1997-98 U.S. SUPREME COURT TERM: CASES AFFECTING CRIMINAL LAW & PROCEDURE

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Bruton Issue

Bruton-Redacted Confession of Codefendant That Replaces Defendant's Name with Obvious Indication of Deletion, Such as Word "Deleted," Violates *Bruton*

Gray v. Maryland, 118 S. Ct. 1151, 140 L. Ed. 2d 294, 62 Crim. L. Rep. 2119 (9 March 1998). Anthony Bell confessed that he, the defendant, and a third person (Vanlandingham) participated in a beating that caused the victim's death. Bell and the defendant were tried jointly for murder, and the detective read a redacted version of Bell's confession to the jury. The detective said the word "deleted" or "deletion" whenever the defendant's or Vanlandingham's name appeared. After reading the confession, the detective was asked by the prosecutor, "after [Bell] gave you that information, you subsequently were able to arrest [the defendant]; is that correct?" The detective said, "That's correct." The state produced other witnesses who said six people (including the three mentioned above) participated in the beating. The defendant testified and denied his participation. Bell did not testify. The judge instructed the jury that it should not use Bell's confession against the defendant. The Court ruled that the use of the redacted confession in this case violated Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The Court reasoned that a redaction that replaces a defendant's name with an obvious indication of deletion—such as a blank space, the word "deleted," or a similar symbol—is a *Bruton* violation. A jury will often realize that a confession redacted in such a manner is specifically referring to the defendant. The Court indicated, however, that it would have been permissible to redact the confession (when the defendant answered the detective's question of who beat the victim), to state, "Me and a few other guys," instead of "Me, deleted, deleted, and a few other guys." The Court distinguished Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) (redacted codefendant's confession that deleted all indication that anyone other than codefendant and third person committed crime did not violate *Bruton*, although confession became incriminating when linked to evidence introduced later in trial). The redacted statement in *Richardson* did not point directly to the defendant at all.

Double Jeopardy

Court Disavows Its Method of Analysis Used in *United States v. Halper* to Determine When a Civil Remedy Constitutes Punishment under Double Jeopardy Clause

Hudson v. United States, 118 S. Ct. 488, 139 L. Ed. 2d. 450, 62 Crim. L. Rep. 2022 (10 December 1997). Civil monetary penalties and occupational debarment were imposed against three bankers for violating banking laws, and they later were charged with criminal offenses based on the same violations. The court of appeals ruled that the double jeopardy clause did not bar the

criminal charges. The Court affirmed the ruling of the court of appeals but disavowed the method of analysis used in Halper v. United States, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) to determine whether a civil remedy constitutes punishment under the Double Jeopardy Clause that would bar a later criminal prosecution based on the same conduct. The Court stated that it would use—instead of the *Halper* method of analysis—the seven factors set out in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). The Court then noted that these factors must be considered with the particular civil remedy statute at issue (not the actual civil remedy imposed in the case), and "only the clearest proof" will suffice to override legislative intent and transform into a criminal punishment what has been denominated a civil remedy. [Note: The effect of this ruling is to make it more difficult to show that a civil remedy is a criminal punishment under the Double Jeopardy Clause.]

Double Jeopardy Clause Does Not Apply to Noncapital Sentencing Hearings

Monge v. California, 118 S. Ct. 2246, 141 L. Ed. 2d 615, 63 Crim. L. Rep. 442 (26 June 1998). The state at a noncapital sentencing hearing provided insufficient evidence of the defendant's prior conviction. The Court ruled that the state could attempt to provide sufficient evidence at a later sentencing hearing because the Double Jeopardy Clause does not apply to noncapital sentencing hearings. The Court distinguished Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) (jury's life imprisonment verdict bars, on Double Jeopardy grounds, death penalty verdict at later sentencing hearing).

Search and Seizure

Richards v. Wisconsin Standard Applies When Officers Making "No Knock" Entry with Search Warrant Must Destroy Property to Enter Home

United States v. Ramirez, 118 S. Ct. 992, 140 L. Ed. 2d 191, 62 Crim. L. Rep. 2108 (4 March 1998). In Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997), the Court ruled that under the Fourth Amendment officers are not required to knock and announce their presence before entering a home if they have reasonable suspicion that doing so would be dangerous or futile, or that it would inhibit the effective investigation of crime. The Court in this case rejected the defendant's argument that a higher standard should apply when officers must destroy property to enter a home (for example, break a window). Instead, it ruled that the *Richards* standard applies in such a case. The Court then examined the facts in this case, in which officers broke a garage window where they suspected weapons were located that could be used against them, and determined that the officers' "no knock" entry was reasonable under the Fourth Amendment.

