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The United States Supreme Court's 2000-2001 term will always be remembered for the Court's role in deciding the outcome of the contemporaneous presidential election. Despite the notoriety of that decision, the rest of the term was relatively uneventful. Marked by recurrent split decisions, the Court addressed significant issues regarding an individual's Fourth Amendment rights in the face of technological advance and law enforcement authority, the death penalty, and other topics of criminal procedure.[1]

THE FOURTH AMENDMENT

In *City of Indianapolis v. Edmond*,[2] the Court held that though Indianapolis's vehicle checkpoint program was instituted to discover drugs in stopped vehicles by using narcotics detection dogs, its "primary purpose . . . [was] ultimately indistinguishable from the general interest in crime control" and therefore contravened the Fourth Amendment's requirement of "individualized suspicion." Though the city argued that its program, like previously accepted drunk-driving checkpoints, had the "ultimate purpose of arresting those suspected of committing crimes," the Court refused to accept such a "high level of generality" because it would provide no conceivable stopping point for law enforcement activity." Regarding the city's secondary purpose of "keeping impaired motorists off the road and verifying licenses and registrations," the Court pointed out that such a justification would permit any checkpoints "so long as they also included a license or sobriety check." The Court concluded that the Indianapolis program lacked a specific "connection to the roadway," unlike a sobriety checkpoint that focuses on "immediate, vehicle bound threat to life and limb."

Justice Breyer, writing for the Court in *Illinois v. McArthur*,[3] held that police officers may deny individuals unaccompanied entrance into their home for a limited time as long as there is probable cause to believe that drugs are present and a reasonable belief that those drugs would be destroyed without restraining the occupant's entrance. Informed of the presence of drugs, police officers refused to let Charles McArthur enter his trailer unaccompanied until they could obtain a search warrant. Balancing the privacy and law enforcement interests at stake, the Court pointed out four significant considerations in this case. First, the officers had probable cause based on the testimony of McArthur's wife that drugs were present. Second, they had good reason to believe that McArthur would destroy the drugs before they could obtain a warrant. Third, by merely denying McArthur unobserved entrance, the officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." Finally, the restraint lasted only two hours, which is reasonable time to diligently obtain a warrant. Therefore, this brief warrantless seizure met Fourth Amendment demands because it was "limited and tailored reasonably to secure law enforcement needs while protecting privacy interests."

The Court in *Ferguson v. City of Charleston*[4] held that a state hospital's administration of nonconsensual drug tests to obtain evidence of a patient's criminal conduct for law enforcement purposes does not comport with the "special needs" doctrine and is an impermissible search under the Fourth Amendment. When a patient of the Medical University of South Carolina was identified as using drugs during pregnancy, the hospital immediately notified police, and the patient was subject to arrest if she did not agree to treatment. Identifying previous cases that used the "special needs" doctrine to validate suspicionless searches, the Court noted that it used a "balancing test that weighed the intrusion on the individual's interest in privacy against the 'special need' that supported the program." In those earlier cases, "there was no misunderstanding about the purpose of the test or the potential use of the test results" and there were "protections against the dissemination of the results to third parties." The Court considered the hospital's tests to be a severe intrusion because patients have a "reasonable expectation" that their test results "will not be shared with nonmedical personnel without [their] consent." Most significantly, the Court asserted that when the "special needs" doctrine has been used, "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." Though the hospital's policy ultimately sought to protect the health of both mother and child, the Court believed "the immediate objective of the searches was to generate evidence for law enforcement purposes" and therefore concluded that "this case simply does not fit within the closely guarded category of 'special needs.'" Moreover, the Court indicated that if an "ultimate purpose" justification were sufficient,

Footnotes

1. For a more in-depth review of the decisions of the past Term, *see* CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2000-2001 (Amer. Acad. of Jud. Educ. 2001).
2. 531 U.S. 32 (2000).
3. 531 U.S. 326 (2001).
4. 532 U.S. 318 (2001).

"virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."

