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UNITED STATES SUPREME COURT: 1988-89 TERM

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This article summarizes some of the United States Supreme Court's recent decisions in criminal law. In terms of its impact on federal prosecutions, the most important decision of the term may have been *Mistretta v. United States*, 109 S.Ct. 647 (1989), in which the Court upheld the sentencing guidelines promulgated under the Sentencing Reform Act. The guidelines were challenged on a number of grounds, including separation of powers and improper delegation of legislative authority.

SEARCH AND SEIZURE

Aerial Surveillance

The defendant in *Florida v. Riley*, 109 S.Ct. 693 (1989), lived in a mobile home on five acres of rural property. A greenhouse was located 10 to 20 feet behind the home. A wire fence surrounded both structures, and a "Do not enter" sign had been posted. Two sides of the greenhouse were enclosed. Although the other two sides were open, trees, shrubs, and the home obscured the view. Panels, some translucent and some opaque, covered the roof. Two panels, however, were missing.

After receiving an anonymous tip, the local sheriff went to Riley's property to investigate the cultivation of marijuana. Because the contents of the greenhouse could not be viewed from the road, the sheriff used a helicopter. At the height of 400 feet, he saw what he thought was marijuana and subsequently obtained a search warrant.

Riley moved to suppress the seized marijuana, arguing that the aerial surveillance was a search, conducted without probable cause or a warrant. The Court rejected his argument. A plurality believed that the case was governed by *California v. Ciraolo*, 476 U.S. 207 (1986). In *Ciraolo* a fixed-wing aircraft flew over property at 1,000 feet, from which point marijuana was seen growing in the defendant's yard. The Court ruled that the observations made from the plane did not constitute a search within the meaning of the Fourth Amendment because a person does not have a reasonable expectation of privacy in this context. The Court wrote:

In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitu-

tionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye. *Id.* at 215.

The plurality in *Riley* did not believe that a helicopter, flying at 400 feet, should be treated differently. Even though a fixed-wing plane could not travel that low, it was legal for a helicopter to fly at that altitude. Any member of the public could have rented a helicopter and viewed the greenhouse. The sheriff did no more. The plurality, however, did comment: "This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law." 109 S.Ct. at 697. The plurality suggested that an interference with Riley's right to use the greenhouse, or the revelation of intimate details of the home, or undue noise, wind, or threat of injury might lead to a different result.

Justice O'Connor concurred in the judgment but wrote a separate opinion. She believed that "the plurality's approach rested too heavily on compliance with FAA regulations whose purpose is to promote air safety and not to protect" Fourth Amendment values. *Id.* Simply because a helicopter can view the curtilage legally at almost any height does not mean that a person does not have an expectation of privacy from such an observation. Riley lost, in her view, because there was reason to believe that there is considerable public use of the airspace at 400 feet. Thus, any expectation of privacy that he did possess was not one that society was prepared to accept as reasonable. She warned, however, that flights at lower altitudes may be sufficiently rare to violate reasonable expectations of privacy.

Stop and Frisk

Andrew Sokolow purchased two round-trip airline tickets from Honolulu to Miami. *United States v. Sokolow*, 109 S. Ct. 1581 (1989). He paid cash, \$2,100, from a roll of \$20 bills. He did not check any luggage and appeared nervous. The ticket agent contacted the police, and

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subsequent investigation revealed that the telephone number listed did not match the name (Andrew Kray), under which he was traveling. Moreover, his stay in Miami was to last only 48 hours even though the trip from Honolulu to Miami takes 20 hours. When he returned to Honolulu, he was stopped by the police, and a drug dog alerted when it sniffed his bag; 1,063 grams of cocaine were found. The Ninth Circuit held the stop invalid, finding that the DEA agents did not have reasonable suspicion to stop.

The U.S. Supreme Court reversed. Under *Terry v. Ohio*, 392 U.S. 1 (1968), the police can stop and briefly detain a person if the officer has reasonable suspicion supported by articulable facts that criminal activity may be afoot. In determining reasonable suspicion, the courts look at the totality of the circumstances. According to the Court, the facts supported a finding of reasonable suspicion, a standard which requires less than a showing of probable cause. The use of an alias, although not determinative, is a relevant fact. The use of cash, amounting to \$2,100 and paid in \$20 bills, is also relevant. Moreover, few travelers would spend 20 hours on a flight and then only 48 hours in Miami before returning home. "Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." *Id.* at 1586.

