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United States Supreme Court: 2001 Term

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This issue summarizes most of the United States Supreme Court's criminal procedure decisions of the last term.

SEARCH AND SEIZURE

Thermal Imaging

The defendant in Kyllo v. United States, 121 S.Ct. 2038 (2001), was suspected by an agent of the Department of the Interior of growing marijuana in his home. Because growing marijuana typically requires lamps that emit heat, agents used an Amega Thermovision 210 thermal imager to scan his residence. The scanner detects infrared radiation, which is emitted by nearly all objects but remains invisible to the naked eye. The scan took only a few minutes and showed that the "roof over the garage and a side wall of [Kyllo's] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes." Based on the scan results, Agent Elliot concluded that Kyllo was growing marijuana plants using halide lights. Based in part on the thermal imaging scan, a warrant to search the residence was obtained. The search confirmed that Kyllo was in fact growing more than 100 marijuana plants in his home.

The Supreme Court addressed the issue whether a thermal imaging scan of a residence constitutes a "search" within the meaning of the Fourth Amendment. Applying the test from Katz v. United States, 389 U.S. 347 (1967), the Court had held in California v. Ciraolo, 476 U.S. 207 (1986), that a "Fourth Amendment search does not occur — even when the explicitly protected location of a house is concerned — unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" Id. at 2042-43. Recognizing the heightened expectation of privacy in a private home, the Court stated that "there is a ready criterion, with roots deep in common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment." Id. at 2043.

The government argued that thermal imaging detects only heat radiating from the external surfaces of the house and, therefore, was not a search. The dissent supported this contention, distinguishing between "off-the-wall" observations and "through-the-wall" surveillance. Rejecting this argument, the Court stated that "[w]hile the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." Id. at 2044.

The government further contended that because the agents drew only an inference regarding the activity in the home it was not a search. In addition, the government asserted that thermal imaging was constitutional because it did not "detect private activities occurring in private areas." Id. at 2045. The Court rejected these arguments as well.

Quoting Carroll v. United States, 267 U.S. 132 (1925), the Court held that "'[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.' Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 121 S.Ct. at 2046.

Warrantless Arrest for Minor Offenses

In Atwater v. City of Lago Vista, 121 S.Ct. 1536 (2001), Mrs. Atwater was arrested for a seat belt violation following a traffic stop. She sued the City of Lago Vista, claiming her Fourth Amendment rights had been violated. The question before the Court was whether the Fourth Amendment prohibits warrantless arrests for a minor criminal offense, such as a misdemeanor seat belt violation punishable only by a fine.

Atwater claimed that police officers' authority to make

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warrantless arrests for misdemeanors was restricted at common law. She argued specifically that "'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace,' a category she claims was then understood narrowly as covering only those nonfelony offenses 'involving or tending toward violence.'" Id. at 1543.

The Supreme Court disagreed. After examining the common usage of the term "breach of the peace," as well as the available case law, the Court discovered "divergent conclusions with respect to officers' warrantless misdemeanor arrest power." Id. at 1544. Apparently the term "breach of the peace" meant different things depending on the context. "Having reviewed the relevant English decisions, as well as English and colonial American legal treatises, legal dictionaries, and procedure manuals, we simply are not convinced that Atwater's is the correct, or even necessarily the better, reading of the common-law history." Id. at 1546. "We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace." Id. at 1550.

Alternatively, Atwater asked the Court to "mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness." Id. at 1553.

The Court recognized that Atwater "might well prevail" if a rule was derived to "exclusively address the uncontested facts of this case." Id. at 1553. However, the Court replied to Atwater's argument by stating, "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." Id. at 1553.

The Supreme Court concluded that Atwater's arrest was constitutional. Probable cause was not disputed, and, although the arrest may have caused Atwater embarrassment or humiliation, it was not made in an extraordinary manner.

Execution of Search Warrants

In Illinois v. McArthur, 121 S.Ct. 946 (2001), the Supreme Court concluded that law enforcement officials acted reasonably when they refused to allow a man suspected of unlawful possession of drug paraphernalia and marijuana to enter his residence unaccompanied until a search warrant was obtained.

