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THE UNITED STATES SUPREME COURT: THE 1982-1983 TERM

Part II

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This is the second of a two-part article reviewing the significant decisions involving criminal procedure decided by the Supreme Court last Term. Part I appeared in the last issue.

FIFTH AMENDMENT

Refusal to Submit to Intoxication Test

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that a compelled blood-alcohol test did not violate the Fifth Amendment. Although the Court recognized that such a procedure involved "compulsion" and "incriminating evidence," it concluded that the Fifth Amendment was intended to prohibit only the compelled production of testimonial or communicative evidence, not real or physical evidence. Last Term, in *South Dakota v. Neville*, 103 S. Ct. 916 (1983), the Court addressed an issue left unresolved in *Schmerber*: whether evidence of a defendant's refusal to submit to a blood-alcohol test violated the Fifth Amendment. The South Dakota Supreme Court had held that such a refusal was "a tacit or overt expression and communication of defendant's thoughts" and thus covered by the Fifth Amendment.

The Supreme Court reversed. It did not, however, hold that the defendant's refusal to take the test was not communicative or testimonial. Instead, the Court ruled that the request to take the test did not constitute compulsion within the meaning of the Fifth Amendment. The Court reasoned that since the state could compel the defendant to take the test under *Schmerber*, the offering of an option to refuse the test and attaching penalties to the exercise of that option (*i.e.*, admission of the evidence at trial), was valid. *Id.* at 923. In a footnote, the Court also pointed out that "a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*." *Id.* at 923 n.15.

Comment on Silence

In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court ruled that prosecutorial comment on a defendant's failure to testify placed an unconstitutional burden on the Fifth Amendment guarantee against self-incrimination. In *U.S. v. Hastings*, 103 S. Ct. 1974 (1983), the Seventh Circuit had refused to apply the harmless error rule to a *Griffin* violation. The Supreme Court construed the Seventh Circuit disposition of the case as an exercise of that court's supervisory powers to discipline prosecutors.

In an opinion written by the Chief Justice, the Court reviewed the policies underlying the supervisory powers, under which federal courts may formulate procedural rules not specifically required by the Constitution or the Congress. These powers are used (1) to implement a remedy for violation of recognized rights, (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and (3) as a remedy designed to deter illegal conduct. *Id.* at 1978-79. According to the Court, the first two policies are not implicated where an error is harmless. "Supervisory power . . . is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have been obtained notwithstanding the asserted error." *Id.* at 1979. In addition, the integrity of the process rationale "carries less weight" because under the harmless error doctrine the judgment stands only if there is no reasonable doubt that the error contributed to the conviction.

Finally, the deterrence rationale is not applicable where the prosecutorial comment "is at most an attenuated violation of *Griffin* and where means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Id.* In a footnote, the Court pointed out that the lower court could

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have ordered the prosecutor to show cause why he should not be disciplined, or requested the Justice Department to initiate disciplinary proceedings, or chastised the prosecutor publicly in the opinion. *Id.* at 1979 n.5. The Court went on to conclude that the error was harmless beyond a reasonable doubt.

Immunity

Pillsbury Co. v. Conboy, 103 S. Ct. 608 (1983), involved a grant of immunity pursuant to 18 U.S.C. § 6002. Conboy was granted use immunity when he appeared before a federal grand jury investigating price-fixing under the antitrust laws. In subsequent civil litigation, a federal district court ordered that his immunized testimony be made available to the civil litigants. Thereafter Conboy was deposed, at which time he was examined on his immunized testimony. When asked whether this testimony was true, he refused to answer on Fifth Amendment grounds. In an opinion written by Justice Powell, the Court held that Conboy had properly invoked the Fifth Amendment.

The Court offered two reasons for its decision. First, the federal immunity statute provides for only use and derivative use immunity, not transactional immunity. If the civil deposition testimony were held to derive from his immunized grand jury testimony, more testimony would be immunized than the government had originally intended. Moreover, such a ruling would make it more difficult for the government to establish in a subsequent prosecution of Conboy that its evidence was not derived from the deposition testimony. This result, in effect, would invest the deponent with transactional immunity, a result not intended by Congress in enacting the federal immunity statute.

