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## UNITED STATES SUPREME COURT: 1998 TERM

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

### SEARCH AND SEIZURE

#### Knock and Announce

In *United States v. Ramirez*, 118 S.Ct. 992 (1998), the Oregon Police, acting on a tip, searched Ramirez's garage, looking for an escaped prisoner, Alan Shelby. The police observed a man resembling Shelby outside of Ramirez's home and obtained a "no-knock" warrant. During the initial raid, the police broke a window in the garage and pointed a gun into the window to stop the occupants from arming themselves. At the sound of the break-in, Ramirez grabbed his pistol and shot into the garage. The police then shouted "police," and he surrendered. Because Ramirez owned multiple guns and was a convicted felon, he was indicted on federal charges for possession of a firearm by a felon.

In *Richards v. Wisconsin*, 118 S.Ct. 1416 (1997), the Supreme Court had held that no knock warrants are justified when police officers have a "reasonable suspicion" that knocking and announcing their authority before entering would be dangerous or futile, or inhibit the effective investigation of the crime. Ramirez argued that a higher standard should apply when property is destroyed. The Court disagreed, holding that the lawfulness of the warrant is not based on whether there is property damage. The standard for a "no-knock" warrant is "reasonable suspicion" that announcing their presence would be dangerous and ineffective. The Court found that "reasonable suspicion" did exist and the warrant was valid; Shelby had a history of violence and a reliable informant had stated that he may have access to weapons. However, the manner in which the warrant is executed is important. Because the Fourth Amendment is based on reasonableness, excessive and unnecessary damage is prohibited. The damage in this case was not excessive or unnecessary.

The Court also rejected a claim that 18 U.S.C. § 3109,

the federal statute that codifies the common law rule, was violated because there were no "exigent circumstances" to justify the destruction of property. According to the Court, the statute authorizes the destruction of property in certain circumstances. Therefore, as long as the officers have reason, they may incur property damage.

#### Parolees

In *Pennsylvania Board of Probation and Parole v. Scott*, 118 S.Ct. 2014 (1998), the Supreme Court reversed a Pennsylvania Supreme Court ruling, which had applied the Fourth Amendment exclusionary rule to parole hearings. As one condition of parole, Scott could not possess a firearm. Parole officials had received some evidence from a reliable source that Scott kept weapons in his home. Parole officers, who searched the home, found firearms and a bow and arrows. Consequently, the parole board sent Scott back to prison. The Commonwealth Court reversed, based on the fact that the warrant was improper, and the Supreme Court of Pennsylvania affirmed.

The U.S. Supreme Court held that the exclusionary rule does not bar evidence in parole hearings. Although the search was illegal, the use of the evidence was not. The Court found that the exclusionary rule is not constitutionally mandated but is rather a judicial rule created to deter illegal searches. Therefore, the burdens and benefits of the rule must be weighed. The Court believed that the cost of allowing dangerous criminals to remain on the streets after they have violated their parole is quite high. In addition, there is a great likelihood that these criminals will commit future crimes. In contrast, the Court held that there would be very little added deterrence since so much deterrence already exist against illegal searches.

### RIGHT OF CONFRONTATION

In *Gray v. Maryland*, 118 S.Ct. 1151 (1998), a co-defendant's confession in a joint trial had been edited by replacing Gray's name with a blank space or the word "deleted." The Supreme Court found that this type of redaction violat-

ed the rule in *Bruton v. U.S.*, 391 U.S. 123 (1968). The defendants were tried jointly for beating a person to death. One of the defendants, Anthony Bell, confessed to the Baltimore police that he and others had killed the victim, naming only Gray and another man. The trial court denied Gray's motion for a separate trial and admitted Bell's confession into evidence, ordering that the statement be redacted. The confession was changed so that the names of Gray and the other named assailant were replaced with the word "deleted."

The Supreme Court held that the cursory revisions to Bell's statement did not place the confession outside the bounds of the *Bruton* rule. The admission of the statement by a non-testifying co-defendant, naming the other defendant, violated the Sixth Amendment's right to cross-examination. The Court found that the revisions made in the statement were transparent. By using the word "deleted" and asking the detectives if Gray's arrest was based on the confession made clear what the edited words were. "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view the law must require the same result." *Id.* at 1155.