On April 2, 1997, Tera McArthur went to the trailer she shared with her husband to obtain her personal effects. Mrs. McArthur was accompanied by police officers for the purpose of keeping the peace. Upon leaving the trailer with her belongings, Mrs. McArthur advised the police to search the trailer because she had seen her husband slide "some dope underneath the couch." Charles McArthur refused to allow the police to search his trailer. At that time a police officer, accompanied by Tera McArthur, left the scene to obtain a search warrant. When Charles McArthur, now positioned on the front porch, attempted to enter his trailer, the remaining officer detained him, explaining that McArthur would not be permitted to enter his residence unaccompanied by a police officer until a search warrant was obtained. A search warrant was obtained approximately two hours later, and a search of the trailer uncovered 2.5 grams of marijuana and drug paraphernalia.

The Supreme Court held that the temporary seizure was reasonable and did not violate the Fourth Amendment. "It involves a plausible claim of specially pressing or urgent law enforcement need, i.e., 'exigent circumstances.'" Id. at 950. The Court, applying a balancing test, based its decision on four circumstances. First, the police had probable cause to believe the trailer contained contraband and had an opportunity to make an assessment of Tera McArthur's reliability. Second, the police had good reason to believe that if the defendant were permitted to enter the residence unaccompanied he would destroy the evidence. Third, the police chose to prevent McArthur from entering his residence until a warrant arrived instead of searching the trailer or arresting McArthur without a warrant. "They left his home and his belongings intact." Id. at 950. "'The chief evil against which the ... Fourth Amendment is directed' is warrantless entry and search of home." Id. at 950 (quoting United States v. United States District Court, 407 U.S. 297 (1972)). Fourth, the restraint was imposed for a limited amount of time. McArthur was restrained for only two hours. "As far as the record reveals, this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." 121 S.Ct. at 951.

The Court stated: "[W]e have found no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time." Id. at 951-52.

Pretextual Searches

In Arkansas v. Sullivan, 121 S.Ct. 1876 (2001), Sullivan was stopped by police officers for speeding and having improperly tinted windows. After viewing Sullivan's driver's license, the police realized that they were aware of intelligence on Sullivan regarding narcotics. Sullivan was arrested for speeding, driving without registration and insurance documentation, carrying a weapon (a rusty roofing hatchet), and improper window tinting. During an inventory search of Sullivan's car following his arrest, police officers found drugs (methamphetamine) and drug paraphernalia. Sullivan moved to suppress the evidence on the basis that his arrest was merely a "pretext and sham to search" him. The trial court granted Sullivan's motion to suppress, and the Arkansas Supreme Court affirmed.

The U.S. Supreme Court relied on its previous decision in Whren v. United States, 517 U.S. 806 (1996). "The Arkansas Supreme Court declined to follow *Whren* on the ground that 'much of it is *dicta*.' The court reiterated the trial judge's conclusion that 'the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime,' and observed that 'we do not believe that *Whren* disallows' suppression on such a basis. Finally, the court asserted that, even if it were to conclude that *Whren* precludes inquiry into an arresting officer's subjective motivation, 'there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights.'" Id. at 1878 (citations omitted).

The U.S. Supreme Court stated that the Arkansas Supreme Court's affirmation of the trial court's suppression of the drug-related evidence was improper because the decision was "flatly contrary" to the U.S. Supreme Court's decision in *Whren*. The Court, quoting from its decision in

Whren, noted its "'unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual officers,' and held unanimously that 'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'" Id. at 1877.

Next, the Court addressed the Arkansas Supreme Court's holding that it may interpret the U.S. Constitution to provide greater protection than the United States Supreme Court's federal constitutional precedents. The state court had cited Oregon v. Hass, 420 U.S. 714 (1975). In *Hass*, however, the U.S. Supreme Court held "that while 'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.'" *Sullivan*, 121 S.Ct. at 1878 (quoting *Hass*, 420 U.S. at 719).