The fact that some of these factors are part of the DEA drug courier profile did not undercut their validity. The Court wrote:

A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent. *Id.* at 1587.

Drug Testing

National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989), involved the urinalysis program operated by the United States Customs Service. One of the Service's responsibilities is the seizure of contraband, including illegal drugs. Employees who sought a transfer or promotion to certain positions were subject to drug testing—those involved in drug interdiction, those who carried weapons, and those who dealt with classified information. The Union challenged the testing program, arguing that it violated the Fourth Amendment rights of the employees.

The Supreme Court upheld the testing program, at least as it applied to those employees who were involved in drug interdiction or who carried firearms. Initially, the Court concluded that the urinalysis program was a governmental search and thus subject to the Fourth Amendment. Accordingly, the critical question was whether the search was reasonable. Typically, a reasonable search is one based upon a warrant and probable cause. However, if a special governmental need is involved, these requirements may be dispensed with:

[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's private expectations against the Government's interest

to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. *Id.* at 1390.

Here, the Court believed that the warrant requirement would not provide much additional protection for employees but would exact a substantial cost to the Service. Under the program, drug testing was limited to narrowly defined situations, and employees who sought promotion or transfer were aware of these requirements. There would be no special facts for a neutral and detached magistrate to evaluate.

Next, the Court considered the probable cause requirement. Prior cases had established an exception to this requirement for certain types of administrative searches:

[T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, . . . especially where the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person . . . Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. *Id.* at 1392.

The Court went on to hold that the Government's interest was sufficiently compelling to validate the testing program as it applied to those who were involved in drug interdiction and those who carried weapons. Moreover, Customs employees in these categories have a diminished expectation of privacy. "Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." *Id.* at 1394. The Court believed that the record had not been sufficiently developed to make such a determination concerning employees who handled classified material and thus remanded on that issue.

Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989), involved the constitutionality of a drug testing program that covered railroad employees. The program was implemented under the authority of the Federal Railroad Safety Act. It required testing after most railroad accidents and permitted testing under certain other conditions. The Court's analysis paralleled that of *Von Raab*. It first concluded that the testing program was a governmental search under the Fourth Amendment. Then it considered the reasonableness of the procedure, balancing the need against the privacy intrusion. Again, the Court upheld the search as reasonable.

CONFESSIONS

Miranda—Custody

While driving, the defendant in *Pennsylvania v. Bruder*, 109 S. Ct. 205 (1988), was stopped by the police for traffic violations. After the officer smelled alcohol and observed stumbling movements, he administered a field sobriety test. The officer also asked about alcohol use, and Bruder responded that he had been drinking. When

Bruder failed the sobriety test, he was arrested. His incriminatory statements were admitted at trial. A state appellate court, however, ruled the statements inadmissible as violative of *Miranda*.

On review, the Supreme Court reversed. According to the Court, the case was controlled by *Berkemer v. McCarty*, 468 U.S. 420 (1984), which held that persons subjected to temporary traffic stops were not entitled to *Miranda* warnings. Although the person is seized within the meaning of the Fourth Amendment, there is no "custodial interrogation," the triggering mechanism for the Fifth Amendment privilege against self-incrimination. In other words, only persons in custody are entitled to *Miranda* warnings, and a traffic stop does not amount to custody. This rule was based on two factors. First, traffic stops were usually brief, unlike the stationhouse interrogations discussed in *Miranda*. Second, traffic stops commonly occur in public, a situation far removed from the police dominated stationhouse depicted in *Miranda*.

Once a person is arrested, however, *Miranda* warnings are required. In a footnote the Court indicated that detaining a suspect for "over one-half an hour" and questioning him in a "patrol car" would also trigger the *Miranda* safeguards, even in the absence of a formal arrest.

