held that an investigatory pursuit was a seizure under *Terry v. Ohio*, 392 U.S. 1 (1968), and flight alone did not amount to reasonable suspicion.

The U.S. Supreme Court reversed. Chesternut argued that all police chases were seizures. In contrast, the State argued that a seizure did not occur until the suspect stopped, and thus chases were never seizures. The Court rejected both contentions, adopting instead a middle ground. In *Terry* the Court wrote: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16. Later the Court adopted Justice Stewart's definition of a seizure. Under this test, a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Applying this test to the facts, the Court found no seizure. The police did not activate a siren, command Chesternut to stop, or display weapons. Neither did they use the car to block his path or control his direction or speed. According to the Court, "[w]hile the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure." 108 S.Ct. at 1980. The brief acceleration to catch up with Chesternut and the short drive alongside were not so intimidating that a reasonable person would believe they could not go about their business. Thus, since there was no seizure, there was no need to justify the pursuit with reasonable suspicion.

Independent Source

The defendants in *Murray v. United States*, 43 Crim. L. Rptr. 3168 (1988), were placed under surveillance for suspected drug violations. They were followed to a warehouse in South Boston. After they had left the warehouse, the police entered without a warrant, viewing numerous burlap-wrapped bales that were later found to contain marijuana. The police left without disturbing the bales, kept the warehouse under surveillance, and applied for a search warrant. In applying for the warrant the police did not mention their prior entry and did not rely on any observations made during that entry. When the warrant was issued, the police immediately reentered the warehouse and seized 270 bales of marijuana.

On review, the Supreme Court ruled that the search could have been based on an untainted "independent source." The independent source rule was first recognized by Justice Holmes soon after the exclusionary rule was applied to federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914). Justice Holmes wrote:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this

does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

The rule was applied to Fifth and Sixth Amendment violations (e.g., confessions and lineups) in later cases. See *Nix v. Williams*, 467 U.S. 431 (1984); *United States v. Wade*, 388 U.S. 218, 240-42 (1967). In a recent case, the Court explained the rule as follows:

[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

The Court believed that the independent source rule may be applicable in *Murray*. According to the Court, the ultimate question was "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." 43 Crim. L. Rptr. at 3170-71. There would be no independent source if the decision to seek the warrant was prompted by what the police had seen during the illegal entry, or if information obtained during that entry was used to establish the probable cause necessary for the warrant. The Court remanded on this issue, so that the District Court could make further findings. In particular, whether "the agents would have sought a warrant if they had not earlier entered the warehouse." *Id.*

CONFESSIONS

Miranda

The defendant in *Arizona v. Roberson*, 43 Crim. L. Rptr. 3085 (1985), was arrested at the scene of a burglary. Advised of his *Miranda* rights, he requested counsel. Three days later, while still in custody, a different police officer questioned him about a different burglary. This officer was unaware of the fact that Roberson had requested an attorney at the time of his arrest. *Miranda* warnings were again read and an incriminating statement was obtained.

On review, the Supreme Court found a *Miranda* violation. The prosecution argued that *Michigan v. Mosley*, 423 U.S. 96 (1975), controlled. In *Mosley* the defendant asserted his right to remain silent but did not request counsel. He was later questioned by a different police officer about a different crime. This interrogation led to a confession. The Court upheld the admissibility of the confession, finding that the police had "scrupulously honored" the defendant's decision to remain silent: "[T]he police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been the subject of the earlier interrogation." *Id.* at 105-06. The Court, however, had established a different rule when a suspect claims the right to

counsel. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court wrote:

[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself *initiates* further communication, exchanges, or conversations with the police. *Id.* at 484-85 (emphasis added).

The Court ruled that the *Edwards* "initiation" rule applied. In the Court's view, the fact that a different crime was involved in the second interrogation did not matter. The compulsion remained the same and was not dissipated by a second set of warnings, especially after prolonged police custody. Moreover, the fact that the second officer was unaware of Robeson's initial request for counsel was irrelevant. That officer was obliged to determine whether a demand for an attorney had been made: "The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer." 43 Crim. L. Rptr. at 3088.

Right to Counsel

Patterson v. Illinois, 43 Crim. L. Rptr. 3146 (1988), involved a confession and the Sixth Amendment right to counsel. Patterson was arrested for his participation in a gang fight, which he admitted after receiving *Miranda* warnings. He was also suspected of a murder that occurred after the gang fight, but he denied any knowledge of this incident. He was subsequently indicted for the murder. While being transferred to a different jail, he voluntarily made some incriminating statements. He was promptly advised of his *Miranda* rights and confessed.