## FIFTH AMENDMENT

### Immunity: Foreign Prosecutions

In *United States v. Balsys*, 118 S.Ct. 2218 (1998), the Supreme Court addressed the issue of whether the Fifth Amendment protects against self-incrimination in a foreign court. The Office of Special Investigations (OSI) of the Department of Justice's Criminal Division subpoenaed Balsys, a resident alien. The OSI sought testimony concerning Balsys' activities between 1940 and 1944 and his 1961 immigration to the United States. Balsys claimed Fifth Amendment protection because he feared prosecution in a foreign nation (Lithuania, Israel, or Germany).

The Supreme Court held that fear of prosecution in a foreign court fell outside the scope of the Fifth Amendment. The Court found that, although Balsys was an alien, he was still considered a "person" under the Clause and thus entitled to the same protections as citizens. The critical question, however, was whether a foreign prosecution was "a criminal case" for the purposes of the Clause. Balsys sought to argue a literal meaning to the phrase "any criminal Case." The Court, however, noted that the other provisions of the Fifth Amendment (e.g., grand jury indictment, double jeopardy, due process) applied only to the United States, and therefore it would be odd for one clause to be so broad.

The Court found that there was no common-law rule or practice that fell within the bounds of this case. Looking back at the history of the Amendment, the Court noted that the Amendment did not apply to the states until *Malloy v. Hogan*, 378 U.S. 1 (1964). Prior to that time, a person facing federal prosecution could not assert the privilege based on the fear of prosecution in state courts. After *Malloy*, this rule changed. In *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), the Court wrote:

After *Malloy*, the Fifth Amendment limitation could no longer be seen as framed for one jurisdiction alone, each jurisdiction having instead become subject to the same claim of privilege flowing from the one litigation. Since fear of prosecution in the one jurisdiction bound

by the Clause now implicated the very privilege binding upon the other, the *Murphy* opinion sensibly recognized that if a witness could not assert the privilege in such circumstances, the witness could be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to both." *Id.* at 2227 (citation omitted).

This reasoning simply does not apply to foreign jurisdictions. The Court also rejected expansive language in its prior cases which based the privilege, in part, on the "inviolability" of the human personality. "[W]hat we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years." *Id.* at 2232.

### Clemency Procedures

In *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244 (1998), the Supreme Court upheld Ohio's voluntary clemency process. A prisoner sentenced to death filed suit against the State, arguing that its voluntary clemency process violated his Fourteenth and Fifth Amendment rights. Woodard was convicted of murder while committing a carjacking and sentenced to death. The conviction and sentence were affirmed on direct appeal, and the Court denied certiorari. The Ohio Adult Parole Authority then started the clemency process in accordance with state law. Before the first voluntary interview, Woodard filed suit for the violation of his Fifth Amendment right against self-incrimination. Though the district court ruled for the State, the Sixth Circuit did find something to Woodard's claim. The Sixth Circuit held that there was no state created liberty interest in clemency, and therefore the district court was right in dismissing the Fourteenth Amendment due process claim. This is because clemency rests solely with the discretion of the Governor. However, the court of appeals did find that there was a "second strand" of due process because the clemency process has become an integral part of the death sentence procedure. In addition, the Sixth Circuit found that there was no real choice when it came to the clemency hearing — one either confessed, incriminating oneself, or did not receive clemency. The court of appeals found this constitutionally suspect.

The U.S. Supreme Court reversed, holding that the voluntary nature of the interview did not violate the Fifth Amendment. The Amendment protects only against compelled incrimination. The Court found that even though the interview is not confidential and that authorities may draw adverse inference from failure to answer, the testimony is not "compelled" within the meaning of the Fifth Amendment. Woodard in that situation faces the same situation as a criminal defendant in a trial. Difficult choices, even under the pressures of a criminal trial, do not necessarily amount to constitutional "compulsion." The Court wrote:

Long ago we held that a defendant who took the stand in his own defense could not claim the privilege against self-incrimination when the prosecution sought to cross examine him. A defendant who takes the stand in his own behalf may be impeached by proof of prior convictions without violation of the Fifth Amendment privilege. A defendant whose motion for acquittal at the close of the Government's case is denied must then elect whether to stand on his motion or to put on

a defense, with the accompanying risk that in doing so he will augment the Government's case against him. In each of these situations, there are undoubted pressures — generated by the strength of the Government's case against him — pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute "compulsion" for Fifth Amendment purposes. *Id.* (citations omitted).

