



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 18 | Number 1

Article 6

---

March 2016

## **Much Ado About Some Things: Fourth Amendment Rulings Dominate the Supreme Court's Criminal Law Decisions in the 2000 Term**

William E. Hellerstein

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Criminal Law Commons](#), and the [Fourth Amendment Commons](#)

---

### **Recommended Citation**

Hellerstein, William E. (2016) "Much Ado About Some Things: Fourth Amendment Rulings Dominate the Supreme Court's Criminal Law Decisions in the 2000 Term," *Touro Law Review*: Vol. 18: No. 1, Article 6. Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol18/iss1/6>

This Annual Supreme Court Review is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

---

## Much Ado About Some Things: Fourth Amendment Rulings Dominate the Supreme Court's Criminal Law Decisions in the 2000 Term

Cover Page Footnote

18-1

# **MUCH ADO ABOUT SOME THINGS: FOURTH AMENDMENT RULINGS DOMINATE THE SUPREME COURT'S CRIMINAL LAW DECISIONS IN THE 2000 TERM**

*William E. Hellerstein*<sup>1</sup>

The United State Supreme Court's criminal law cases last term were heavily dominated by Fourth Amendment issues. There were seven decisions in the Fourth Amendment area. After the events of September 11th, it is obvious to all of us how relevant the Supreme Court's jurisprudence is, and will be, with respect to searches and seizures. Also in the criminal law area there were two cases pertaining to the assistance of counsel that I will discuss, one case concerning sentencing, one case concerning the *Ex Post Facto* Clause, one case concerning the Double Jeopardy clause, one involving the Fifth Amendment privilege against self-incrimination, and finally, one case concerning the death penalty.

## **I. FOURTH AMENDMENT CASES**

### ***Kyllo v. United States***

The first case, *Kyllo v. United States*,<sup>2</sup> involved a search using thermal imaging. The facts are quite simple. The police, believing that Mr. Kyllo was growing marijuana in his home, used a thermal imaging device outside the house to scan it and determine whether certain heat patterns were emanating from it.<sup>3</sup> Based on the positive response from the thermal imaging device, the police applied for a warrant to search the home. While

---

<sup>1</sup> Professor of Law, Brooklyn Law School; B.A., Brooklyn College; J.D., Harvard Law School; Professor Hellerstein teaches Constitutional Law, Civil Rights Law, and Criminal Procedure. He is an expert in criminal law and constitutional litigation, and has argued numerous appeals before the U.S. Supreme Court, the Second Circuit, and the New York Court of Appeals.

<sup>2</sup> 533 U.S. 27 (2001).

<sup>3</sup> *Id.* at 29.

executing the warrant they found marijuana.<sup>4</sup> In a five to four decision, with a very interesting change of role, the Supreme Court reversed the conviction, holding that the use of a thermal imaging device to detect heat patterns in someone's home is a search, and must be performed pursuant to a warrant based upon probable cause.<sup>5</sup> Justice Scalia wrote the opinion for the Court and Justice Stevens wrote a vehement dissent.

Essentially, the Court held that when the government uses a device that is not in "general public use" to explore the details of a home previously unknowable without a physical intrusion, the surveillance is a search, and is presumptively unreasonable without a warrant.<sup>6</sup> To fully understand this decision, we must look at the *Katz* decision of 1967.<sup>7</sup> We, being the defense side of things, thought *Kyllo* was an open and shut case based upon the *Katz* decision. In 1967, when the Court departed from the old common law trespass concept of what constituted a search, Justice Stewart said the Fourth Amendment<sup>8</sup> protects people, not places, in their expectation of privacy.<sup>9</sup> Justice Harlan's concurring opinion stated that for a person to have an expectation of privacy, "the expectation must be one that society is willing to recognize as reasonable."<sup>10</sup> Now, who is society? As the *Katz* case evolves, society has been, and will remain, five justices of the United States Supreme Court, who determine what our expectations of privacy are.

---

<sup>4</sup> *Id.* at 30.

<sup>5</sup> *Id.* at 40.

<sup>6</sup> *Id.*

<sup>7</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>8</sup> U.S. CONST. amend. IV. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>9</sup> *Katz*, 389 U.S. at 351.

<sup>10</sup> *Id.* at 361 (Harlan, J., concurring).