A divided Court in *Atwater v. City of Lago Vista*[5] held that the Fourth Amendment does not prohibit police officers from making a full custodial arrest when they observe a minor violation, like failing to wear a seat belt, for which the penalty is only a fine. A police officer for the city of Lago Vista observed Gail Atwater driving her pickup truck and neither she nor her two small children were wearing seat belts. After being arrested and placed in jail for an hour, she was released on bond and subsequently paid the fine for the misdemeanor seatbelt offense, which was $50. Atwater argued that pre-founding English and early American common law prohibited peace officers from making warrantless misdemeanor arrests unless the offense was a "breach of the peace." To the contrary, the Court recognized "considerable evidence of a broader conception of common law misdemeanor arrest authority unlimited by any breach-of-the-peace condition." Further, statutes in all 50 states and the District of Columbia permit warrantless arrests "for *any* misdemeanor committed in the arresting officer's presence." The Court declined to "mint a new rule of constitutional law" that would prohibit a custodial arrest when conviction for the offense would not result in jail time. Recognizing that Atwater would prevail under such a rule, the Court nonetheless said that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations." Instead, the Court must "draw [reasonableness] standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second guessing months and years after an arrest or search is made." Moreover, the Court concluded that there are sufficient practical and statutory protections already in place, and if more protections are required in the future, it would be "easier to devise a minor-offense limitation by statute than to derive one through the Constitution." In her dissent, Justice O'Connor criticized the majority for holding constitutionally permissible an arrest that it recognized as "a pointless indignity" in the name of "administrative ease." She stressed that "clarity is certainly a value worthy of consideration . . . [but,] it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections." She warned that the Court's "*per se* rule . . . has potentially serious consequences for the everyday lives of Americans" because "unbounded discretion carries with it grave potential for abuse."

Justice Scalia, writing the opinion for the divided Court in *Kyllo v. United States*,[6] held that the use of a sense-enhancing device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion is a "search" and is presumptively unreasonable without a warrant. Danny Kyllo was suspected of growing marijuana in his home, which typically requires high-intensity lamps. Officers used a thermal-imaging device to scan the heat emanating from his home and determined that the heat was consistent with the use of such lamps. They subsequently obtained a warrant and found more than 100 marijuana plants. Noting that a warrantless search of the home is generally unreasonable, Scalia explained that the relevant inquiry is to determine "when a search is not a search." Citing *Katz v. United States*,[7] he explained that the Court had formulated a two-part answer to that question: an individual must manifest a subjective expectation of privacy in the object of the search and society must be willing to recognize that expectation as reasonable. Scalia observed that though "the advance of technology . . . [has] uncovered portions of the house and its curtilage that once were private," the Court has never decided "how much technological enhancement of ordinary perception . . . is too much." Therefore, he set out to establish a general principle that "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted" and yet takes into account technology "already in use or in development." Based on that principle, "the information obtained by the thermal imager . . . was the product of a search." Scalia rejected the contention that "the thermal imaging must be upheld because it detected 'only heat radiating from the external surface of the house.'" He pointed out that this "mechanical interpretation of the Fourth Amendment" was also rejected in "*Katz*, where the eavesdropping device [placed on the outside of a telephone booth] picked up only sound waves that reached the exterior of the phone booth." To depart from this precedent "would leave the homeowner at the mercy of technology—including imaging technology that could discern all human activity in the home." Although the government insisted that the thermal imaging did not detect private activities in the home or reveal "intimate details," Scalia asserted, "in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Justice Stevens, in dissent, argued that the thermal-imaging device only "gathered data exposed on the outside of petitioner's home" and should therefore be permissible because "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

In *Saucier v. Katz*,[8] the Court held that "qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." During a speech by Vice President Al Gore in 1994, protester Elliot Katz was apprehended, quickly "shoved" into a military van, and briefly detained. The Court of Appeals for the Ninth Circuit agreed with the district court "that 'in the Fourth Amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits,'" and accordingly ruled "that the reasonableness inquiry into excessive force meant that it need not consider aspects of qualified immunity, [therefore] leaving the whole matter to the jury." The United States Supreme Court overruled that ruling because qualified immunity is intended to be "an entitlement [to officials] not to

5. 532 U.S. 318 (2001).
6. 121 S.Ct. 2038 (2001).
7. 389 U.S. 347 (1967).
8. 121 S.Ct. 2151 (2001).

stand trial or face the other burdens of litigation" such as "the costs and expenses of trial." Accordingly, "a qualified immunity defense must be considered in proper sequence . . . [and] a ruling on that issue should be made early in the proceedings" and not be fused with the constitutional analysis to be decided later by the jury.