The Court also rejected the due process argument, with four Justices finding that the Due Process Clause did not apply to clemency proceedings and four Justices finding that due process had been satisfied in this case.

## DOUBLE JEOPARDY

### Criminal-Civil Distinction

In *United States v. Halper*, 490 U.S. 435 (1989), the defendant was convicted of submitting 65 false claims under the federal Medicare program. While working for a medical laboratory, he submitted claims for a \$12 reimbursement for \$3 procedures. The total amount of the fraud was \$585. Halper was convicted on all 65 counts, as well as 16 counts of mail fraud, and 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. The Court found this penalty barred by the double jeopardy safeguard, writing:

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.

In *Hudson v. United States*, 118 S.Ct. 488 (1997), the Supreme Court reversed *Halper*, replacing its analysis with the two-step approach set forth in *United States v. Ward*, 448 U.S. 242 (1980). The Government initially imposed monetary penalties and occupational disbarment on petitioners for violating federal banking statutes. The petitioners were later indicted for essentially the same conduct, at which time they raised the double jeopardy issue.

In the Court's view, "*Halper's* test proved unworkable, creating confusion by attempting to distinguish between 'punitive' and 'nonpunitive' penalties." *Id.* at 491. Under the proper approach, the first step is to determine (as a matter of statutory interpretation) if the legislature intended the punishment to be criminal or civil. Second, even if the legislature intended a civil penalty, the courts may determine whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy to a criminal penalty. In making this determination, several useful guideposts are relevant: (1) whether the sanction involves an affirmative disability or restraint; (2); whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose may rationally be assigned for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S.

144, 168-69 (1963). The Court went on to hold that the statutory scheme was civil in nature.

### Multiple Punishment

In *Monge v. California*, 118 S.Ct. 2246 (1998), the Supreme Court addressed the double jeopardy implications of an enhanced sentencing procedure. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Supreme Court had applied the Double Jeopardy Clause to capital sentencing, ruling that a defendant who received a life sentence in a death penalty case could not be sentenced to death following a successful appeal and retrial. *Bullington*, however, was an exception to the Court's position that double jeopardy protection did not extend to sentencing proceedings. *Monge* argued that *Bullington* should be extended to other types of sentencing procedures.

Under California's "three-strikes" law, a convicted felon with one prior conviction for a serious crime can qualify for sentence enhancement after a second conviction. This system has several procedural safeguards, including the right to a jury trial, the right to confront witnesses, the privilege against self-incrimination, the "proof beyond a reasonable doubt" standard, and the application of the rules of evidence.

*Monge* was convicted of three drug violations. At the sentencing hearing, the prosecution sought to have his sentence enhanced based on a prior assault with a deadly weapon conviction. The trial court found that the prior conviction was a sufficient predicate for enhancement. A California court of appeals subsequently ruled that the evidence was insufficient to warrant enhancement. In addition, the court held that a remand would violate double jeopardy, basing this decision on *Bullington*.

The U.S. Supreme Court ruled that the Double Jeopardy Clause does not apply because there is no "offense." Sentence determinations are not analogous to an acquittal. The Court wrote: "[I]t is a 'well-established part of our constitutional jurisprudence' that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal." 118 S.Ct. at 2251. The *Bullington* exception was based on the death penalty sanction. The emotional importance of a death penalty hearing in addition to its procedural safeguards is what creates the narrow exception in the double jeopardy rule. Therefore, the Court found that the rehearing of a sentence enhancement did not qualify as an exception to the rule.

### POLYGRAPH: RIGHT TO PRESENT A DEFENSE

In *United States v. Sheffer*, 118 S.Ct. 1261 (1998), the U.S. Supreme Court held that adoption of a per se rule of exclusion for polygraph evidence is not unconstitutional. The Court acknowledged once more the right to present a defense, albeit a qualified right. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *Id.* at 1264. In the Court's view, evidence "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or disproportionate to the purposes they are designed to serve. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.*