In post-*Katz* cases like the garbage case<sup>11</sup> and the fly-over cases,<sup>12</sup> the Court determined that we, as citizens, do not have expectations of privacy in our garbage or in our backyards when the police fly over us. Justice Scalia, in *Kyllo*, acknowledged that the *Katz* test has become circular.<sup>13</sup> Nonetheless, he said that this case is different because it involved a home.<sup>14</sup> He said that we have always had an expectation of privacy in our homes, and using a device such as a thermal imaging scanner constitutes a search.<sup>15</sup>

*Kyllo* is extremely significant because of the scope of the language in Justice Scalia's opinion. It is not a decision limited to the specific device employed in the case because the Court stated that the rule it adopted took into account other, more sophisticated, systems in use or in development.<sup>16</sup> The Court said that the homeowner is not to be left to the "mercy of

---

<sup>11</sup> *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (holding that a person does not have a reasonable expectation of privacy when leaving garbage out on the curb because "society" does not have an expectation of privacy in trash left on the curb for collection, due to the fact that it is accessible to anyone. As such, the Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of an individual's garbage when left on a curb).

<sup>12</sup> *Florida v. Riley*, 488 U.S. 445, 448-52 (1989) (holding that a police officer who obtained a warrant by observing an individual's property by helicopter after the officer could not view the property from the ground, was not in violation of the Fourth Amendment because the defendant could not reasonably have believed that his greenhouse could not have been seen by a helicopter flying overhead, and concluded that the Fourth Amendment does not require the police to obtain a warrant for naked eye observations, even in an aircraft); *see also California v. Ciraolo*, 476 U.S. 207, 209-14 (1986) (holding that a warrantless, naked-eye observation by a police officer who obtained an airplane to view an individual's backyard, because of an anonymous telephone tip reporting the individual was growing marijuana, did not violate the individual's Fourth Amendment right, reasoning that this expectation of privacy is not what "society is prepared to honor").

<sup>13</sup> *Kyllo*, 533 U.S. at 34.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 35-36; *see also id.* at 36 n.3 (describing projects already underway by law enforcement to see through walls and other barriers).

expanding technology.”<sup>17</sup> If it is thermal imaging today, it could be a more sophisticated technology very shortly. The open questions are: What other types of technology? It can vary. What is the meaning of “in general public use” and how can that serve as a criterion? Many things are deemed to be “in general public use.” Justice Stevens’ main point in his dissent was that this search was “off the wall,” not “through the wall,” and so there is a metaphysical issue as well.<sup>18</sup>

It must be considered that several years ago the Court, in *United States v. Place*,<sup>19</sup> held that a dog sniffing a person’s luggage was not a search. If the Court holds that something is not a search, then the Fourth Amendment is inapplicable, because the Fourth Amendment only protects against unreasonable searches and seizures.<sup>20</sup> Despite the fact that you think your luggage is an “effect”<sup>21</sup> and is subject to privacy, the Court disagreed; Fido, the trained dog, can sniff your luggage.

After the decision in *Kyllo*, I do not know whether the police can have Fido the dog come by your front door and sniff for drugs. Perhaps the dog is all right, but the thermal imager is not. The dog’s nose is as good as the thermal imager at close range. However, the Court is not talking about thermal imaging alone, and it will be interesting to see how the Court reacts to other technologies, such as those that detect odors.

### *City of Indianapolis v. Edmond*

Another critically important case from this past term is *City of Indianapolis v. Edmond*.<sup>22</sup> *Edmond* is another of what I call the “special needs” line of search cases; however, *Edmond* came up short in qualifying in that category.<sup>23</sup> The City of

---

<sup>17</sup> *Id.* at 35.

<sup>18</sup> *Kyllo*, 533 U.S. at 46 (Stevens, J., dissenting).

<sup>19</sup> 462 U.S. 696, 697-98 (1983).

<sup>20</sup> *Id.* at 707.

<sup>21</sup> See U.S. CONST. amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects . . .”).

<sup>22</sup> 531 U.S. 32 (2000).

<sup>23</sup> *Id.* at 47.