The Supreme Court ruled that Patterson's right to counsel had not been violated. The Sixth Amendment right to counsel differs from the *Miranda* rights, which are based on the Fifth Amendment privilege against self-incrimination and also includes a right to counsel. The Sixth Amendment is triggered by the commencement of judicial adversary proceedings. Here, the indictment triggered Patterson's right to counsel. Patterson argued that the indictment placed him in the same position as a pre-indictment suspect who, while being interrogated, asserts the Fifth Amendment right to counsel. Under *Edwards v. Arizona*, 451 U.S. 477 (1981), such a suspect may not be questioned again unless he *initiates* the meeting with the police. The Court rejected this argument. The essence of *Edwards* is the preservation of "the integrity of an accused's choice to communicate with the police only through counsel." Because Patterson never requested counsel, this policy was never implicated.

Patterson's second argument concerned the validity of his decision to waive his right to counsel and speak to the police. In particular, whether the *Miranda* warnings, which are directed to Fifth Amendment rights, also provide sufficient notice for the waiver of Sixth Amendment rights. The Court held that, in this context at least, the warnings are sufficient. The *Miranda* warnings informed Patterson of his right to consult an attorney and the consequences if he spoke without an attorney. According to the Court, there was little else to tell him about the right to counsel.

As a general matter, then, an accused who is

admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one. We feel that our conclusion in a recent Fifth Amendment case is equally apposite here: "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statement to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Id.* at 3149 (quoting *Moran v. Burbine*, 475 U.S. 412, 422-23 (1986)).

Accordingly, the Court rejected the notion that a Sixth Amendment waiver was "more demanding" than a Fifth Amendment waiver, a position that had been advocated by some commentators and adopted by a number of courts.

RIGHT TO COUNSEL

Counsel of Choice

The defendant in *Wheat v. United States*, 108 S.Ct. 1692 (1988), along with numerous codefendants, was charged with a far-flung drug distribution conspiracy. Two of the codefendants, Gomez-Barajas and Bravo, were represented by the same attorney, Eugene Iredale. Bravo pleaded guilty to one count of transporting marijuana, and Gomez-Barajas offered to plead guilty to tax evasion and illegal importation. At this point in the proceedings Iredale informed the trial court that Wheat wanted Iredale to represent him. The prosecution objected to the substitution of Iredale as counsel on the ground that his representation of Gomez-Barajas and Bravo created a serious conflict of interest. There was a possibility that Bravo would be called as a prosecution witness at Wheat's trial, in which case Iredale might not be able to cross-examine him in a meaningful way. Despite this conflict, Gomez-Barajas, Bravo, and Wheat were willing to waive their right to conflict-free counsel. The trial court, however, refused to permit the substitution. Wheat went to trial with his original lawyer, was convicted, and appealed.

The U.S. Supreme Court upheld the trial court's decision. The Court first pointed out the qualified nature of the right to choose one's own counsel. For example, an accused may not choose as an advocate a person who is not a member of the bar. Similarly, an accused cannot insist on an attorney that he cannot afford. Here, the issue was the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same conspiracy. In prior cases the Court had held that multiple representation may raise a conflict of interest and thus violate the right to effective assistance of counsel:

Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from

arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978).

A defendant's waiver of the right to conflict-free counsel would not automatically cure the problem. The federal courts have an independent interest in ensuring that trials are conducted in conformance with ethical standards and just verdicts are rendered. Moreover, a trial court must make its decision before all the evidence is introduced at trial. This fact makes the decision more difficult. In many cases even the attorneys will find it difficult to predict how the trial will develop; a "few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants." *Id.* at 1699.

Accordingly, trial courts must be allowed "substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* In this case, the motion for substitution was made two days before trial in a complex conspiracy case with each defendant playing different roles. Under these circumstances, the trial court's refusal to permit substitution of counsel was not an abuse of discretion.

Appointed Counsel — Frivolous Appeals

McCoy v. Court of Appeals of Wisconsin, District 1, 108 S.Ct. 1895 (1988), concerned the scope of court-appointed appellate counsel's responsibility to an indigent client. In *Anders v. California*, 386 U.S. 738 (1967), the Court held that appellate counsel could not withdraw from an appeal by simply advising the appellate court of his conclusion that the appeal was frivolous. Instead, counsel must include with the request to withdraw "a brief referring to anything in the records that might arguably support the appeal." *Id.* at 744. The Wisconsin Supreme Court adopted a rule that imposed an additional requirement in this context. The brief must also include "a discussion of why the issue lacks merit." *McCoy*, an indigent, was convicted of abduction and sexual assault. He challenged the "discussion" requirement as violative of *Anders* and the Sixth Amendment.