Drug Roadblocks

In City of Indianapolis v. Edmond, 121 S.Ct. 447 (2000), the city of Indianapolis set up vehicle checkpoints in an effort to discover and interdict illegal drugs. The police stopped a predetermined number of vehicles at each checkpoint. An officer approached the vehicle, advised the driver that they were being stopped at a drug checkpoint, and asked the driver for a license and vehicle registration. The officer looked for "signs of impairment" and conducted an "open-view examination of the vehicle from the outside." Id. at 450-51. The average time of each vehicle stop was 2-3 minutes, not including vehicles subject to further processing.

Respondents filed a class action suit against the city, claiming a Fourth Amendment violation. The Supreme Court agreed.

Previous Supreme Court decisions had upheld brief, suspicionless vehicle searches at permanent immigration checkpoints to intercept illegal aliens and at highway sobriety checkpoints to identify and detain drunk drivers. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990). The primary purposes of these checkpoint programs were "to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety." However, the Court had never indicated "approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." 121 S.Ct. at 452.

The Court rejected the contention that the Indianapolis program had the same ultimate purpose as the previously upheld checkpoint programs: to arrest those suspected of committing a crime. The Court reasoned that "if we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose." Id. at 454.

In addition, the city argued that the secondary purpose of the checkpoints — to verify license and registration information and keep impaired motorists off the road — satisfied Fourth Amendment concerns. Again, the Court rejected the argument, finding that under such a policy "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check." The Court went on to hold: "When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion." Id. at 457.

The Court did allow for exceptions in extraordinary situations when the primary purpose of a vehicle checkpoint is general crime control such as roadblocks designed to "thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." While allowing for exceptions, the Court declined to approve vehicle checkpoint programs "whose primary purpose is ultimately indistinguishable from general crime control." Id. at 455.

Drug Testing

Motivated by an apparent increase in cocaine use by patients receiving prenatal care, the Medical University of South Carolina [MUSC] instituted a policy to identify pregnant patients suspected of drug abuse and began conducting urine tests of hospital obstetric patients pursuant to that policy. Ten obstetric patients who were arrested after testing positive for cocaine sued the City of Charleston, law enforcement officials who helped develop and enforce the policy, and representatives of MUSC alleging, inter alia, violation of the Fourth Amendment's prohibition against nonconsensual, warrantless, and suspicionless searches. The Fourth Circuit affirmed without addressing the consent issue. The Court of Appeals found the searches to be reasonable as a matter of law under the "special needs" doctrine as set forth in Chandler v. Miller, 520 U.S. 305 (1997); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 656 (1989); and Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995).

In Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001), the Supreme Court held that: (1) the urine tests conducted by the MUSC were "searches" within the meaning of the Fourth Amendment, and (2) absent patients' consent, the testing and subsequent reporting of positive test results to police constituted unreasonable searches. The Court found that "because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients, this case differs from the four previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches." Id. at 1288.

In each of the previous drug-testing cases the Court had used a balancing test where it "weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." Id. at 1288. However, in these cases the purpose of the drug test and the potential use of the test results were understood by the parties. In addition, there were protections against the dissemination of the test results to third parties. This was not true in this case.

The Court found the critical difference to "lie in the nature of the 'special need' asserted as justification for the warrantless searches." In the previous drug-testing cases the "special need" was "divorced from the State's general interest in law enforcement." Id. at 1289. Here, a review of the policy plainly revealed that the purpose actually served by the MUSC searches was indistinguishable from the general interest in crime control. The policy incorporated the police's operational guidelines, detailing chain of custody procedures, possible criminal charges, and the logistics of police notification and arrests. The policy did not, however, discuss different courses of medical treatment for either the

mother who has tested positive for cocaine or her infant. This appeared inconsistent with the stated purpose of the policy: to protect the health of both mother and child.

The Supreme Court also stated that "[w]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." Id. at 1291. The Court found the "primary purpose" of the policy to be to force women into drug treatment through the use of threat of arrest and prosecution. Given the primary purpose of the policy and the extensive involvement of law enforcement officials in its development and implementation, the policy violated the Fourth Amendment's prohibition against nonconsensual, warrantless, and suspicionless searches.