Second, the deponent would be subjected to substantial risks in the event a court in a subsequent prosecution held that his deposition testimony was not immunized. The Court wrote: "Unless the grant of immunity assures a witness that his incriminating testimony will not be used against him in a subsequent criminal prosecution, the witness has not received the certain protection of his Fifth Amendment privilege that he has been forced to exchange." *Id.* at 616.

HABEAS CORPUS

State Court Factual Findings

Marshall v. Lonberger, 103 S.Ct. 843 (1983), involved an Ohio conviction for aggravated murder with specifications, *i.e.*, that the defendant had previously been convicted for a "purposeful killing of or attempt to kill another." RC 2929.04(A)(5). Lonberger argued that his prior Illinois conviction for attempted murder was unconstitutional because his guilty plea had not been voluntarily and intelligently made as required by *Henderson v. Morgan*, 426 U.S. 637 (1976), and *Boykin v. Alabama*, 395 U.S. 238 (1969). If the plea was unconstitutional, the conviction could not be used in the Ohio trial according to *Burgett v. Texas*, 389 U.S. 109 (1967).

The records of the Illinois proceedings were somewhat unclear, indicating that Lonberger had been informed at the time of his plea that he was being charged with "an attempt on Dorothy Maxwell, with a knife." No mention of attempted murder appeared. Lonberger, however, had been arraigned on the attempted murder charge and was represented by counsel at the time of his plea. The Ohio courts found that Lonberger understood that he was pleading guilty to attempted murder. The federal habeas statute, 28 U.S.C. § 2254(d), provides for a presumption of correctness for state court factual findings. See *Sumner v. Mata*, 449 U.S. 539 (1982). One of the exceptions to this presumption involves cases where a federal habeas court concludes that the factual determinations are not "fairly supported" by the record.

According to a majority of the Court, in an opinion by Justice Rehnquist, "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair[] support' in the record." 103 S. Ct. at 850. In addition, the Sixth Circuit apparently credited Lonberger's habeas testimony that he believed he pled guilty only to aggravated battery, not attempted murder. The Court disagreed with this assessment: "28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Id.* at 851. Thus, the Court concluded that the factual findings were supported by the record.

Justices Brennan and Marshall dissented, disagreeing with the majority's resolution of the habeas issue. Of greater significance was Justice Stevens' dissent, which was joined by three other Justices. He questioned the continued validity of *Spencer v. Texas*, 385 U.S. 554 (1967), which upheld the admission at trial of a prior conviction for the purpose of punishment. He argued that Ohio's refusal to use a bifurcated procedure in which the prior conviction could be admitted only after conviction was unconstitutional, especially in a case in which the defense offered to stipulate to the prior conviction. "[T]he tactics employed in this case dramatically unmask the true prosecutorial interest in preserving a one-stage procedure — to enhance the likelihood that the jury will convict." *Id.* at 863. The majority rejected this argument in a footnote. *Id.* at 853 n.6.

Maggio v. Fulford, 103 S. Ct. 2261 (1983), also involved federal habeas review of state court factual findings. At trial the defendant raised the issue of his mental competency to stand trial. The trial judge ruled that he was competent, a decision that the Louisiana Supreme Court affirmed. On appeal in habeas proceedings, the Fifth Circuit disagreed. The Supreme Court reversed per curiam. Citing *Sumner v. Mata*, the majority stated that "the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that

of the Louisiana courts — a prerogative which 28 U.S.C. § 2254 does not allow it." *Id.* at 2262.

Exhaustion of State Remedies

The present Court's inclination to restrict federal habeas relief, was also evidenced in *Anderson v. Harless*, 103 S. Ct. 276 (1982). Harless was convicted of first degree murder. On appeal, he claimed a jury instruction on "malice" had been "erroneous" and cited several state cases in support. After his appeal was rejected, he filed a habeas petition. The federal district court held the instruction unconstitutional under *Sandstrom v. Montana*, 442 U.S. 510 (1979), because it shifted the burden of proof on the issue of malice to the defendant. The court also found that Harless had exhausted his state remedies as required by the habeas statute. The Sixth Circuit agreed. The Supreme Court did not.