[Note: G.S. 15A-251 requires an officer, before executing a search warrant and entering premises without giving notice, to have *probable cause* to believe that giving notice would *endanger the life or safety of any person*. Thus, this statute imposes a more stringent standard on officers than the Fourth Amendment. See also G.S. 15A-401(e)c., which requires an officer, before entering premises to make an arrest without giving notice of the officer's authority and purpose, to have *reasonable cause* to believe that the giving of such notice would present a *clear danger to human life*.]

Law Enforcement Officer Did Not Seize Person under Fourth Amendment When During High-Speed Chase Person Fell Off Motorcycle Being Pursued, and Officer's Vehicle Accidentally Struck Person

County of Sacramento v. Lewis, 118 S. Ct. 1708, 140 L. Ed. 2d 1043, 63 Crim. L. Rep. 245 (26 May 1998). The court, relying on California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) and Brower v. County of Inyo, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989), ruled that a law enforcement officer did not seize a person under the Fourth Amendment when during a high-speed chase the person fell off a motorcycle being pursued by the officer, and the officer's vehicle accidentally struck the person. There was no governmental termination of the person's movement *through means intentionally applied*. The Court also ruled, relying on *Hodari D.*, that the Fourth Amendment does not include failed attempts to make a seizure.

Fourth Amendment's Exclusionary Rule Does Not Bar Introduction At Parole Revocation Hearings of Evidence Seized in Violation of Parolee's Fourth Amendment Rights, Even When Searching Officer Knows That Person Is a Parolee

Pennsylvania Board of Probation and Parole v. Scott, 118 S. Ct. 2014, 141 L. Ed. 2d 344, 63 Crim. L. Rep. 393 (22 June 1998). The Court ruled that the Fourth Amendment's exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of a parolee's Fourth Amendment rights, even when the searching officer knows that the person is a parolee. [Note: See also State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982) (Fourth Amendment's exclusionary rule does not apply to evidence used in probation revocation hearing).]

Miscellaneous

Military Court's Evidence Rule, Which Makes Polygraph Evidence Inadmissible in Court-Martial Proceedings, Does Not Unconstitutionally Abridge Defendant's Right to Present Defense

United States v. Scheffer, 118 S. Ct. 1261, 140 L. Ed. 2d 413, 63 Crim. L. Rep. 28 (31 March 1998). The defendant was tried in a court-martial with illegally using drugs. He sought to introduce polygraph evidence in support of his testimony that he did not knowingly use drugs. A military evidence rule absolutely prohibited the introduction of this evidence. The Court ruled that this rule did not unconstitutionally abridge the defendant's right to present a defense. Four Justices concluded that an absolute rule prohibiting such testimony was constitutional. Four other Justices stated that the rule was not so arbitrary or disproportionate that it was unconstitutional; however, some future case might present a more compelling case for the introduction of such evidence. One Justice dissented and stated that the rule was unconstitutional in this case.

Prosecutor Was Not Entitled To Absolute Immunity in Section 1983 Lawsuit When the Prosecutor Completed a Document, Which Was Functionally Equivalent to an Affidavit, to Support Issuance of Arrest Warrant

Kalina v. Fletcher, 118 S. Ct. 502, 139 L. Ed. 2d. 471, 62 Crim. L. Rep. 2028 (10 December 1997). A state prosecutor began a criminal proceeding against Fletcher (the plaintiff in a section 1983 lawsuit against the prosecutor) with two documents: (1) an information charging Fletcher with burglary, and (2) a motion for an arrest warrant. The prosecutor supported the motion for an arrest warrant with her execution of a certification ("Certification for Determination of Probable Cause") that was functionally equivalent to an affidavit. The prosecutor's certification set out facts, under penalty of perjury, supporting the issuance of the arrest warrant against Fletcher. The Court ruled that the prosecutor's certification was not entitled to absolute immunity. The Court noted that although state law required the certification to be sworn or certified under penalty of perjury, neither federal nor state law required that a prosecutor must make the certification. The Court rejected the prosecutor's argument that execution of the certificate was the work of an advocate and integral to the initiation of the prosecution. The Court stated that that characterization was appropriate for the drafting of the certification, the determination that the evidence was sufficient to justify a finding of probable cause, the decision to file criminal charges, and the presentation of the information and motion to the court. However, testifying about facts is the function of a witness, not a lawyer. Therefore, the certification was not a prosecutorial function that entitled the prosecutor to absolute immunity.