CONFESSIONS: RIGHT TO COUNSEL

In Texas v. Cobb, 121 S.Ct. 1335 (2001), Lindsey Owings found his home burglarized with his wife and infant daughter missing. Raymond Levi Cobb admitted to burglarizing the home, which was located across the street from his residence. Cobb was subsequently indicted for burglary and appointed counsel. While admitting to the burglary, Cobb denied knowledge of the whereabouts of Mrs. Owings and her daughter.

Cobb's father, whom Cobb was living with while free on bond, contacted police and indicated that Cobb confessed to killing Mrs. Owings and her daughter. Officers arrested Cobb and obtained his waiver of Fifth Amendment rights under *Miranda*. Cobb then confessed to police the murder of Mrs. Owings and her daughter and led police to the area where he buried their bodies. Cobb's confession was used to obtain his conviction of capital murder.

Cobb appealed the conviction to the Court of Criminal Appeals of Texas, claiming his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. He contended his right to counsel attached when he was appointed counsel for the burglary charge and, therefore, police were required to obtain permission to interrogate Cobb from his appointed counsel. The state court agreed, but the U.S. Supreme Court decided to review the case to determine whether the Sixth Amendment right to counsel extends to crimes that are "factually related" to those that have actually been charged.

In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court held that "[t]he Sixth Amendment right [to counsel] ... is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Id. at 175. Thus, a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses.

Some state and federal courts had read an exception into McNeil's offense-specific definition for crimes that are factually related to a charged offense. The Court rejected this interpretation of *McNeil*, reiterating its holding that the Sixth Amendment right to counsel is offense-specific. The Court further stated:

> Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In Blockburger v. United States, 284 U.S. 299 ... we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." ... We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test. Id. at 1343.

The Court concluded that Cobb's Sixth Amendment right to counsel was not violated when he was interrogated about the disappearance of Mrs. Owing and her daughter. Therefore, the confession was admissible.

FIFTH AMENDMENT

In Ohio v. Matthew Reiner, 121 S.Ct. 1252 (2001), the U.S. Supreme Court reversed an Ohio Supreme Court decision, holding that a witness who claims innocence may assert the Fifth Amendment privilege against compelled self-incrimination. Matthew Reiner was convicted of the involuntary manslaughter of his two-month old son, Alex. Alex died from "shaken baby syndrome." Reiner contended that the family's baby-sitter, Susan Batt, was responsible for the infant's death. Batt had cared for Reiner's children for about two weeks before the infant died and was alone with Alex during the potential time frame Alex sustained the fatal trauma.

Batt informed the trial court that she intended to assert her Fifth Amendment privilege when testifying at trial. The court granted Batt transactional immunity from prosecution at the State's request. Batt testified that she had refused to testify without immunity from prosecution "although she had done nothing wrong." Id. at 1253. Reiner was subsequently convicted of the involuntary manslaughter of his infant son.

The Supreme Court of Ohio affirmed the conviction on the ground that Batt had no valid Fifth Amendment privilege and that the trial court's grant of immunity was therefore unlawful. The state court held Batt did not have a valid Fifth Amendment privilege because her testimony at trial did not incriminate her.

The U.S. Supreme Court found that Batt did have a valid Fifth Amendment privilege. The Court stated "that one of the Fifth Amendment's 'basic functions ... is to protect innocent men ... 'who otherwise might be ensnared by ambiguous circumstances.'" Id. at 1254 (quoting Grunewald v. United States, 353 U.S. 391). Batt had been alone with the infant for extended periods of time in the weeks preceding the infant's death. In addition, she was alone with the infant during the time period in which the fatal trauma may have occurred. The Court concluded that "Batt had 'reasonable cause' to apprehend danger from her answers if questioned at respondent's trial" and, therefore, reasonably feared that

her answers to direct questions may have incriminated her. Id. at 1255.