Indianapolis decided to have a highway checkpoint program to detect, not drunk drivers, which had already been upheld by the Supreme Court in *Michigan Dep't of State Police v. Sitz*,<sup>24</sup> but a checkpoint program to detect drug use or possession.<sup>25</sup> At the checkpoints dogs would come by and sniff the car.<sup>26</sup> Here the Court in a five to four decision, held that this was unconstitutional.<sup>27</sup>

The Court explained that special needs cases represent a category of cases in which there is no requirement of suspicion in order to search.<sup>28</sup> The need to search is based on needs that go "beyond the normal need for law enforcement."<sup>29</sup> Some examples of this first category of special needs cases include: urine testing for high school athletes, which was upheld in *Vernonia School District 47J v. Acton*,<sup>30</sup> urine testing of treasury employees in Customs Service, which was upheld in *National Treasury Employees Union v. Von Raab*,<sup>31</sup> and post accident drug and alcohol tests, which were upheld in *Skinner v. Railway Labor Executives*, the companion case to *Von Raab*.<sup>32</sup> Some other special needs cases involved fixed checkpoints. *United States v. Martinez-Fuerte* involved a checkpoint within a hundred miles of the Mexican border.<sup>33</sup> A fixed checkpoint looking for illegal aliens, not a border checkpoint, was upheld by the Supreme

---

<sup>24</sup> 496 U.S. 444, 455 (1990) (reasoning that balancing the State's interest in protecting citizens from drunk drivers against the "intrusion upon individual motorists who are briefly stopped," weighs in favor of the State's interest in protecting the public, thus not violating the Fourth Amendment).

<sup>25</sup> *Edmond*, 531 U.S. at 34.

<sup>26</sup> *Id.* at 35.

<sup>27</sup> *Id.* at 48.

<sup>28</sup> *Id.* at 37.

<sup>29</sup> *Id.* at 48.

<sup>30</sup> 515 U.S. 646, 665 (1995) (holding that due to the decreased expectation of privacy of students, the "relative unobtrusiveness of the search," and the severity of the need satisfied by the search, the policy was constitutional).

<sup>31</sup> 489 U.S. 656, 679 (1989) (holding that "testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable").

<sup>32</sup> 489 U.S. 602 (1989).

<sup>33</sup> 428 U.S. 543, 545 (1976).

Court because it was for the purpose of finding illegal aliens, and not to enforce a criminal law.<sup>34</sup> The closest case, factually, to *Edmond* was the sobriety checkpoint case, *Sitz*, where the Court said the sobriety checkpoint is not for criminal purposes, but for public safety.<sup>35</sup>

However, the *Edmond* Court held that the stopping of a car at a fixed checkpoint, without individualized suspicion, for the purpose of drug detection is not permissible.<sup>36</sup> Essentially, the purpose of the checkpoint was to uncover criminal wrongdoing and to search for evidence of crime. The Court reasoned that if the use of checkpoints is expanded for the purpose of enforcing the criminal law, then the Fourth Amendment must apply.<sup>37</sup> Therefore, the line of cases that the Court had upheld as special needs cases were distinguished.

Justice Rehnquist, for the four dissenting Justices, stated that this case “follows naturally from *Martinez-Fuerte* and *Sitz*.”<sup>38</sup> One plus one should equal two. One, *Sitz* says you can have a drunk-driving checkpoint,<sup>39</sup> and *Martinez-Fuerte* upheld a fixed checkpoint.<sup>40</sup> So fixed checkpoints are permissible.<sup>41</sup> And, two, according to the *Place* case, a dog can sniff.<sup>42</sup> Hence, he reasoned, one plus one equals two; it should be okay to take a

---

<sup>34</sup> *Id.* at 556-57.

<sup>35</sup> *Sitz*, 496 U.S. at 447.

<sup>36</sup> *Edmond*, 531 U.S. at 41-42.

<sup>37</sup> *Id.* at 41 (“We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion”).

<sup>38</sup> *Id.* at 50 (Rehnquist, C.J., dissenting).

<sup>39</sup> *Sitz*, 496 U.S. at 447.

<sup>40</sup> *Martinez-Fuerte*, 428 U.S. at 556-57.