THE FIFTH AMENDMENT

In *Ohio v. Reiner*,[9] the Court reversed an Ohio Supreme Court holding that a witness who denies all culpability cannot claim a Fifth Amendment privilege against testifying. The Court cited its holding in *Hoffman v. United States*[10] that "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Thus, a person who claims innocence may still invoke the Fifth Amendment as long as there is reasonable cause to apprehend incrimination from a direct answer at trial. The Court asserted that although it had previously "held that the privilege's protection extends only to witnesses who have 'reasonable cause to apprehend danger from direct answer," it has "never held . . . that the privilege is unavailable to those who claim innocence."

DOUBLE JEOPARDY

In *Seling v. Young*,[11] the Court held that a confinement statute, found to be civil, cannot be deemed punitive "as applied" to a single individual in violation of the Double Jeopardy and Ex Post Facto clauses and thus provide cause for release. Andre Brigham Young was convicted of six rapes over the course of three decades. Upon release from prison, he was found to be a "sexually violent predator" under Washington State's Community Protection Act of 1990 and therefore civilly "committed for control, care, and treatment to the custody of the department of social and health services." The Washington Supreme Court found that the statute was "clearly intended to create a civil scheme both in the statutory language and legislative history," and since its "goals of incapacitation and treatment" were distinguished from a goal of punishment, it did not violate the Double Jeopardy and Ex Post Facto Clauses of the Federal Constitution. When Young claimed that he was subject to confinement conditions that were punitive and "incompatible with treatment," however, the Ninth Circuit reasoned that "the actual conditions of his confinement could divest a facially valid statute of its civil label" if there is clear proof that it is "punitive in effect." The United States Supreme Court held that this "as applied" analysis of the statute on Double Jeopardy and Ex Post Facto grounds was "fundamentally flawed" and could not be used to provide relief. The Court explained that it must look at the "legislature's manifest intent" when determining whether an act is civil or punitive in nature. The Court also insisted that in evaluating the civil nature of an act, courts must refer "to a variety of factors 'considered in relation to the statute on its face'" and not on the effect the statute has on a single individual. In concluding that the "as applied" analysis was "unworkable," the Court said that such 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."

THE SIXTH AMENDMENT

Chief Justice Rehnquist, writing for a divided Court in *Texas v. Cobb*,[12] held that the Sixth Amendment right to counsel attaches to offenses, though not formally charged, that are the "same offense" under the test set forth in *Blockburger v. United States*.[13] In that case, the Court explained that whether the Sixth Amendment right to counsel will attach to an uncharged offense depends on "whether each provision requires proof of a fact which the other [charged] offense does not." In the present case, Raymond Cobb was indicted for burglary and was appointed counsel. While free on bond, Cobb confessed to his father that he had murdered the occupants of the home he burglarized. Police took him into custody and administered warnings pursuant to *Miranda v. Arizona*,[14] which he waived. He then confessed to the police and was convicted of capital murder. Cobb argued that his confession should have been inadmissible because it was obtained in violation of his Sixth Amendment right to counsel, which attached when counsel was appointed for him on the burglary charge. However, the chief justice pointed out that under Texas law burglary and capital murder are different offenses based on the *Blockburger* test, and therefore the right to counsel did not attach to the capital murder offense. Thus, the confession was admissible. In response to predictions that this "offense specific rule will prove 'disastrous' to suspects' constitutional rights" by allowing police "complete and total license to conduct unwanted and uncounseled interrogations," the chief justice offers two important considerations. First, suspects are guaranteed their rights against self-incrimination under *Miranda*. Second, "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses."