Miranda - Warnings

Duckworth v. Eagan, 109 S. Ct. 2875 (1989), involved the adequacy of warnings given pursuant to *Miranda*. Before confessing to attempted murder, Eagan was given warnings, which included the advice that a lawyer would be appointed "if and when you go to court." Eagan argued that this advice suggested that a suspect is not entitled to counsel unless charges are filed against him, and that only those who can afford an attorney are entitled to one before questioning.

On review, the Supreme Court rejected these arguments. The Court noted that it had "never insisted that *Miranda* warnings be given in the exact form described in that decision." *Id.* at 2879. In *California v. Prysock*, 453 U.S. 355 (1981), the Court had remarked that "the 'rigidity' of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant," and that "no talismanic incantation [is] required to satisfy its strictures." *Id.* at 359.

In this case the Court believed that the warnings, as a whole, conveyed the information required by *Miranda*. The initial warnings included the following statement: "You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning." In addition, Eagan was told that he had the right to the advice and presence of a lawyer even if he could not afford to hire one, and that he had the right to stop answering questions until he talked to a lawyer.

RIGHT OF CONFRONTATION

The defendant in *Olden v. Kentucky*, 109 S.Ct. 480 (1988), was charged with kidnaping, rape, and sodomy. The alleged victim testified that Olden had tricked her into leaving a bar and then raped her with the assistance of a codefendant. She was then driven to the house of Bill Russell, where she was released. Russell also testified as a prosecution witness. He told the jury that he

witnessed the victim leaving the car and that she told him immediately that she had been raped.

The defense contended that the act of intercourse was consensual. The defense theory was that the victim and Russell were having an extramarital relationship and that the rape story was made up to explain why she was disembarking from the defendant's car. By the time of the trial, the victim and Russell were living together, but the trial judge refused to permit cross-examination about this fact. The judge believed that this information would prejudice the jury against the victim because she was white and Russell was black. The jury acquitted the codefendant and convicted Olden of sodomy only.

On review the Supreme Court reversed per curiam. The right of confrontation includes the right to conduct reasonable cross-examination. In particular, "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). The Court's cases consistently reaffirm this right. For example, the Court recently held that

a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), quoting *Davis, supra*, at 415 U.S. at 318.

In this case Olden had consistently maintained that the alleged victim lied because she feared jeopardizing her relationship with Russell. Thus, inquiry into her current living arrangement with Russell would have been relevant to impeachment. Foreclosure of this line of questioning violated Olden's right of confrontation. Moreover, this error could not be considered harmless—especially in light of the jury's inconsistent verdict and acquittal of the codefendant.

PRESERVATION OF EVIDENCE

In *Arizona v. Youngblood*, 109 S.Ct. 333 (1988), a 10-year old boy was kidnaped and sodomized. After he was released, his mother took him to a hospital, where a physician treated him for rectal injuries. The doctor also used a "sexual assault kit" to collect evidence. This involved the use of swabs to collect samples, which are then transferred to slides. The slides were turned over to the police, who placed them in a secure refrigerator. The boy's clothing was also collected, but it was not refrigerated or frozen. Tests to determine whether sexual contact had occurred were conducted, but further tests to identify blood group substances were not conducted. Nor were tests performed on the clothing until much later. Youngblood was eventually identified and charged based on a photo display. His conviction was subsequently overturned by an Arizona appellate court because expert testimony indicated that timely tests on properly preserved semen samples could have produced results that might have exonerated him. According to the court, this failure to preserve the evidence violated due process.

On review, the Supreme Court reversed. The issue raised went beyond the *Brady* line of cases, which

require the prosecution to disclose exculpatory evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976). Here, the prosecution disclosed all the relevant material. What it failed to do was test the evidence immediately or preserve it in a way that would permit the defendant to test it later.

A recent case, *California v. Trombetta*, 467 U.S. 479 (1984), raised a similar issue. In that case the defendant sought to suppress the results of an intoxication test because the State had failed to preserve breath samples. The Court rejected the due process argument because the State had acted in good faith, the chance of exculpation had the sample been preserved was slim, and alternative ways of contesting the test results were available.