<sup>41</sup> *Id.*

<sup>42</sup> *Place*, 462 U.S. at 697-98.



dog to a checkpoint to sniff.<sup>43</sup> However, five Justices disagreed and held the other way.<sup>44</sup>

Justice Thomas' dissent is worth mentioning. He frequently writes a dissent if the Court holds in favor of the defendant. Here, however, he dissented only because he could not distinguish *Sitz* and *Martinez-Fuerte*.<sup>45</sup> He believed those two cases were decided wrongly and that sobriety checkpoints should not be allowed.<sup>46</sup> However, because he could not distinguish them here, he also did not think the Court had distinguished them, and thus he criticized the majority for its analysis.<sup>47</sup>

### *Ferguson v. City of Charleston*

A second special needs case decided this term that also came up short was *Ferguson v. City of Charleston*.<sup>48</sup> Here, the petitioners were pregnant women patients who were arrested after they tested positive for cocaine.<sup>49</sup> A urine test had been conducted on the women by the hospital pursuant to an agreement between it and the Charleston Police Department.<sup>50</sup> Testing positive for cocaine resulted in the women being charged with drug possession or endangering a minor, unless they agreed to go to a drug abuse program.<sup>51</sup> Thus they were forced to deal with their drug problems and their children or face criminal charges. The Supreme Court said, however, that urine testing has always qualified as a search and, therefore, the search must be

---

<sup>43</sup> *Edmond*, 531 U.S. at 50 (Rehnquist, C.J., dissenting).

<sup>44</sup> *Id.* at 48 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment").

<sup>45</sup> *Id.* at 56 (Thomas, J., dissenting).

<sup>46</sup> *Id.* ("I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing.")

<sup>47</sup> *Id.*

<sup>48</sup> 532 U.S. 67 (2001).

<sup>49</sup> *Id.* at 73.

<sup>50</sup> *Id.* at 71-73.

<sup>51</sup> *Id.* at 73.

reasonable.<sup>52</sup> Law enforcement was the purpose of the testing.<sup>53</sup> The Court held that the arrest and the use of the coercive aspects of prosecution for a crime, to achieve what might be a normal, legitimate social purpose of getting pregnant mothers off drugs, nevertheless, ran afoul of the Fourth Amendment because the direct effect was a criminal prosecution.<sup>54</sup>

### *Atwater v. City of Lago Vista*

*Atwater v. City of Lago Vista*,<sup>55</sup> is the next Fourth Amendment case, which I refer to as “The Soccer Mom Case.” The son of a very dear friend and longtime colleague, who is a Judge of the Supreme Court, Bronx County, has a son, Kenneth. He just finished a clerkship with Justice Souter, whom I greatly admire and respect. Kenneth called me a couple of weeks ago to ask me for a favor. I said “Kenneth, if you tell me you had nothing to do with Justice Souter’s opinion in the *Atwater* case I will do anything you want.” He said, “That wasn’t me, that was the other clerk; but mostly it was Justice Souter.” I asked, “What happened to Justice Souter here?” Let me tell you why.

This is a § 1983<sup>56</sup> suit brought by Ms. Atwater, who was stopped by an officer of the town of Lago Vista, with a population of about two to three thousand people.<sup>57</sup> She and her

---

<sup>52</sup> *Id.* at 76; see also *Acton*, 515 U.S. 646, 658 (“We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon “an excretory function traditionally shielded by great privacy.”) (citations omitted).

<sup>53</sup> *Ferguson*, 532 U.S. at 79.

<sup>54</sup> *Id.* at 82-84.

<sup>55</sup> 532 U.S. 318 (2001).

<sup>56</sup> 42 U.S.C. § 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

<sup>57</sup> *Atwater*, 532 U.S. at 324-25.

children were not wearing seat belts.<sup>58</sup> Generally, you can not go to prison for not having your children in seatbelts, but the officer arrested Ms. Atwater anyway. She was taken to the Lago Vista jail where she was searched, had her shoes removed, and was put in a cell.<sup>59</sup> The issue was whether this conduct was an unreasonable seizure. The police had the authority to arrest her, but were not required to.<sup>60</sup>

Being arrested for such a minor offense, as defined by state law, raised serious Fourth Amendment seizure questions. In a five to four decision, the Court held that the Fourth Amendment does not forbid a warrantless arrest for this type of minor criminal offense.<sup>61</sup> The first battleground in the case was the common law. The Court often considers the common law of England when deciding Fourth Amendment issues; in fact, one could argue, perhaps too much. Therefore, it is important to look at several cases that preceded *Atwater*.