In a per curiam opinion, from which Justices Stevens, Brennan and Marshall dissented, the Court held that Harless had failed to exhaust his state remedies. The Court wrote: "It is not enough that all the facts necessary to support the federal claim were before the state courts. . . or that a somewhat similar state-law claim was made. . . the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." *Id.* at 277. By merely claiming that the instruction was erroneous and citing state cases, Harless had failed to satisfy this requirement, and thus had not exhausted his state remedies.

Stone v. Powell

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court placed substantial limitations on federal habeas review of alleged Fourth Amendment violations. Under *Stone*, such review is precluded where the prisoner has had an opportunity for a full and fair litigation of the Fourth Amendment claim in the state courts. In *Cardwell v. Taylor*, 103 S. Ct. 2015 (1983), the Court reaffirmed *Stone*. Taylor initially challenged the admissibility of his confession on the ground that it was not voluntary. The district court denied relief. On appeal the Ninth Circuit ruled that the statement may have been obtained in violation of *Dunaway v. New York*, 442 U.S. 200 (1975), in which the Supreme Court had held that statements obtained while a defendant was illegally detained at a stationhouse were inadmissible as fruit of the poisonous tree. *Dunaway*, however, was decided on Fourth Amendment, not Fifth Amendment, grounds. The Supreme Court held in *Taylor* that *Stone* controlled and therefore consideration of this issue was precluded. "Only if the statements are involuntary, and therefore obtained in violation of the Fifth Amendment could the federal courts grant relief on collateral review." *Id.* at 2016.

CAPITAL PUNISHMENT

Aggravating Circumstances

The Court returned to constitutionality of impos-

ing capital punishment in *Zant v. Stephens*, 103 S. Ct. 2733 (1983). Stephens was convicted of murder and in the penalty phase of the trial the jury explicitly found that three of the aggravating circumstances, which trigger capital punishment under the Georgia statute, had been proven beyond a reasonable doubt. The jury imposed the death sentence. On appeal, the Georgia Supreme Court held, based on an earlier decision, that one of the aggravating circumstances — a substantial history of serious assaultive criminal convictions — was unconstitutionally vague. Nevertheless, the state court upheld the imposition of the death penalty. The defendant challenged this ruling.

After reviewing the state capital punishment scheme and finding no constitutional objections to it, the Court turned its attention to the argument that the invalidity of one of the statutory aggravating circumstances underlying the jury's sentencing verdict invalidated the death sentence. The defendant's argument rested on his interpretation of *Stromberg v. California*, 283 U.S. 359 (1931).

According to the Court, *Stromberg* establishes two related but different rules. First, *Stromberg* "requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Id.* at 2745. *Stephens* did not come within this rule because he jury did not return a general verdict, but rather made specific findings that each aggravating circumstance had been proven. Second, *Stromberg* encompasses a situation in which a general verdict on a single-count indictment rested on both a constitutional and an unconstitutional ground. Because such cases involve First Amendment rights, the Court found them inapplicable to *Stephens'* case.

Finally, the Court held that evidence of the Stephan's past criminal record, which had been admitted to establish the invalid aggravating circumstance, would have been admissible in any event during the penalty phase and thus did not impermissively prejudice him.

The Court also addressed the use of aggravating factors in *Barclay v. Florida*, 103 S. Ct. 3418 (1983). The Florida capital sentencing scheme requires a jury determination on the merits, a jury recommendation on the death penalty, and a trial judge sentencing decision. In imposing the death penalty, the trial court is required to make three findings: (1) that at least one statutory aggravating factor is proved beyond a reasonable doubt, (2) that the statutory aggravating circumstances are not outweighed by statutory mitigating circumstances, and (3) that death is an appropriate sentence for the individual defendant.

The principal issue in *Barclay* involved the trial court's consideration of a nonstatutory aggravating circumstance — the defendant's prior record — in imposing the death sentence. Under Florida law, nonstatutory aggravating circumstances may

not be considered. Justice Rehnquist, writing for a plurality, held that consideration of a nonstatutory aggravating circumstance, even if contrary to state law, did not violate the U.S. Constitution. He noted that the imposition of the death penalty based solely on nonstatutory aggravating circumstances would be a different matter. In *Barclay*, however, statutory aggravating circumstances had been found. Justice Stevens, along with Justice Powell, concurred on this issue; Justice Brennan and Marshall dissented.