THE DEATH PENALTY

In *Penry v. Johnson*,[15] the Supreme Court reversed a Texas court's judgment sentencing John Paul Penry, a retarded man, to death. The Court failed to reach the question of whether the Constitution prohibits the execution of the retarded, however, overturning the sentence based on inadequacy of the jury instructions. When Penry was originally found guilty of capital murder, the jury was instructed to determine his sentence by answering three statutorily mandated "special issues"

9. 532 U.S. 17 (2001).
10. 341 U.S. 479, 486-87 (1951).
11. 531 U.S. 250 (2001).
12. 532 U.S. 162 (2001).
13. 284 U.S. 299 (1932).
14. 384 U.S. 436 (1966).
15. 121 S.Ct. 1910 (2001).

regarding: (1) whether he acted deliberately, (2) the probability of his future dangerousness, and (3) whether he responded unreasonably to any provocation. The Court found, however, that "the jury was never instructed that it could consider and give mitigating effect to" evidence concerning Penry's mental retardation and past child abuse. Therefore, the Court vacated his sentence, emphasizing the fact that the three special issues were not broad enough to provide the jury with a "vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." During the retrial, Penry was again found guilty and the trial court again instructed the jury to answer the same three "special issues" explaining that a "yes" to all of the questions would result in a death sentence and a "no" on any issue would result in a life sentence. The jury was also given a "supplemental instruction" that informed them to consider and give effect to any mitigating circumstances and that if they believed that a life sentence was appropriate, "a negative finding should be given to one of the special issues." However, "the verdict form itself . . . contained only the text of the three special issues, and gave the jury two choices with respect to each special issue." Penry was again sentenced to death, and the Supreme Court again vacated the sentence because the instructions "had no practical effect . . . [and] were not meaningfully different from the ones [it] found constitutionally inadequate" in the first case. The Court suggested that the "confusing" instructions were problematic for two reasons. First, the jury was "shackled and confined within the scope of the three special issues" already found inadequate to give effect to Penry's mitigating evidence. Second, to give effect to the mitigating evidence, the jury would have been forced to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence for Penry." The Court concluded that "it would have been both logically and ethically impossible for a juror to follow both sets of instructions" because either the supplemental instruction or the verdict form would have to have been ignored.

THE FOURTEENTH AMENDMENT

In *Rogers v. Tennessee*,[16] the Court held that the retroactive application of a judicial decision abolishing the common-law "year-and-a-day rule" to uphold a murder conviction did not deny a person of due process in violation of the Fourteenth Amendment. Wilbert Rogers was convicted of second-degree murder for stabbing a person who went into a coma and died 15 months later. Rogers asserted that according to common law he could not be convicted because his victim had not "died by [his] act within a year and a day of the act." The Tennessee Supreme Court reviewed the rule's justification and "found that the original reasons for recognizing the rule no longer exist" and, therefore, "abolished the rule as it had existed at common law in Tennessee" and affirmed his conviction. A divided United States Supreme Court held that this retroactive judicial abolition of the common-law rule did not offend the Fourteenth Amendment. It relied on its decision in *Bouie v. City of Columbia*,[17] where it "held that due process prohibits retroactive application of any 'judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.'" The Court considered this limitation on judicial decision making equally apposite in the common-law context because it provides the courts with "the substantial leeway . . . necessary to bring the common law into conformity with logic and common sense." In reference to the "year and a day rule," the Court concluded that its abolition was not unexpected and indefensible because it was created to compensate for the inadequacies of medical science in a time when it "was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death." Further, the Court recognized a trend among the majority of jurisdictions in abolishing the rule as relevant in determining whether it was unexpected and indefensible.

FEDERAL HABEAS CORPUS

In two cases this Term, the Court addressed whether criminal defendants may use habeas review under the Antiterrorism and Effective Death Penalty Act to collaterally challenge prior convictions upon which a present sentence enhancement is based. The first decision to answer this question was *Daniels v. United States*.[18] Justice O'Connor, writing for a divided Court, held that if an individual failed to pursue remedies (or did so unsuccessfully) that were otherwise available to directly challenge prior convictions while in custody for those convictions, that person may not use a 28 U.S.C. section 2255 challenge of his present, enhanced federal sentence to collaterally attack the prior convictions. Section 2255 "permits 'a prisoner in custody under sentence of a [federal] court' to 'move the court which imposed the sentence to vacate, set aside or correct the sentence' upon the ground that 'the sentence was imposed in violation of the Constitution.'" The Court supported this conclusion by focusing on the "ease of administration and the interest in promoting the finality of judgments." The Court explained that "a district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction." Regarding the interest in finality, the Court reasoned that "even after a defendant has served the full measure of his sentence, a State retains a strong interest in preserving the convictions it has obtained," noting that states "impose a wide range of disabilities on those who have been convicted of crimes, even after their release." The Court acknowledged a forum must be provided in which "defendants may challenge their convictions or constitutional infirmity." "But it does not necessarily follow," the Court ruled, "that a § 2255 motion is an appropriate vehicle for determining whether a conviction later used to enhance a federal sentence was unconstitutionally obtained."