In *United States v. Watson*,<sup>62</sup> the Court held that an officer may make an arrest in public without a warrant.<sup>63</sup> Justice Powell, who wrote a concurring opinion, said that as a matter of logic the decision does not make any sense because the Fourth Amendment secures equally persons, papers, effects and places.<sup>64</sup> He argued that if you are going to have a probable cause requirement, the seizure of a person should be treated similarly to a search of a home because there is no distinction between the two in the language of the Fourth Amendment.<sup>65</sup> The Court in *Watson*, however, relying on the common law of arrest, held that constables could always make arrests in public without

---

<sup>58</sup> *Id.* at 323-24.

<sup>59</sup> *Id.* at 324 (Atwater was arrested and transported to jail where she was told to remove her shoes, jewelry, eyeglasses and empty her pockets. Her "mug shot" was taken and then she was placed in a cell for about an hour).

<sup>60</sup> *Id.* at 326.

<sup>61</sup> *Id.*

<sup>62</sup> 423 U.S. 411 (1976).

<sup>63</sup> *Id.* at 423.

<sup>64</sup> *Id.* at 428-29 (Powell, J. concurring).

<sup>65</sup> *Id.* at 429 ("Logic therefore, would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches.").

warrants.<sup>66</sup> Justice Marshall dissented.<sup>67</sup> The Justices were sharply divided on this issue. In his concurring opinion in *Watson*, Justice Powell said that the history of the common law controls, and even though it was illogical to treat the seizure of a person less meaningfully than the search of a home, he said, "But, sometimes logic must defer to history and experience."<sup>68</sup> The case turned, I think, largely on the common law of England because all of the heavy common law hitters, such as Blackstone and Hale, said you could arrest without a warrant.<sup>69</sup>

The next case was *Payton v. New York*, which involved an arrest without a warrant in the home.<sup>70</sup> I argued *Payton*, and we believed that Justice Powell had to be persuaded that the common law with respect to arrests in the home was different from the power to arrest in public without a warrant as in *Watson*. Blackstone, Hale, and other big-name commentators were not on our side.<sup>71</sup> However, others such as Dalton, *Country Justice*, and Sir Edwin Coke supported our view that a warrant was required.<sup>72</sup> The common law was a wash,<sup>73</sup> and the Court in *Payton*, six to three, held that a warrant is necessary for an arrest in the home.<sup>74</sup>

In *Payton* our common law presentation greatly influenced the outcome. Now comes *Atwater*. Ms. Atwater's common law argument was stronger than was ours in *Payton*. Unlike in *Payton*, she had on her side the great Sir William Blackstone, Sir

---

<sup>66</sup> *Id.* at 418 (stating "the ancient common-law rule [was] that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.").

<sup>67</sup> *Watson*, 423 U.S. at 438 (Marshall, J., dissenting) (stating that the majority's reliance on the common law rule is misplaced since "as a matter of doctrine, the longstanding existence of a Government practice does not immunize the practice from scrutiny under the mandate of our Constitution.").

<sup>68</sup> *Id.* at 429 (Powell, J., concurring).

<sup>69</sup> *Id.*

<sup>70</sup> 445 U.S. 573, 574 (1980).

<sup>71</sup> *Id.* at 590 n.30.

<sup>72</sup> *Id.* at 593-97.

<sup>73</sup> *Id.* at 598.

<sup>74</sup> *Id.* at 603.

James Fitzjames Stephen, Glanville Williams, and Sir Matthew Hale. All of those commentators said that, for the most part, only misdemeanors which also breached the peace justified warrantless arrests.<sup>75</sup> This caused Justice Souter to rely considerably on certain Elizabethan era statutes that dispensed with a warrant for non-breach of the peace misdemeanors.<sup>76</sup> But the weakness of his argument is evident from his citation to one such statute that made it a misdemeanor to be a “night-walker” and authorized a warrantless arrest for that offense.<sup>77</sup> But what else could the constable do under the law? If a person was a “night walker” and was not arrested, he would continue to walk in the night.