Expedited Appeals; Future Prediction of Dangerousness

Barefoot v. Estelle, 103 S. Ct. 3383 (1983), presented the Court with two different issues. The first involved the procedures used by federal courts in reviewing habeas petitions in capital cases. The second issue involved the constitutionality of using expert predictions of future dangerousness in imposing the death penalty.

Barefoot was convicted of the murder of a police officer. In the sentencing phase, the jury was instructed, as provided by a Texas statute, to determine whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The jury answered in the affirmative, and the defendant was sentenced to death. After the defendant exhausted his state appellate and habeas remedies, he filed a federal habeas petition. When the federal district court rejected the petition, the defendant filed a motion with the Fifth Circuit requesting a stay of execution pending an appeal from the denial of the petition. The Fifth Circuit considered the merits of the appeal at the same time it considered the stay of execution.

In addressing the procedural issue, the Supreme Court, speaking through Justice White, commented: "Approving the execution of a defendant before his appeal is decided on the merits would clearly be improper. . . . However, a practice of deciding the merits of an appeal, when possible, together with the application for a stay, is not inconsistent with our cases." *Id.* at 3392. The Fifth Circuit followed the latter procedure in *Barefoot* and the Court found no error in this practice, provided the defendant is given an adequate opportunity to address the merits of the appeal. The Court wrote: "The parties addressed the merits and were given unlimited time to present argument. . . . The primary issue presented had been briefed and argued throughout the proceedings in the state courts and rebriefed and reargued in the District Court's habeas corpus proceeding." *Id.* at 3392-93.

The Court went on to provide guidelines for stays of execution and habeas appeals. First, a petitioner is required by statute to obtain a certificate of probable cause to appeal. This requirement is intended to separate meritorious from frivolous appeals. According to the Court, a certificate of probable cause requires the petitioner to make a substantial showing of the denial of a federal right. Second, if a certificate of probable cause is

issued by the district or appellate court, the petitioner must be afforded an opportunity to address the merits of the appeal. "Accordingly, a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal." *Id.* at 3394.

Third, appellate courts may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a certificate of probable cause, provided counsel has adequate opportunity to address the merits. "If appropriate notice is provided, argument on the merits may be heard at the same time the motion for a stay is considered. . . ." *Id.* at 3395. Fourth, successive habeas petitions may be dismissed if no new or different grounds for relief are alleged. Even if dismissal is not appropriate, district courts may expedite consideration of a petition. "The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." *Id.* Fifth, stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from the Court.

The issue on the merits involved the admissibility of expert psychiatric testimony concerning the defendant's future dangerousness. Two experts testified about future dangerousness in response to hypothetical questions. Neither had personally examined the defendant. Reaffirming *Jurek v. Texas*, 428 U.S. 262 (1976), the Court held that future dangerousness was a valid consideration in death penalty cases. Consequently, expert testimony on dangerousness was admissible. Although the Court recognized that there is a dispute about whether such expert predictions are valid, the Court observed: "We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case." *Id.* at 3398. Moreover, the use of hypothetical questions and the lack of a personal examination of the defendant by the experts were not unconstitutional.

Justice Marshall, along with Justice Brennan, dissented. He focused on the Court's sanctioning of expedited procedures in capital cases: "If full briefing and argument are generally regarded as necessary to fair and careful review of a nonfrivolous appeal — and they are — there is absolutely no justification for providing fewer procedural protections solely because a man's life is at stake." *Id.* at 3404. Justice Blackmun also dissented. He focused on the merits. Relying on research concerning predictions of future dangerousness, he criticized the Court for permitting expert predictive testimony "despite the fact that such testimony is wrong two times out of three." *Id.* at 3406.

Commutation Instruction

California law requires the trial court in a capital sentencing proceeding to instruct the jury that the Governor has the power to grant a reprieve, pardon or commute a sentence of life imprisonment without the possibility of parole. The instruction was given in *Ramos v. California*, 103 S. Ct. 3446 (1983), and the jury imposed death. The California Supreme Court reversed, finding the instruction violative of federal constitutional law. The U.S. Supreme Court, in an opinion by Justice O'Connor, disagreed. According to the Court, the "instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process. It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissively inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm." *Id.* at 3459.