Fugitive Contesting Extradition in Asylum State Court Cannot Raise Issue that Demanding State Would Revoke His Parole Without Due Process and He Would Be Returned to Prison Where He Faced Bodily Injury

New Mexico ex. rel. Ortiz v. Reed, 118 S. Ct. 1860, 141 L. Ed. 2d 131, 63 Crim. L. Rep. 2071 (8 June 1998). The Court ruled, relying on Michigan v. Doran, 439 U.S. 282 (1978) and other cases, that a fugitive contesting extradition in an asylum state court cannot raise the issue that the demanding state (that is, the state seeking extradition) would revoke his parole without due process and he would be returned to prison where he faced bodily injury. Such an assertion may only be raised in the demanding state.

White Defendant Has Standing to Raise Fourteenth Amendment Equal Protection Claim Alleging Discrimination in Selection of Grand Jurors and Standing to Raise Claim that Defendant's Due Process Rights Were Violated as Result of Such Discrimination

Campbell v. Louisiana, 118 S. Ct. 1419, 140 L. Ed. 2d 575, 63 Crim. L. Rep. 94 (21 April 1998). The Court ruled that a white defendant has standing to raise a Fourteenth Amendment Equal Protection Clause claim alleging discrimination in the selection of grand jurors and also has standing to raise a claim that the defendant's due process rights were violated as a result of such discrimination.

Eighth Amendment Does Not Require That Capital Sentencing Jury Must Be Instructed on Concept of Mitigating Evidence Generally or Particular Mitigating Factors

Buchanan v. Angelone, 118 S. Ct. 757, 139 L. Ed. 2d 702, 62 Crim. L. Rep. 2084 (21 January 1998). The court ruled that the Eighth Amendment does not require that a capital sentencing jury must be instructed on concept of mitigating evidence generally or on particular mitigating factors. The amendment only requires that the sentencer not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.

Beck v. Alabama **Does Not Require State Court to Instruct on Offenses That under State Law Are Not Considered Lesser Offenses of the Charged Offense**

Hopkins v. Reeves, 118 S. Ct. 1895, 141 L. Ed. 2d 76, 63 Crim. L. Rep. 304 (8 June 1998). The Court ruled that Beck v. Alabama, 447 U.S. 625 (1980) (jury in capital case must be allowed to consider verdict of guilt on lesser-included offense) does not require a state court to instruct on offenses that under state law are not considered lesser offenses of the charged offense.

Full Forfeiture of Defendant's $357,144, Which Was Required As Result of Conviction of Violating Federal Currency Reporting Law, Violates Excessive Fines Clause of Eighth Amendment, Based on Facts in This Case

United States v. Bajakajian, 118 S. Ct. 2028, 141 L. Ed. 2d 314, 63 Crim. L. Rep. 383 (22 June 1998). The defendant attempted to leave the United States with $357,144 in currency without reporting, as required by federal law, that he was transporting more than $10,000 in currency. Such conduct is a federal criminal offense, for which the defendant was convicted. Federal law requires the forfeiture, after conviction, of all property involved in this offense. The Court ruled that the forfeiture of $357,144 would be a "fine" under the Excessive Fines Clause of the Eighth Amendment (the forfeiture under this statute is an *in personam* criminal forfeiture, not a civil *in rem* forfeiture). The Court then ruled that the full forfeiture of defendant's $357,144 after his conviction of violating the federal currency reporting law would violate the Excessive Fines Clause of the Eighth Amendment, based on facts in this case. The forfeiture would be grossly disproportional to the gravity of the offense it was designed to punish.

Ohio Clemency Proceedings for Death-Row Inmate Did Not Violate Due Process

Ohio Adult Parole Authority v. Woodard, 118 S. Ct. 1244, 140 L. Ed. 2d 387, 63 Crim. L. Rep. 21 (25 March 1998). The court ruled that the Ohio's clemency proceedings for a death-row inmate did not violate due process.