Although Justice Souter recognized that the common law history did not really support his argument, he concluded that what the police did to Ms. Atwater was constitutionally acceptable because he did not think that the Framers were particularly concerned with the issue and that subsequent to the Constitution’s ratification, state statutes did not limit warrantless arrests to misdemeanors which also breached the peace.<sup>78</sup> He did so despite his own belief that what the police officer did to Ms. Atwater was terrible in that “the physical incidents of arrest were merely gratuitous humiliations,” served no purpose, and brought discredit to the City of Lago Vista.<sup>79</sup> I emphasize that this comment was made, not in the dissent, but in Justice Souter’s opinion for the Court. Nonetheless, Justice Souter reasoned that if the Court found for Ms. Atwater, then the police would have to figure out the proper procedures for all kinds of minor offenses. Rather than have that, the Court wanted a bright-line rule by

---

<sup>75</sup> *Atwater*, 532 U.S. at 327-30. Atwater’s argument was essentially that the common law prohibited peace officers from making warrantless misdemeanor arrests, except in cases involving a breach of the peace.

<sup>76</sup> *Id.* at 333 (citing 1285 ‘Statutes at Large’ 3 Edw. I. Ch.4 §§ 5-6).

<sup>77</sup> *Id.*

<sup>78</sup> *Atwater*, 532 U.S. at 338-40 (“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.”)

<sup>79</sup> *Id.* at 346-47

which the police could be guided so they would not have to go to the books or think too hard. Consequently, the Court disdained a case-by-case balancing test.<sup>80</sup>

Justice Souter also concluded that there is no real problem of police abuse in this context that required a different result.<sup>81</sup> He pointed to the fact that Atwater's counsel could only cite one case in which the police had overreached in exercising their arrest powers for a very minor offense. That was an instance where police officers in the District of Columbia arrested a young girl for the "crime" of eating McDonald's fries in the subway.<sup>82</sup> My colleague, Professor Susan Herman, who wrote the ACLU brief in *Atwater*, cited eight such cases; including one which involved a New York City arrest for riding a bicycle without a bell on it.<sup>83</sup> Thus, Justice Souter concluded that the absence of many cases of abuse "out there" was yet another reason for holding that the Fourth Amendment's "reasonableness" requirement did not, in this context, require greater attention from the Court.<sup>84</sup> This made me wonder whether Justice Souter was a Sherlock Holmes aficionado and I concluded that he probably was not. Otherwise, he could have pondered whether the absence of instances of warrantless arrests for trivial offenses actually was significant in the same way that, in the Sherlock Holmes tale, the dog *did not* bark was.<sup>85</sup>

Precisely because the police do not *usually* make arrests for minor offenses, akin to Ms. Atwater's, is it not the absence of police abuse of their arrest powers that takes on greater meaning

---

<sup>80</sup> *Id.* at 347-50.

<sup>81</sup> *Id.* at 353.

<sup>82</sup> *Atwater*, 532 U.S. at 353 n.23.

<sup>83</sup> *Id.* at 353 n.24.

<sup>84</sup> *Id.* at 351 (stating that "it leads one to wonder whether warrantless misdemeanor arrests need constitutional attention").

<sup>85</sup> See 1 SIR ARTHUR C. DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335, 347 (Doubleday & Co., N.Y. 1990)(1922). The passage is as follows:

"Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

when they treat a person as Ms. Atwater was treated? I would submit that it is the departure from the norm that renders the police conduct in *Atwater*, in Fourth Amendment terms, “unreasonable”. However, Justice Souter is from New Hampshire, a pastoral environment, and Lago Vista may be similarly categorized. But what about New York City?<sup>86</sup>

In dissent, Justice O'Connor said, wait a minute, we have to balance.<sup>87</sup> She pointed out that when they make an arrest the police have the power to search incident to the arrest and to conduct the inventory search that goes along with it.<sup>88</sup> Further, she added, in *Whren v. United States*,<sup>89</sup> the Court held that the use of a pretext to stop someone for a traffic infraction to search for drugs was acceptable, and that the Fourth Amendment does not require any inquiry into motive.<sup>90</sup> She argued that to allow the police to arrest for seat belt violations or bicycles without bells raises the question of whether such conduct is really what concerns the police.<sup>91</sup> She also noted that the racial profiling cases show the power to arrest is serious business.<sup>92</sup> Therefore, Justice O'Connor argued that the only standard needed to govern police conduct is that a police officer should be required to demonstrate that the arrest he made was for a needful purpose. To give the police carte blanche to arrest misdemeanants merely

---

<sup>86</sup> New York City recently settled a \$50 million class action suit brought by misdemeanor arrestees who had been subjected to unlawful strip searches. There were at least 50,000 plaintiffs in the class. See Benjamin Weiser, *New York Will Pay \$50 Million In 50,000 Illegal Strip Searches*, N.Y. TIMES, January 10, 2001, at A1.