Justices Brennan, Marshall and Blackmun dissented.

CRIMINAL PRESUMPTIONS

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court held an instruction informing the jury that "the law presumes that a person intends the ordinary consequences of voluntary acts" violated the due process clause. *Sandstrom*, however, left unresolved the question of whether such an instruction could be considered harmless error. The Court addressed this issue in *Connecticut v. Johnson*, 103 S. Ct. 969 (1983).

Johnson was charged with attempted murder, kidnapping, robbery, and sexual assault. The defense theory was that the defendant did not intend to kill the victim or permanently keep her car. During the jury instructions, the trial court stated, "However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act." *Id.* at 973. There was little question that the instruction was erroneous under *Sandstrom*; the issue was whether it could be considered harmless error under *Chapman v. California*, 386 U.S. 18 (1967).

Writing for a plurality, Justice Blackmun held that only in rare situations could a *Sandstrom* violation be considered harmless error. According to the plurality, an "erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. . . . The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." *Id.* at 977. As examples of the "rare situations in which the reviewing court can be confident that a *Sandstrom* error did not play any role in the jury verdict," Justice Blackmun

cited a case in which the defendant concedes the issue of intent and presents an affirmative defense, and a case in which the defendant is acquitted on the erroneously instructed charge and convicted of an unrelated offense. *Id.* at 977-78.

The precedential value of the opinion, however, is undercut by Justice Stevens concurring opinion; he cast the fifth vote affirming the judgment. Justice Stevens did not believe that the case presented a federal question and only concurred in order to allow the lower court's judgment to stand. The four dissenting Justices not only found the harmless error doctrine applicable to *Sandstrom* errors but that a court reviewing the trial record could "well say beyond a reasonable doubt that the jury found the presumption unnecessary to its task of determining intent." *Id.* at 985.

DOUBLE JEOPARDY

In *Missouri v. Hunter*, 103 S. Ct. 673 (1983), the Court addressed the issue of multiple punishments under the double jeopardy clause. Based on his participation in a robbery of an A&P store in which he had used a weapon, Hunter was convicted of first degree robbery and armed criminal action. Under Missouri law, armed criminal action is defined as the commission of any felony under the laws of Missouri by, with, or through the use, assistance or aid of a dangerous or deadly weapon. *Id.* at 676. Armed criminal action is a separate offense punished by a term of not less than three years. The defendant was sentenced to concurrent terms of tens years for first degree robbery and fifteen years for armed criminal action. On appeal, the Missouri Supreme Court held that armed criminal action and the underlying felony were "the same offense" for purposes of the double jeopardy clause and therefore the imposition of punishment for both offenses was prohibited.

The Supreme Court disagreed and reversed. According to the Court, "[w]ith respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 678. In a subsequent passage, the Court wrote that "simply because two criminal statutes may be construed to proscribe the same conduct. . . does not mean that the double jeopardy clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Id.* at 679. Since the Missouri Supreme Court had found that the legislature specifically intended to impose cumulative punishments, Hunter had suffered no constitutional deprivation.

RIGHT TO COUNSEL

Meaningful Relationship

In *Morris v. Slappy*, 103 S. Ct. 1610 (1983), the defendant was convicted of robbery, burglary, false imprisonment, rape, and forcible oral copulation. A public defender, named Goldfine, was assigned to represent him. Goldfine served as counsel at the

preliminary hearing and conducted an extensive investigation. After Goldfine was hospitalized for emergency surgery, a second public defender, Hotchkiss, was assigned to the case. This occurred six days before trial. On the first day of trial, the defendant told the court that he had been represented by the new attorney for only several days. Construing this statement as a request for a continuance, the trial court denied the motion. Hotchkiss stated that he was prepared to try the case and Slappy stated that he was satisfied with his attorney. On the second day the defendant again raised the issue of his attorney's preparedness. On the third day the defendant stated that Goldfine, not Hotchkiss, was his attorney and thereafter refused to cooperate with Hotchkiss.