Law Enforcement Officer Does Not Violate Substantive Due Process By Causing Death Through Deliberate or Reckless Indifference to Life in High Speed Vehicle Chase Aimed at Apprehending Suspect

County of Sacramento v. Lewis, 118 S. Ct. 1708, 140 L. Ed. 2d 1043, 63 Crim. L. Rep. 245 (26 May 1998). The court ruled that a law enforcement officer does not violate substantive due

process by causing the death of another through deliberate or reckless indifference to life in a high speed vehicle chase aimed at apprehending a suspect. Only a chase conducted with intent to do harm could violate substantive due process.

Neither Fifth Amendment's Due Process Clause Nor Federal Civil Service Reform Act Precludes Federal Agency from Sanctioning Employee from Making False Statements to Agency Concerning Alleged Employment-Related Misconduct

La Chance v. Erickson, 118 S. Ct. 695, 139 L. Ed. 2d 645, 66 U.S.L.W. 4073 (21 January 1998). The court ruled that neither the Fifth Amendment's Due Process Clause nor the federal Civil Service Reform Act precludes a federal agency from sanctioning an employee from making false statements to an agency concerning alleged employment-related misconduct.

Person May Not Assert Fifth Amendment Privilege Against Self-Incrimination Based on Fear of Later Prosecution by Foreign Nation

United States v. Balsys, 118 S. Ct. 2218, 141 L. Ed. 2d 575, 63 Crim. L. Rep. 425 (25 June 1998). The Court ruled that a person may not assert the Fifth Amendment privilege against self-incrimination based on the fear of a later prosecution by a foreign nation.

Federal Habeas Petitioner Procedurally Defaulted Claim, by Failing to Raise in State Court Alleged Violation of International Treaty: Arresting Officers Failure to Inform Him, a Foreign National, of Right to Contact His Nation's Consulate

Breard v. Greene, 118 S. Ct. 1352, 140 L. Ed. 2d 529, 63 Crim. L. Rep. 2026 (14 April 1998). The Court ruled that the federal habeas petitioner procedurally defaulted claim, by failing to raise in state court alleged violation of international treaty—arresting officers failure to inform him, a foreign national, of his right to contact his nation's consulate.

Ninth Circuit Court of Appeals Abused Its Discretion in Recalling Mandate in Death Penalty Case

Calderon v. Thompson, 118 S. Ct. 1489, 140 L. Ed. 2d 728, 63 Crim. L. Rep. 138 (29 April 1998). The Court ruled that the Ninth Circuit Court of Appeals abused its discretion in recalling its mandate in a death penalty case.

Court Rejects Lower Court's Ruling that in § 1983 Unconstitutional-Motive Case Against Public Official, Plaintiff Must Establish Motive by Clear and Convincing Evidence

Crawford-El v. Britton, 118 S. Ct. 1854, 140 L. Ed. 2d 759, 63 Crim. L. Rep. 148 (4 May 1998). The Court rejected a lower court's ruling that in a § 1983 unconstitutional-motive case against a public official, the plaintiff must establish motive by clear and convincing evidence.

Court Clarifies Effect of State's Restoration of Convicted Person's Civil Rights on Federal Firearms Prohibition

Caron v. United States, 118 S. Ct. 2007, 141 L. Ed. 2d 303, 63 Crim. L. Rep. 379 (22 June 1998). The Court ruled that a state pardon or restoration of civil rights that allows a person previously convicted of a felony to possess some but not all types of firearms qualifies as "expressly provid[ing] that the person may not . . . possess . . . firearms" for purposes of 18 U.S.C. 921(a)(20) and the federal statutory scheme that prohibits and punishes the possession of any firearm by a person previously convicted of a felony.

Attorney's Notes of Interview with Client Made Shortly Before Client's Death Were Protected by Attorney-Client Privilege, When Notes Were Sought by Office of Independent Counsel in Connection with Investigation of Obstruction of Justice

Swidler & Berlin v. United States, 118 S. Ct. 2081, 141 L. Ed. 2d 379, 63 Crim. L. Rep. 420 (25 June 1998). The Court ruled, in a case applicable to federal courts, that an attorney's notes of an interview with a client made shortly before the client's death were protected by the attorney-client privilege, based on the facts in this case. The notes were sought by the Office of Independent Counsel in connection with the investigation of obstruction of justice and other crimes allegedly committed when employees were dismissed from the White House Travel Office.