On review, the Supreme Court upheld the constitutionality of the discussion rule. Initially, the Court reviewed the difference between counsel's obligations at trial and appeal. At trial, the defendant is presumed innocent. It is proper for counsel to remain silent and require the prosecution to carry its burden of proof. Once convicted, however, the presumption of innocence no longer applies and counsel must assert specific grounds for reversal. This requirement carries with it ethical obligations.

Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law, or consume the time and the energies of the court or the opposing party by advancing frivolous arguments. An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal. 108 S.Ct. at 1900. If counsel determines the appeal would be frivolous, he must inform his client that it would be unethical to go

forward with the appeal. This is true whether counsel is retained or appointed. Appointed counsel, however, cannot withdraw without permission of the court. This presents a dilemma, creating an apparent conflict between counsel's obligation to the court and his obligation to his client. *Anders* attempted to resolve this dilemma.

An *Anders* brief "was designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability." *Id.* at 1902. It also provides the court with a basis for determining whether counsel's judgment about the merits of an appeal is correct. The Wisconsin "discussion" rule requires counsel to explain why the appeal lacks merit by, for example, summarizing case or statutory authority which support counsel's conclusions. As the Court noted, the rule does go beyond *Anders*. "Instead of relying on an unexplained assumption that the attorney has discovered law or facts that completely refute the arguments identified in the brief, the Wisconsin court requires additional evidence of counsel's diligence." *Id.* at 1904. According to the Court, this is consistent with *Anders* and may in fact aid the client. The rule provides "an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous." *Id.*

RIGHT OF CONFRONTATION

Face-to-face Accusation

The defendant in *Coy v. Iowa*, 56 Law Week 4931 (1988), was charged with sexually assaulting two 13-year old girls. At trial the prosecution moved to have the girls testify either via closed-circuit television or behind a screen. Both procedures were authorized by statute. The trial court opted to use a large screen. *Coy* objected, asserting his right of confrontation. The Iowa courts rejected this claim.

When the issue reached the U.S. Supreme Court, it reversed. The Court first reviewed its prior cases. In an early case, *Kirby v. United States*, 174 U.S. 47 (1899), the Court had written: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at trial, upon whom he can look while being tried . . ." *Id.* at 55. Similarly, in a recent case, the Court observed: "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

Next, the Court found that face-to-face confrontation was essential to fairness and the integrity of the fact-finding process. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly." 56 Law Week at 4933. In the Court's view, the importance of this right outweighed its drawbacks.

[F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a

truism that constitutional protections have costs. *Id.*

The Court declined to determine whether an exception to face-to-face confrontation could be justified. The State argued that the statute created a presumption of trauma for child abuse victims. The record in this case, however, did not support such a finding. "Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.* at 4934. The Court then sent the case back to the state courts to consider the harmless error rule.

Justice O'Connor, who joined the majority opinion, also wrote a concurring opinion, in which Justice White joined. Their votes were necessary for a majority. She wrote:

I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony. *Id.*

She specifically referred to state statutes that authorized closed circuit television and video-taped testimony. Thus, "if a court makes a case-specific finding of necessity," the compelling state interest of protecting the child could outweigh the defendant's right.

Hearsay

United States v. Owens, 108 S.Ct. 838 (1988), involved a confrontation-hearsay issue. John Foster, a correctional counselor, was assaulted in a federal prison. He suffered a fractured skull, which resulted in an impaired memory. While hospitalized, he identified Owens as his attacker and picked his picture from an array of photographs. At trial, Foster testified about the attack, including his identification of Owens while in the hospital. On cross-examination, however, he admitted that he could not remember seeing his assailant. Foster also admitted that he could not remember any of the numerous visitors who he saw in the hospital, except for the F.B.I. agent who interviewed him. He could not remember whether any of these visitors suggested Owens as the attacker. The defense attempted to refresh his recollection with hospital records, including one in which he attributed the assault to a third party. Owens was convicted and appealed on hearsay and confrontation grounds.

The Supreme Court rejected both arguments. The Court concluded that the Confrontation Clause did not bar testimony concerning a prior out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification. According to the Court, the Clause guarantees only an *opportunity* for effective cross-examination. This right is satisfied when the defendant has the opportunity to bring out such matters as a bad memory.