<sup>87</sup> *Atwater*, 532 U.S. at 361-63 (O'Connor, J., dissenting).

<sup>88</sup> *Id.* at 364 (O'Connor, J., dissenting).

<sup>89</sup> 517 U.S. 806 (1996).

<sup>90</sup> *Atwater*, 532 U.S. at 363 (O'Connor, J., dissenting) (citing *Whren*, 517 U.S. at 818, where the Court held that the subjective intent of the police officer was not a pertinent consideration in determining the reasonableness of a traffic stop and that “the making of a traffic stop . . . is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”)

<sup>91</sup> *Id.* at 371-72 (O'Connor, J., dissenting).

<sup>92</sup> *Id.* at 372 (O'Connor, J., dissenting).

because there is statutory authorization to arrest is very dangerous.<sup>93</sup>

*Illinois v. McArthur*

The issue in the next case, *Illinois v. McArthur*, involved the seizure of a home while the police sought a search warrant.<sup>94</sup> This was an eight to one decision.<sup>95</sup> Not a very significant case, but the decision solves an important piece of the Fourth Amendment puzzle. Mr. McArthur was having a problem with his wife.<sup>96</sup> She called the police for assistance in removing her belongings from their home and after she cleared out her things, she told them that her husband had “dope in there.”<sup>97</sup> The police believed they had probable cause, but they also knew they had to get a warrant. The police then kept McArthur from entering his house for two hours while they obtained a search warrant.<sup>98</sup> McArthur argued that his house could not be “seized” without a warrant.<sup>99</sup>

In contrast with *Atwater*, the Court, this time, said it would balance the privacy interests of the individual against law enforcement concerns.<sup>100</sup> First, the Court pointed out that the police had reason to believe the wife because she had firsthand knowledge that there were drugs on the premises.<sup>101</sup> Second, the police also had good reason to fear that if McArthur went back into the house he would destroy the evidence.<sup>102</sup> Third, the police tried to reconcile McArthur’s privacy interest in his home; they

---

<sup>93</sup> *Id.* at 365 (O’Connor, J., dissenting).

<sup>94</sup> 531 U.S. 326, 328 (2001).

<sup>95</sup> *Id.* at 327.

<sup>96</sup> *Id.* at 328.

<sup>97</sup> *Id.* at 328-29.

<sup>98</sup> *Id.* at 329.

<sup>99</sup> *McArthur*, 531 U.S. at 329.

<sup>100</sup> *Id.* at 331 (“rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”).

<sup>101</sup> *Id.* at 331-32.

<sup>102</sup> *Id.* at 332.



obtained a warrant, but also kept him out of his house.<sup>103</sup> Accordingly, the Court found that the action taken by the police officers was proper.<sup>104</sup>

### *Arkansas v. Sullivan*

In *Arkansas v. Sullivan*, the Supreme Court of Arkansas, not a terribly liberal Fourth Amendment state court, upheld the suppression of evidence obtained by police under a pretext stop.<sup>105</sup> The police stopped Sullivan for speeding, and after checking his identification they realized that Sullivan was suspected of drug dealing. They then arrested him for the speeding charge and conducted a search of his car. The search uncovered drugs and drug paraphernalia.<sup>106</sup> Sullivan moved to suppress the evidence on the basis that the arrest was a pretext in order to search his vehicle.<sup>107</sup> The trial court granted the suppression motion, and the Arkansas Supreme Court affirmed.<sup>108</sup>

The Arkansas court declined to follow the Supreme Court's approach in *Whren* for two reasons.<sup>109</sup> First, the court said that much of *Whren* is dicta.<sup>110</sup> Second, the court thought that as the high court of a state, it had the power to construe the United States Constitution more broadly than the Supreme Court.<sup>111</sup> The Supreme Court, in a *per curiam* decision, reversed, saying that the *Whren* case is clear regarding

---

<sup>103</sup> *Id.*

<sup>104</sup> *McArthur*, 531 U.S. at 332-33.