In *Youngblood* the Court focused on the good faith requirement. While good faith is not a requirement in the *Brady*-suppression cases, the Court believed it was determinative in a failure to preserve situation: "We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 109 S.Ct. at 337. According to the Court, the record possibly showed negligence but not bad faith.

PRESUMPTIONS

The defendant in *Carella v. California*, 109 S. Ct. 2419 (1989), was convicted of grand theft for failure to return a rental car. The jury instructions adopted two statutory presumptions. One required the jury to find intent to commit theft by fraud if a rental car is not returned within 20 days after a demand is made by the owner. The other presumption required the jury to return a finding of embezzlement if a rental car is not return within five days of the expiration of the lease.

The Supreme Court found these instructions unconstitutional. Due Process requires the State to establish guilt beyond a reasonable doubt. In *re Winship*, 397 U.S. 358 (1970). Jury instructions that relieve the State of this burden are constitutionally suspect. *Francis v. Franklin*, 471 U.S. 307 (1985). "Such directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases." 109 S. Ct. at 2420. Since the instructions in question were mandatory directives to the jury, they "directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses. . . " and they "also relieved the State of its burden of proof articulated in *Winship*, namely proving by evidence every essential element of *Carella's* crime beyond a reasonable doubt." *Id.*

RIGHT TO JURY TRIAL

Blanton v. City of North Las Vegas, 109 S.Ct. 1289 (1989), involved the petty offense exception to the right to trial by jury. *Blanton* was charged with driving under the influence, which carried a maximum prison term of six months. His request for a jury trial was denied, and he appealed on this ground.

The Court had long recognized "a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan v. Louisiana*,

391 U.S. 145, 159 (1968). The principal issue is how to define this category. The Court's early cases focused on the nature of the crime and whether the crime was one triable by jury at common law. Later cases, however, sought a more objective standard. By the time *Baldwin v. New York*, 399 U.S. 66 (1970), was decided, a plurality of the Court stated: "[W]e have found the most relevant such criteria in the severity of the maximum authorized penalty." *Id.* at 68. In *Baldwin* the Court held that the right to jury trial was triggered whenever the charged crime carries a maximum authorized prison term greater than six months. The Court, however, did not rule that a maximum term of less than six months imprisonment would *always* be a petty offense. It left open the possibility that a jury trial could be required, at least in some cases, even if the maximum prison term was less than six months.

In *Blanton* the Court reaffirmed this possibility. A crime punishable with a prison term less than six months was presumed to be a petty crime, but this presumption could be rebutted.

A defendant is entitled to jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line." 109 S.Ct. at 1293.

Applying this standard, the Court found that *Blanton* was not entitled to a jury trial. The fact that a minimum term may be imposed was considered irrelevant by the Court. Likewise, a 90-day license suspension did not take DUI out of the petty offense category. One other aspect of the statute was considered. In lieu of prison, a DUI offender may be ordered to perform 48 hours of community service dressed in clothing identifying him as a DUI offender. This scheme, however, did not make DUI a "serious" offense, according to the Court.

RIGHT TO COUNSEL

Right to Consult

The defendant in *Perry v. Leeke*, 109 S.Ct. 594 (1989), was convicted of murder, kidnaping, and sexual assault. He claimed that he had not taken an active part in the homicide or kidnaping and that his participation in the sexual assault was due to duress. Evidence indicated that he was mildly retarded, nonviolent, and could be easily influenced by others. Perry took the stand after a lunch recess. At the conclusion of the direct examination, the trial judge ordered a 15-minute recess. He also ordered Perry not to talk to anyone, including his defense counsel.

Perry asserted that this order violated his right to counsel, an argument based on *Geders v. United States*, 425 U.S. 80 (1976). In *Geders* the trial court ordered the defendant not to consult with his attorney during an overnight recess.

The Court ruled that this order interfered with the right

to counsel. In *Perry*, however, the Court held *Geders* inapplicable. The Court ruled that the right to consult with an attorney was not operative in this context:

[W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice. 109 S.Ct. at 600.