EX POST FACTO: OVERTURNING JUDICIAL PRECEDENT

In Rogers v. Tennessee, 121 S. Ct. 1693 (2001), the accused stabbed his victim, who remained comatosed until his death 15 months later. Rogers was convicted of second-degree murder and subsequently appealed. He argued his conviction was precluded by the common law "year and a day" rule, which provided that a defendant cannot be convicted unless the victim dies within a year and a day of the defendant's act. The Tennessee Supreme Court abolished the rule, citing a lack of support in policy as the reason. It concluded, relying on Bouie v. Columbia, 378 U.S. 347 (1964), that Rogers' due process rights were not violated. Rogers appealed to the U.S. Supreme Court.

Rogers argued that the Ex Post Facto Clause prohibited the application of the decision abolishing the common law "year and a day" rule, therefore violating his due process rights. The Court concluded:

> In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles. It was on account of concerns such as these that *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 121 S.Ct. at 1700 (quoting *Bouie*, 378 U.S. at 354).

Applying this analysis to the facts, the Court concluded that the abolition of the "year and a day" rule was not unexpected and indefensible. The rule has been "abolished in the vast majority of jurisdictions recently to have addressed the issue." Id. at 1701.

Furthermore, the Court noted that the Tennessee criminal homicide statute does not mention the "year and a day" rule. The statute defines criminal homicide simply as "the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide." Tenn. Code Ann. § 39-13-201 (1997). "[T]he rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta." Id. at 1701.

Finally, the Court concluded that "[t]here is, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." Id. at 1703.

MEDICAL NECESSITY DEFENSE: MARIJUANA

In United States v. Oakland Cannabis Buyers' Cooperative, 121 S.Ct. 1711 (2001), the Supreme Court refused to recognize medical necessity as a legally cognizable defense to a violation of the Controlled Substances Act. Oakland Cannabis Buyers' Cooperative distributed marijuana for medical purposes under California's 1996 Compassionate Use Act.

The United States sued the Cooperative to enjoin it from distributing and manufacturing marijuana by arguing that, although it may not have violated California law, it had violated federal law. Because an injunction issued by the District Court was openly violated, the Cooperative was subsequently found in contempt.

The Controlled Substances Act prohibits "any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841 (a)(1). The Act provides an exception in cases of government-approved research projects. The Supreme Court concluded that Congress would have provided for a medical necessity exception if it had intended to exempt such conduct. The Court failed to accept the Cooperative's argument that the Act contains implied exceptions, including medical necessity.

Faced with the question whether federal courts ever have authority to recognize a necessity defense not provided by statute, the Court stated "[w]hether as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." Id. at 1717. The Court concluded, "we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act." Id. at 1718.

DEATH PENALTY

Mitigating Circumstances

The Supreme Court overturned a death sentence in Penry v. Johnson, 121 S.Ct. 1910 (2001). Although Penry was mentally retarded, the Court did not address the issue of whether a mentally retarded person should be executed, but rather overturned Penry's death sentence because the jury instructions did not allow jurors to sufficiently take his retardation into account. The Court stated it would revisit the issue of whether the execution of a mentally retarded person is constitutionally permissible in its next term.

In *Penry* I, the Supreme Court had held that, based on the prosecutor's argument and the jury instructions, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." Id. at 1915-16. The Court stated that a juror must be able to consider mitigating evidence when imposing sentence "so that 'the sentence imposed .. . reflects a reasoned moral response to the defendant's background, character, and crime.'" Id. at 1916.

Penry was retried and again found guilty of capital murder. In *Penry* II the jury was instructed to answer three special issues to determine the sentence in addition to a supplemental instruction. However, the verdict form only contained the three special issues and not the supplemental instruction. These were the same three issues as in *Penry* I. The jury unanimously answered "yes" to each of the special issues, and the trial court sentenced Penry to death in accordance with state law.

On review, the Supreme Court considered whether the jury instructions at Penry's resentencing complied with *Penry* I and whether the admission into evidence of statements from a psychiatric report based on an uncounseled interview with Penry ran afoul of the Fifth Amendment.