Justice Thomas's opinion identified three interests that support the per se rule of exclusion: (1) ensuring that only

reliable evidence is introduced at trial, (2) preserving the jury's role in determining credibility, and (3) avoiding litigation of collateral issues. Interestingly, Justice Kennedy along with three other Justices rejected the second and third interests. As to reliability, Justice Thomas's opinion notes that "the scientific community remains extremely polarized about the reliability of polygraph techniques." *Id.* at 1265. Justice Thomas also cited the preservation of the jury's role in determining credibility. "By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations." *Id.* at 1267. A third reason supporting the per se rule of exclusion is, in Justice Thomas's view, the avoidance of litigation on collateral issues, which "prolongs criminal trials and threatens to distract the jury from its central function of determining guilt or innocence." *Id.*

In his concurring opinion, Justice Kennedy pointed out that Federal Rule 704 abolishes the ultimate issue rule and the "invading the province of the jury" argument has been rejected under most modern evidence codes. Significantly, he also wrote:

I doubt that the rule of per se exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. Though the considerable discretion given to the trial court in admitting and excluding scientific evidence is not a constitutional one, . . . there is some tension between that rule and our holding today. And, as Justice Stevens points out [in dissent], there is much inconsistency between the Government's extensive use of polygraph to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests. *Id.* at 1269.

### GRAND JURY DISCRIMINATION

In *Campbell v. Louisiana*, 118 S.Ct. 1419 (1998), the Supreme Court reversed a decision by the Louisiana Supreme Court, which had held that a white defendant did not have standing to bring equal protection, due process, and Sixth Amendment fair cross-section claims for discrimination against African Americans in grand juries. The Louisiana Supreme Court found that a white defendant accused of killing another white man did not meet the "considerable and substantial impact" criteria set in *Powers v. Ohio*, 499 U.S. 400 (1991), as a requirement for standing.

A grand jury in Evangeline Parish Louisiana indicted Campbell for second degree murder. In the history of the parish no African American had ever been appointed grand jury foreperson. The Supreme Court held that Campbell did have standing to bring both due process and equal protection claims for discrimination against African Americans. In *Powers*, which concerned discrimination in the use of peremptory challenges, the Court had set forth three conditions for third-party standing. First, the defendant must suffer an "injury in fact." Second, there must be a close relationship to the excluded juror's. Finally, there must be some hindrance to the excluded jurors assertion of their own rights, such as economic disincentives to pursue the issue. The Court found that all three conditions were satisfied.

### DEATH PENALTY CONSIDERED

#### Lesser Included Offenses

In *Hopkins v. Reeves*, 118 S.Ct. 1895 (1998), the Supreme Court considered whether a capital defendant had

a right to a jury instruction on lesser-included-offenses. The defendant was convicted of two counts of felony murder and sentenced to death. The defendant had raped and murdered two women at a Religious Society of Friends meeting house. Both were stabbed. One of the victims identified the defendant as the assailant. The police charged the defendant with felony-murder based on the fact that the murders were committed during the commission of rape. Under Nebraska law, this is first-degree felony murder. The defendant requested an instruction on second-degree murder and manslaughter as lesser-included offenses. The trial court refused. On a habeas corpus petition, the Eighth Circuit held the failure to instruct unconstitutional under *Beck v. Alabama*, 447 U.S. 625 (1980), which had struck down an Alabama law that prohibited juries from being instructed on lesser-included-offenses in capital cases. This law created an artificial barrier between capital and noncapital cases because lesser-included-offense instructions were permissible in the latter.

The Court held that *Beck* did not mandate jury instructions on offenses that are not lesser included offenses under state law. It had long been the opinion of the Nebraska Supreme Court that second-degree murder and manslaughter are not lesser included offense of felony-murder. Therefore, *Beck* did not apply. Applying *Beck* here would force states to create lesser-included crimes in capital cases when none existed.

#### Mitigation Instruction

In *Buchanan v. Angelone*, 118 S.Ct. 757 (1998), Buchanan was convicted of the murder of his father, step-mother, and two brothers. During the two-day sentencing hearing, the defense counsel presented evidence of the defendant's background and his mental and emotional problems. Both the defense counsel and the prosecutor discussed the mitigating factors in the penalty phase. The trial court refused Buchanan's request for an instruction that contained the particular statutory definitions of mitigating factors. The trial court instructed the jury to hand down the death penalty if it found beyond a reasonable doubt that the conduct was "vile," the aggravating factor under state law. In addition, the trial court instructed the jury to consider all the evidence when deciding which punishment was appropriate. Buchanan was sentenced to death.