Once the accused takes the stand, he is subject to cross-examination, and often cross-examination "depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way." *Id.* at 601. Permitting consultation between direct and cross-examination "grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess." *Id.* Accordingly, the trial court could refuse a recess during the taking of testimony. If this is so, the "judge must also have the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and lawyer would relate to the ongoing testimony." *Id.*

The Court distinguished *Geders* because it involved an overnight recess. In such a situation consultation would cover subjects other than the defendant's testimony. For example, trial tactics and plea negotiations might be discussed. On such matters the defendant has a right to consult with his attorney.

Anders Brief

Penson v. Ohio, 109 S.Ct. 346 (1988), involved the application of an earlier decision, *Anders v. California*, 386 U.S. 738 (1967). Prior to *Anders* the Court had held that the Fourteenth Amendment guaranteed a criminal defendant the right to counsel on a first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963). In *Anders* the Court held that this right could not be denied based on counsel's bare assertion that the appeal was without merit. If appellate counsel concluded that the appeal was frivolous, he could move to withdraw. The motion, however, had to be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* at 744. Moreover, the appellate court must conduct its own examination of the record to determine if the appeal is frivolous.

In *Penson* appellate counsel submitted a certification of a frivolous appeal. The court of appeals permitted the withdrawal even though a brief had not accompanied the certification and before the court had reviewed the record. When the court did review the record, it concluded that counsel's certification that the appeal was without merit was "highly questionable." The court found several arguable claims. Indeed, the court found that plain error had been committed in one jury instruction. It reversed on that count, but upheld the conviction on the remaining counts.

On review, the Supreme Court reversed. According to the Court, the process was flawed in several respects. First, appellate counsel should not have been permitted to withdraw without first submitting an *Anders* brief.

Counsel's failure to file such a brief left the Ohio

court without an adequate basis for determining that he had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal. 109 S.Ct. at 351.

Second, the court erred by permitting the withdrawal prior to its own examination of the record. Finally, and "most significantly," the court failed to appoint new counsel after it determined that several arguable claims existed. Once the court recognized a nonfrivolous claim, the appellant is entitled to counsel under *Douglas v. California*, 372 U.S. 353 (1963). *Anders* is a limited exception, applicable only when there is no merit in an appeal. This much is clear from the Court's prior cases. In *McCoy v. Court of Appeals of Wisconsin*, 108 S.Ct. 1895 (1988), the Court had written: "Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits." *Id.* at 1904-05.

Forfeiture of Attorney's Fees

Christopher Reckmeyer was indicted on drug charges. Pursuant to a federal forfeiture statute, the indictment sought forfeiture of specified assets in Reckmeyer's possession. Reckmeyer and his attorneys from the firm of Caplin & Drysdale sought to exempt attorney fees from forfeiture. Petitioner argued that the statute infringes on the Sixth Amendment right to counsel of choice and the due process guarantee. The Court rejected both arguments. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989).

The right to counsel of choice is a limited right. If a defendant can afford counsel, the prosecution is generally prohibited from interfering with his choice. However, a "defendant may not insist on representation by an attorney he cannot afford." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The forfeiture of assets intended as payment of attorney fees does not, according to the Court, infringe upon this limited right. Simply put, the money is not the defendant's to spend in the first place.

A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. 109 S. Ct. at 2652.

The same is true with forfeiture, which under the applicable statutes, vests title in the United States at the time of the criminal act giving rise to forfeiture. Moreover, the Court found the Government's interest in forfeiture to be substantial; such funds are used to support law enforcement activity, to permit the return of property to rightful owners, and to undermine the economic power of organized crime and drug enterprises.

GUILTY PLEAS

In *United States v. Broce*, 109 S. Ct. 757 (1989), the defendants, Ray Broce and Broce Construction Co., were charged with rigging bids and suppressing competition for highway projects. Two indictments were

returned—one relating to bids on a particular project in April 1978 and another for a different project in July 1979. Both defendants pleaded guilty to both indictments. Subsequently, the defendants attacked their convictions on the ground that only one conspiracy was involved rather than two. Different defendants charged with rigging bids had prevailed on this theory. The Tenth Circuit accepted this argument and reversed.