The weapons available to impugn the witness's statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as demonstrated by defense counsel's summation in this very case, which emphasized Foster's memory loss and argued that his

identification of respondent was the result of the suggestions of people who visited him in the hospital. *Id.* at 843.

The Court also considered a hearsay objection. Federal Evidence Rule 801(d)(1)(C) excludes from the hearsay rule a prior statement "of identification of a person made after perceiving the person," if the declarant "testifies at trial or hearing and is subject to cross-examination concerning the statement." The Court ruled that the requirements of this provision had been satisfied; the witness had been subjected to cross-examination "concerning the statement." He was placed on the stand, took the oath, and responded willingly to questions. His loss of memory did not preclude cross-examination on the statement.

Just as with the constitutional prohibition, limitations on the scope of examination . . . may undermine the process to such a degree that meaningful cross-examination within the intent of the rule no longer exists. But that effect is not produced by the witness's assertion of memory loss — which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. Rule 801(d)(1)(C), which specifies that the cross-examination need only "concer[n] the statement," does not on its face require more. *Id.* at 844.

(Ohio Evidence Rule 801(D)(1)(c) is identical to the federal rule except for the addition of one word).

FIFTH AMENDMENT

Comment Upon Failure to Testify

The defendant in *United States v. Robinson*, 108 S.Ct. 864 (1988), was convicted of mail fraud. The prosecution introduced a number of out-of-court statements made to the police by Robinson, who did not testify. In closing argument Robinson's counsel tried to minimize the prior statements by suggesting that his client had not been given the opportunity to explain his actions. In response, the prosecutor told the jury: "He could have taken the stand and explained it to you . . ."

The Sixth Circuit ruled that this comment violated the Fifth Amendment, citing *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin* the Court wrote:

[Comment on the refusal to testify] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. *Id.* at 614.

Accordingly, the Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615.

The Court in *Robinson*, however, distinguished *Griffin*.

It is one thing to use the Fifth Amendment as a shield; it is quite another thing to use it as a sword:

Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated. But where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege. *Id.* at 869.

Corporate Records

Braswell v. United States, 43 Crim. L. Rptr. 3103 (1988), involved the Fifth Amendment in the corporate context. Braswell controlled two corporations. State law required three directors. His wife and mother were the other directors but did not exercise any authority over the business affairs of the corporations. In August 1986 a federal grand jury issued a subpoena to Braswell, in his capacity as president, for the books and records of both corporations. Braswell moved to quash the subpoena, arguing that the act of producing the records would incriminate him in violation of the Fifth Amendment.

On review, the Supreme Court rejected this argument, and thereby resolved an issue that had divided the lower courts. Braswell's situation fell between two lines of cases. One line of cases had recognized that the *act of producing documents* in response to a subpoena may trigger Fifth Amendment protection:

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Fisher v. United States*, 425 U.S. 391, 410 (1976).

Later, in *United States v. Doe*, 465 U.S. 605 (1984), the Court considered a claim by a sole proprietor that the

compelled production of business records violated the Fifth Amendment. The Court upheld the claim, accepting the lower court's finding that by producing the records, Doe would admit that the records existed, were in his possession, and were authentic. Braswell argued that as sole shareholder he was in the same position and that Doe controlled.

A second line of cases, however, thwarted his claim. These cases recognized the "collective entity rule." In an early case, *Hale v. Henkel*, 201 U.S. 43 (1906), the Court had held that a corporation was not protected by the Fifth Amendment. Subsequently, the Court held that the custodian of corporate records could not assert the privilege in response to a subpoena, even if those records incriminated him. *Dreier v. United States*, 221 U.S. 394 (1911); *Wilson v. United States*, 221 U.S. 361 (1911). The rationale of these cases was extended to labor unions in *United States v. White*, 322 U.S. 694 (1944), and to a small partnership in *Bellis v. United States*, 417 U.S. 85 (1974). In effect, a person who holds the records of a collective entity in a representative capacity cannot assert his own privilege to preclude production. The Court held that this line of authority controlled: "A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds." 43 Crim. L. Rptr. at 3106.

Underlying the Court's decision was a concern for white-collar crime prosecutions:

[R]ecognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime," one of the most serious problems confronting law enforcement authorities. "The greater portion of evidence of wrongdoing by an organization or its representative is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." *Id.* at 3107 (quoting *United States v. White*, 322 U.S. 694, 700 (1944)).