The Supreme Court found that refusing to instruct the jury on the particular statutory definitions of mitigating factors did not violate the Eighth or Fourteenth Amendments. The instruction told the jury to consider all the evidence, including the mitigating factors discussed in the sentencing hearing. The instructions did not preclude the jury from examining the evidence of mitigating factors. The Court summarized its holding as follows: "This case calls on us to decide whether the Eighth Amendment requires that a capital jury be instructed on the concept of mitigation evidence generally, or on particular statutory mitigating factors. We hold it does not." *Id.* at 758-59.

#### Mental Competence

In *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), the Supreme Court allowed a second writ of habeas corpus for incompetence after the first had been denied for being premature. The respondent was convicted of two counts of first-degree murder and sentenced to death. He lost all direct appeals in Arizona. He filed a number of state habeas corpus petitions at the same time he filed three federal habeas petitions. All the federal petitions were denied be-

cause all state avenues had not been exhausted. Later, respondent filed another petition based on *Ford v. Wainwright*, 477 U.S. 399 (1986), in which the Court had decided that those who are insane cannot be executed. The District Court dismissed this petition for being premature. The Ninth Circuit affirmed but stated that its ruling was not based on the merits of the petition. On remand, the respondent sought to reopen the petition, fearing that the Antiterrorism and Effective Death Penalty Act (AEDPA) was in effect. The AEDPA acts as a gatekeeper, forbidding successive habeas corpus petitions. The district court refused to reopen the petition. Later the respondent again sought to reopen the competence issue and was denied on AEDPA grounds. The Ninth Circuit reversed and allowed the petition. The Supreme Court affirmed.

The Supreme Court held that to reopen a previous petition that had been found to be premature is not a "successive" habeas corpus petition. Therefore, it can not be barred by the AEDPA. This was not a separate petition but only a reopening of a former petition, according to the Court. The respondent is entitled to have this claim adjudicated when it became ripe.

### **EXTRADITION**

In *New Mexico ex. rel. Ortiz v. Reed*, 118 S.Ct. 1860 (1998), the Supreme Court addressed the extradition of a fugitive back to Ohio. Reed was paroled from a conviction for armed robbery and drug theft. Reed fled Ohio to New Mexico the next year after being informed by prison officials that they planned to revoke his parole. The Governor of New Mexico ordered the extradition of Reed. A state supreme court judge, however, granted habeas relief. Reed argued that he left Ohio under duress because he believed Ohio authorities would violate his due process rights and cause him physical harm. The New Mexico Supreme Court refused the extradition on the basis that the fugitive was not really a fugitive but a "refugee from injustice." The New Mexico Court believed that its Constitution's guarantee of the right to seek asylum prevailed over the extradition rights

of the other states.

The U.S. Supreme Court held that the asylum state is not the place for a hearing on whether the defendant is a fugitive under Article IV of the Constitution. The Court wrote: "In case after case we have held that claims relating to what actually happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns, are issues that must be tried in the court of that State, and not in those of the asylum State." The Court also held that New Mexico Constitution's provision guaranteeing the right to seek safety does not prevail over Article IV of the Constitution.

### **PROSECUTION IMMUNITY**

In *Kalina v. Fletcher*, 118 S.Ct. 502 (1997), the Supreme Court affirmed the decision of the Ninth Circuit, which had held that prosecutors are not entitled to absolute immunity in executing a certification for determination of probable cause. At the commencement of the criminal proceeding the prosecuting attorney filed a "Certification for Determination of Probable Cause." This is the customary practice in Washington state courts. This document summarized the evidence in support of the charge and is sworn to by the prosecutor and resulted in the respondent's arrest and spending a night in jail. Under 42 U.S.C. § 1983, the respondent brought suit against the prosecutor based on two inaccurate statements in the certification.

The Supreme Court held that the doctrine of absolute prosecutorial immunity did not apply to false statements used to support arrest warrants. When acting as an advocate, the prosecutor has absolute immunity. The prosecutor in this case, however, was acting as a complaining witness and in that function only has qualified immunity. The act of personally attesting to the truth of the certification was the only action outside the scope of absolute immunity. The Court held that "[t]estifying about facts is the function of the witness, not the lawyer." The Court concluded that when prosecutors step outside their role they are no longer entitled to the same privileges.