The Supreme Court disagreed. By pleading guilty to two agreements, which started at different times and embraced different objectives, the defendants conceded guilt to two separate offenses. Even if they miscalculated, they are estopped from challenging the plea. They had the opportunity to go to trial and dispute the “two conspiracy” theory but chose to forego that right. The Court’s cases had held that such erroneous assessment did not invalidate a voluntary plea. In *Brady v. United States*, 397 U.S. 742 (1970), the Court wrote:

A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State’s case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. *Id.* at 757.

Accordingly, the general rule is that “a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.” *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). Although the Court had recognized exceptions to this rule, those exceptions were held to be inapplicable.

DOUBLE JEOPARDY

Retrial - Sufficiency of Evidence

The defendant in *Lockhart v. Nelson*, 109 S.Ct. 285 (1988), was sentenced to an enhanced prison term under a state habitual offender statute. The statute became operative if a defendant had been convicted of four prior offenses. In a later habeas proceeding, the defendant was able to show that one of the prior convictions had been the subject of a pardon, and thus could not be used for enhancement. The State, however, announced that it would introduce a different conviction, which it had not previously used, to bring the defendant within the recidivist statute. The defendant objected on double jeopardy grounds, arguing that without the pardoned conviction, there was insufficient evidence—in effect, an acquittal on the recidivist count.

The Supreme Court rejected this argument. The prohibition against successive prosecutions does not bar a retrial of a defendant who succeeds in gaining a reversal on appeal or in collateral proceedings. *United States v. Ball*, 163 U.S. 662 (1896); *United States v. Tateo*, 377 U.S. 463 (1964). The Court recognized an exception to this rule in *Burks v. United States*, 437 U.S. 1 (1978), for those cases where the sole grounds for a reversal is the insufficiency of the evidence. The Court believed that reversal on this ground was the equivalent of an acquittal, which

historically had provided absolute immunity from reprosecution.

The defendant in *Nelson* argued that his case was governed by *Burks*. Here, the conviction was reversed because evidence had been erroneously admitted and the court determined that without the inadmissible evidence, there was insufficient evidence to convict. The Supreme Court, however, saw a difference. *Burks* was based on a distinction between reversals involving trial errors and those involving insufficient evidence. Nelson’s reversal was based on a trial error, and a retrial would afford him the opportunity to obtain a fair readjudication of guilt free from error. Moreover, had he successfully objected to the inadmissible evidence at trial, the prosecutor would have had the opportunity to introduce a different prior conviction to support the recidivist charge.

Civil Sanctions

United States v. Halper, 109 S. Ct. 1892 (1989), involved a civil penalty which the Court decided constituted punishment for double jeopardy purposes. Halper was convicted of submitting 65 false claims under the federal Medicare program. While working for a medical laboratory, he submitted claims for a \$12.00 reimbursement when the cost of the procedure should have been \$3.00. The total amount of the fraud was \$585. He was convicted on all 65 counts as well as 16 counts of mail fraud. He was subsequently sentenced to imprisonment for two years and fined \$5,000.

The Government then instituted a civil action under the False Claims Act. Based on the criminal verdict, the trial court granted summary judgment. Under the act, a person is liable for \$2000 plus two times the amount of damages for each count. Thus, a statutory penalty of more than \$130,000 was required.

Halper argued that this penalty constituted double punishment in violation of the double jeopardy guarantee, and the Supreme Court agreed. The Court acknowledged that both a civil and criminal penalty may be imposed for the same conduct, and determining whether a penalty is civil or criminal is a matter of statutory construction. The issue, in the Court’s view, was whether the civil penalty was punitive rather than compensatory. The legislature’s labeling of the penalty as criminal or civil was not determinative. Instead, whether the penalty served the aims of retribution and deterrence controlled.

We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution. *Id.* at 1902.