16. 121 S.Ct. 1693 (2001).
17. 378 U.S. 347 (1964).
18. 121 S.Ct. 1578 (2001).

In Justice Souter's dissent, he criticized the Court for placing "a flat ban on §2255 relief" for ease of administration and the interest in finality. He asserted that a prisoner should not "be barred from returning to challenge the validity of a conviction, when the Government is free to reach back to it to impose extended imprisonment under a sentence enhancement law unheard of at the time of the earlier convictions." Breyer concluded, "In denying [a prisoner] any right to attack convictions later when attacks are worth the trouble, the Court adopts a policy of promoting challenges earlier when they may not justify the effort and perhaps never will."

Justice O'Connor wrote the opinion for the same 5-4 majority in *Lackawanna County District Attorney v. Coss*.[19] Referring to its decision in *Daniels*, the Court extended that holding to the 28 U.S.C. section 2254 context. Section 2254 is "a post-conviction remedy in federal court for state prisoners . . . available to 'a person in custody pursuant to the judgment of a State court' if that person 'is in custody in violation of the Constitution.'" The Court held "once a state conviction is no longer open to direct or collateral attack in its own right . . . [and] is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under §2254." The Court offered the same considerations of ease of administration and interest in finality to support this decision as it did in *Daniels*. Justice Souter presented the same criticisms and concerns, declaring, "The error of *Daniels v. United States* . . . is repeated once more."

In *Tyler v. Cain*,[20] a divided Court held that a holding from the United States Supreme Court is the only way a new rule of constitutional law can be made retroactive within the meaning of section 2244(b)(2)(A) of the Antiterrorism and Effective Death Penalty Act. After Melvin Tyler had been found guilty of second-degree murder, the United States Supreme Court decided *Cage v. Louisiana*;[21] under *Cage*, "a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt." Because his jury instruction was identical to the one criticized in *Cage*, Tyler filed a second federal habeas corpus application after *Cage* was decided. Under section 2244(b)(2)(A), a second or successive habeas application can survive only if "the applicant 'shows' that the 'claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The Court explained that it "is the only entity that can 'ma[k]e' a new rule retroactive," and "based on the plain meaning of the text read as a whole, . . . 'made' means 'held' and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review." Though Tyler argued that the *Cage* rule was "made retroactive to cases on collateral review" by the reasoning of two other Supreme Court decisions, the Court concluded that "[t]he most [Tyler] can claim is that . . . this Court should make *Cage* retroactive to cases on collateral review," which it declined to do. Justice Breyer argued in dissent that "nothing in the statute's purpose favors, let alone requires, the majority's conclusion." In addition, he said, "the most likely consequence of the majority's holding is further procedural complexity." Breyer predicted that "we will be required to restate the obvious, case by case, even when we have explicitly said, but not 'held,' that a new rule is retroactive." He concluded that "the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness."

CONCLUSION

As the numerous 5-4 decisions demonstrate, the ideological balance of the Supreme Court plays a significant role in the outcome of many decisions. Though none of the justices retired this term, the longevity of this balance as well as its influence on future criminal cases will ultimately depend on the Court appointments President Bush is expected to make in the coming years.

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19. 121 S.Ct. 1567 (2001).
20. 121 S.Ct. 2478 (2001).
21. 498 U.S. 39 (1990).

THE AMERICAN JUDGES ASSOCIATION

The American Judges Association is the largest independent organization of judges in the world. It has about 3,000 members from the United States, Canada, and Mexico. About 40% of AJA's members are state general jurisdiction trial judges, while another 40% are municipal court or other limited jurisdiction trial judges. The remainder include state and federal appellate judges, federal trial judges, and administrative law judges.