Addressing the issue of the psychiatric report, the Court distinguished the instant case and Estelle v. Smith, 451 U.S. 454 (1981). The Court stated that its holding in *Estelle* was "limited to the 'distinct circumstances' presented there" and "indicated that the Fifth Amendment analysis might be different where a defendant 'intends to introduce psychiatric evidence at the penalty phase.'" Id. at 1919. Because Penry's facts were different from Estelle's, the Court found the Texas court's decision denying Penry's Fifth Amendment claim reasonable.

Penry also claimed the jury instructions given at the second sentencing hearing did not comply with the Supreme Court's holding in *Penry* I. "[T]he key under *Penry* I is that the jury be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence'. ... For it is only when the jury is given a 'vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision,' that we can be sure that the jury 'has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence.'" *Penry*, 121 S.Ct. at 1920 (quoting Woodson v. North Carolina, 428 U.S. 280 (1976)).

The Court concluded that the three special issues conflicted with the supplemental instruction. "[I]t would have been both logically and ethically impossible for a juror to follow both sets of instructions." Id. at 1922. Essentially, in order to avoid imposing a death sentence, the jury would have had to answer falsely to a special issue. The Supreme Court found the Texas court's determination that the jury instructions given in *Penry* II complied with *Penry* I unreasonable.

Jury Instructions

The accused in Shafer v. South Carolina, 121 S. Ct. 1263 (2001), was convicted of murder, attempted armed robbery, and criminal conspiracy. Shafer was subsequently sentenced to death. At the sentencing hearing, against defense argument, "[t]he trial judge decided 'not ... to charge the jury about parole ineligibility,' ... and informed counsel that he would instruct [the jury as follows]: 'Your consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration.'" *Shafer*, 121 S.Ct. at 1269. Shafer appealed the death sentence, arguing that jurors should have been instructed that he was ineligible for parole.

The South Carolina Supreme Court noted the U.S. Supreme Court's decision in Simmons v. South Carolina, 512 U.S. 154 (1994). It "acknowledged that 'when the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible.'" Id. at 1270. It held "*Simmons* generally inapplicable to South Carolina's 'new sentencing scheme'" without considering if Shafer's future dangerousness was placed at issue. Id. at 1270.

Under the South Carolina sentencing scheme, however, the jury is the sole sentencer only upon an initial finding of a statutory aggravator. If aggravating circumstances are found, only two sentencing options are available to the jury, death and life without parole. The U.S. Supreme Court wrote: "We therefore hold that whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole."

SEXUAL PREDATOR STATUTES

Young, respondent in this case, was a convicted rapist (convicted of six rapes in three decades) confined in Washington state since 1990 under that state's sexually violent predator statute. Seling v. Young, 121 S.Ct. 727 (2001). The statute provides for civil commitment of "sexually violent predators," persons who suffer from a mental abnormality or personality disorder that makes them likely to engage in predatory acts of sexual violence. Wash. Rev. Code § 71.09.010 et seq. (1992).

Young filed a habeas corpus petition appealing his commitment, arguing that the Act violated the Double Jeopardy, Ex Post Facto, Due Process, and Equal Protection Clauses. The Washington Supreme Court concluded that "the Act ... is concerned with treating committed persons for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality, rather than being concerned with criminal culpability."

The U.S. Supreme Court began by assuming the Act was civil in nature. In Hudson v. United States, 522 U.S. 93 (1997), the Court "expressly disapproved of evaluating the civil nature of an Act by reference to the effect that Act has on a single individual. Instead, courts must evaluate the question by reference to a variety of factors 'considered in relation to the statute on its face'; the clearest proof is required to override legislative intent and conclude that an Act denominated civil is punitive in purpose or effect." Id. at 734. "With this in mind, [the Court] turn[ed] to the Court of Appeals' determination that respondent could raise an 'as-applied' challenge to the Act on double jeopardy and *ex post facto* grounds and seek release from confinement." Id. at 734.

The Court held that "respondent cannot obtain release through an 'as-applied' challenge to the Washington Act on double jeopardy and *ex post facto* grounds." It agreed "with petitioner that an 'as-applied' analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses." Id. at 735.