The Court went on to comment that the line between remedial and punitive is often not precise, and that therefore reasonable liquidated damages and fixed-penalty-plus-double-damage provisions would be permissible. However, the present case went beyond these acceptable means of establishing damages. The “civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as ‘punishment’ in the plain meaning of the word.” *Id.*

DEATH PENALTY

Right to Counsel

Joseph Giarratano, a death row inmate in Virginia, initiated a 1983 action against state officials, arguing that he had a right to appointed counsel while pursuing collateral relief in connection with his death sentence. The Court rejected this argument. *Murray v. Giarratano*, 109 S. Ct. 2765 (1989).

The Court held that its prior cases did not support a right to counsel in this context. *Gideon v. Wainwright*, 372 U.S. 335 (1963), recognized a right to counsel at trial, and *Douglas v. California*, 372 U.S. 353 (1963), recognized such a right for the initial appeal. However, the Court drew the line in *Ross v. Moffitt*, 417 U.S. 600 (1974), in which it had held that the right to counsel does not extend to discretionary appeals. The function of counsel differs at different stages of the criminal process. At the trial the State is haling the defendant into court and attempting to overcome the presumption of innocence. The defendant needs counsel as a shield. In contrast, at the appellate stage, the defendant uses counsel as a sword to upset a presumptively valid adjudication of guilt. Consequently, the justification for counsel differs.

Based on this rationale, the Court had held in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that there was no federal constitutional right to appointed counsel for indigent prisoners seeking state postconviction relief. Giarratano, however, argued that *Finley* did not control in death penalty cases. The Court disagreed. State collateral proceedings are not constitutionally required and serve a more limited purpose than either the trial or appeal. Moreover, while the Eighth Amendment sometimes imposes higher standards at the *trial stage* of capital cases, it does not necessarily impose higher standards during the appellate or collateral review stages.

Retarded Prisoners

Penry v. Lynaugh, 109 S. Ct. 2934 (1989), concerned the execution of the retarded. Penry was convicted of rape and murder. He was diagnosed as having organic brain damage and had an IQ between 50 and 63, which indicates mild to moderate retardation. His mental age was 6 and 1/2, and his social maturity was that of a 9 or 10 year old. The jury rejected his insanity defense and he was sentenced to death.

One of the issues before the Court was whether the Eighth Amendment prohibits the execution of a mentally retarded person with Penry's reasoning ability. The prohibition against cruel and unusual punishment recognizes the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). In determining such "evolving standards," the Court has looked to objective evidence of how society views a particular punishment today, as evidenced by legislative enactments and jury sentencing.

Initially, the Court traced the evolution of the treatment of the retarded at common law. Here, the evidence supports the proposition that the common law prohibition against the execution of "idiots" would make their execution cruel and unusual punishment under the Eighth

Amendment. Such persons would be profoundly or severely retarded and lack the capacity to appreciate the wrongfulness of their actions. They, however, would rarely reach the point of execution. The insanity defense would shield most from conviction. Moreover, the Eighth Amendment prohibits the execution of the insane; that is, someone who is not aware of the punishment or why they are about to suffer it. *Ford v. Wainwright*, 477 U.S. 399 (1986).

Penry, however, did not fall in this category. He is mildly retarded. He was found competent to stand trial, and the jury rejected his insanity defense. Moreover, only one state prohibits the execution of the retarded. *Ford v. Wainwright* was easily distinguished because no state permitted the execution of the insane and 26 states explicitly forbid it. Finally, there was no other compelling evidence of a national consensus on this issue. Accordingly, the Court rejected this aspect of Penry's argument.

Penry did succeed, however, on another argument. The trial court had failed to instruct the jury that it could consider and give effect to his mitigating evidence of mental retardation in determining the appropriateness of the death penalty. Such consideration was required by earlier cases. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Juveniles

Stanford v. Kentucky, 109 S. Ct. 2969 (1989), required the Court to determine whether the imposition of the death penalty on persons who committed crimes at the age of 16 or 17 violated the Eighth Amendment. In the preceding term the Court had concluded that the Amendment was violated by the execution of a juvenile who had been 15 years old at the time of the offense. *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988). The deciding vote in that case, however, was cast by Justice O'Connor. She again cast the deciding vote in *Stanford*, but this time she found no constitutional violation. She distinguished *Thompson*. Unlike that case, "it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16 or 17-year old capital murderers." *Id.* at 2981.