Subsequently, Slappy filed a habeas petition. The federal district court considered two issues: whether the trial court abused its discretion in denying a continuance (1) for Hotchkiss to prepare and (2) to permit Goldfine to defend Slappy. Both issues were decided against the defendant. On appeal, the Ninth Circuit reversed, holding that the Sixth Amendment right to counsel would "be without substance if it did not include the right to a meaningful attorney-client relationship." *Id.* at 1615.

The Supreme Court, in an opinion by the Chief Justice, reversed. The Court, relying on Hotchkiss' representations that he was prepared to go to trial, rejected the argument that a continuance should have been granted. In addition, the Court questioned the defendant's motives in requesting Goldfine on the third day of trial, after he had stated he was satisfied with Hotchkiss on the first day. According to the Court, the request could be construed as "a transparent ploy for delay." *Id.* 1617.

On the most important aspect of the case, the Chief Justice wrote:

The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a *meaningful attorney-client relationship*," . . . is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney — privately retained or provided by the public — that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel. *Id.* at 1617.

Justice Brennan, along with Justice Marshall, concurred in the result. He wrote, however, that the case should have been decided against Slappy because he had failed to make a timely request for Goldfine. He rejected the majority's Sixth Amendment analysis: "But where an indigent defendant wants to preserve a relationship he has developed with counsel already appointed by the court, I can perceive no rational or fair basis for failing at least to consider this interest in determining whether continued representation is possible." *Id.* at 1622.

Justice Blackmun, along with Justice Stevens, also concurred, finding "the Court's broad-ranging dicta about the right to counsel . . . unnecessary in this case." *Id.* at 1625.

On Appeal

Jones v. Barnes, 103 S. Ct. 3308 (1983), raised the issue of whether an indigent defendant has a constitutional right to compel his appointed attorney to argue nonfrivolous issues on appeal. Barnes was convicted of robbery and assault. He was assigned counsel for appeal and subsequently sent a letter to this attorney outlining issues for the appeal. The attorney accepted some of these issues and rejected others. In his appellate brief, he included three issues. He also submitted a *pro se* brief written by the defendant. At oral argument, the attorney pressed only the issues raised in his brief. In subsequent habeas proceeding, the Second Circuit ruled that this was error. According to that court, when a defendant requests that his attorney raise additional colorable points on appeal, counsel must argue the additional points to the full extent of his professional ability. On review, a majority of the Supreme Court, speaking through the Chief Justice, disagreed.

The defendant's argument rested upon his interpretation of *Anders v. California*, 386 U.S. 738 (1967), in which the Court had held that appointed counsel may not withdraw from a nonfrivolous appeal. In *Barnes* the majority distinguished *Anders*, believing that *Anders* required an attorney to pursue nonfrivolous appeals but not all nonfrivolous issues: "Neither *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Id.* at 3312.

Justices Brennan and Marshall dissented on the grounds that the Sixth Amendment right to counsel requires that the defendant, not the attorney, have the determinative voice in deciding which issues will be pursued on appeal. Justice Blackmun concurred.

PROBATION REVOCATION

The defendant in *Beardon v. Georgia*, 103 S. Ct. 2064 (1983), was placed on probation after being convicted of burglary and receiving stolen property. As a condition of probation, he was required to pay a \$500 fine and \$250 in restitution. He borrowed \$200 to pay the first installment, but lost his job prior to paying the remainder. Consequently, his probation was revoked.

Justice O'Connor, writing for the Court, held that automatically revoking probation when a probationer has made all reasonable efforts to pay a fine or restitution and yet cannot do so through no fault of his own violated the constitutional precept of fundamental fairness. According to the Court, under these circumstances the trial court "must consider alternate measures of punishment other

than imprisonment." *Id.* at 2073. As examples of alternative measures, the Court cited an extension of the time for making payments, reduction of the fine, or the performance of some form of labor or public service in lieu of the fine. By failing to consider these alternatives, the trial court automatically turned a fine into a prison sentence.

The Court distinguished Beardon's situation from other circumstances. First, "if the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." *Id.* at 2070. Second, "a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime." *Id.* Accordingly, revocation of probation would be justified.

CRUEL AND UNUSUAL PUNISHMENT

In recent years the Court has not been receptive to arguments that imposition of noncapital sentences violates the cruel and unusual punishment clause because they are disproportionate to the offense. See *Rummel v. Estelle*, 445 U.S. 263 (1980); *Hutto v. Davis*, 454 U.S. 374 (1981). In *Solem v. Helm*, 33 Crim. L. Rptr. 3220 (1983), the Court, in a 5-4 opinion, reversed this trend and overturned a sentence based upon the proportionality principle. Helm was convicted of uttering a "no account" check for \$100. Because he had been convicted of six prior offenses, he was sentenced under a recidivist statute to life imprisonment without parole. He subsequently challenged the sentence as violative of the Eighth Amendment.

Justice Powell, writing for the Court, rejected the state's assertion that the proportionality principle did not apply to felony prison sentences: "[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 3223. In reviewing a sentence to determine if it is disproportionate, the Court specified three "objective criteria:" (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 3223-24.

In applying these criteria, the Court pointed out that the crime for which Helm was convicted involved neither violence nor the threat of violence; nor did it involve a large amount. Moreover, his prior felonies were for relatively minor nonviolent offenses. In contrast, the sentence of life imprisonment without parole is only surpassed in severity by capital punishment. Thus, "Helm has received the penultimate sentence for relatively minor criminal conduct." *Id.* at 3227. As to the other criteria, the Court concluded that Helm "has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been

treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State." *Id.*

The Chief Justice, along with Justices White, Rehnquist, and O'Connor, dissented, arguing that the Court had ignored the precedent established in *Rummel v. Estelle*.

INSANITY ACQUITEE

The defendant in *Jones v. U.S.*, 103 S. Ct. 3043 (1983), was charged with attempting to steal a jacket, a misdemeanor punishable by a maximum term of one year. Jones entered a plea of not guilty by reason of insanity, an affirmative defense established by a preponderance of the evidence. The trial court accepted the plea, and Jones was committed to a mental hospital. Under the D.C. statute, Jones was subject to release if he established by a preponderance of evidence that he was entitled to release. After being hospitalized for more than a year, the maximum period he could have served in prison if he had been convicted, Jones petitioned the court to either release him unconditionally or initiate civil commitment proceedings. Jones' argument was based on *Addington v. Texas*, 441 U.S. 418 (1979), in which the Court held that due process requires the Government in a civil commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. The Supreme Court, speaking through Justice Powell, rejected Jones' arguments.

His initial point was that an insanity verdict does not establish present mental illness or dangerousness. According to the Court, such a verdict establishes two facts: (1) that the defendant committed the criminal act, and (2) that he committed it because of mental illness. The finding that he committed a criminal act indicates that he is dangerous. Moreover, "[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." 103 S. Ct. 3050.

Jones next argued that his indefinite commitment was unconstitutional because proof of insanity was based on a preponderance of the evidence, rather than *Addington's* civil commitment standard of clear and convincing evidence. Again the Court disagreed. The *Addington* standard rested on a concern that a person could be confined civilly on the basis of "some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." *Id.* at 3051. According to the court, this concern is not present in the case of an insanity acquittee because only the acquittee can advance and establish the insanity defense, and proof that he committed a criminal act eliminates the risk that he is being committed only for "idiosyncratic behavior."

Finally, Jones contended that due process was violated because he had been committed for a longer period than he could have been imprisoned

had he been convicted. The Court rejected this argument as well. Incarceration for a crime is based on a different rationale than commitment after an insanity acquittal. "There simply is no necessary correlation between severity of the offense and length of time necessary for recovery." *Id.* at 3052.

Justice Brennan, in a opinion joined by Justices Blackmun and Marshall, dissented. He pointed out that an insanity verdict "is backward-looking, focusing on one moment in the past, while commit-

ment requires a judgment as to the present and future." *Id.* 3056. Moreover, the "[r]esearch is practically nonexistent on the relationship of *non-violent* criminal behavior, such as petitioner's attempt to shoplift, to future dangerousness." *Id.* at 3057. Justice Stevens also dissented, concluding that the insanity verdict was sufficient to justify the initial commitment but that once the defendant has served the maximum punishment authorized, the Government must establish the need for continued commitment by clear and convincing evidence.