<sup>105</sup> 532 U.S. 769, 770 (2001).

<sup>106</sup> *Id.* at 769-70

<sup>107</sup> *Id.* at 770.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 771

<sup>110</sup> *Sullivan*, 532 U.S. at 771.

<sup>111</sup> *Id.* (citing the Arkansas court's assertion that "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.") (citations omitted).

pretexts.<sup>112</sup> Further, the Supreme Court refused to allow the state court of Arkansas to tell it what the Federal Constitution says.<sup>113</sup> The Court went on to explain that if the Supreme Court of Arkansas wants to do something with its state constitution, it can, but it cannot add substantive meaning to the Fourth Amendment.<sup>114</sup> Obviously, Arkansas does not like the decision in *Whren*.

The significant part of *Sullivan* is the concurring opinion of Justice Ginsburg, joined by Justices Stevens, O'Connor and Breyer.<sup>115</sup> Justice Ginsburg sees great danger in the holding of *Atwater* when it is taken in tandem with the holding in *Whren*. She noted that she joined Justice O'Connor's dissent in *Atwater*, questioning the reliance by the Court on the "dearth of horrors demanding redress."<sup>116</sup> Thus, she offered that "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests,' I hope the Court will reconsider [*Atwater*]."<sup>117</sup> So, at least four Justices have left open the possibility of looking at *Atwater* again, if need be.

You should be aware that currently the Court of Appeals of New York has at least two, perhaps three, cases raising the issue of whether the search and seizure provisions of the New York constitution, Article 1, Section 12,<sup>118</sup> will be construed the same way as the federal search and seizure provisions with

---

<sup>112</sup> *Id.* (finding the decision by the Arkansas Supreme Court "flatly contrary" to controlling precedent of the Supreme Court).

<sup>113</sup> *Id.* at 772.

<sup>114</sup> *Id.* (stating "'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,' however, a state 'may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.'") (quoting *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).

<sup>115</sup> *Sullivan*, 532 U.S. at 772 (Ginsburg, J., concurring).

<sup>116</sup> *Id.* (quoting *Atwater*, 352 U.S. at 353).

<sup>117</sup> *Id.* (quoting *Atwater*, 352 U.S. at 353).

<sup>118</sup> N.Y. CONST. Art. I, § 12. This section provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."

respect to pretext arrests.<sup>119</sup> Based on some of its prior decisions, I think that the New York Court of Appeals may not be sympathetic to abandoning a search for pretext. But it is an open question.<sup>120</sup>

### *Florida v. Thomas*

Another open Fourth Amendment question was raised in the case of *Florida v. Thomas*.<sup>121</sup> The *Thomas* case was dismissed for want of jurisdiction,<sup>122</sup> but the issue raised in the case will return. The issue involves the extent of the “search incident to arrest” rule decided by the Supreme Court in *New York v. Belton*.<sup>123</sup> In *Thomas*, the police were investigating a marijuana operation in a Florida home.<sup>124</sup> While the police were making arrests, Mr. Thomas drove up in his car and parked in the driveway.<sup>125</sup> While he went around to the back of the car, the police checked his license and found an outstanding warrant.<sup>126</sup> He was arrested, handcuffed and taken into the house.<sup>127</sup> The police then searched the car and found contraband.<sup>128</sup> The

---

<sup>119</sup> U.S. CONST. amend IV. The Fourth Amendment provides in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”

<sup>120</sup> Subsequent to Professor Hellerstein’s speech, on December 18, 2001, the New York Court of Appeals decided the case of *People v. Robinson*, 2001 WL 1657207, and held that the New York State Constitution is to be read as coterminous with the United States Constitution on this issue. *Id.* at \*4. The Court stated “we adopt *Whren v. United States* (517 U.S. 806) as a matter of state law.” *Robinson*, WL 1657207 at \*1.

<sup>121</sup> 532 U.S. 774 (2001).

<sup>122</sup> *Id.* at 776.

<sup>123</sup> *Id.*; *New York v. Belton*, 453 U.S. 454, 455-56 (1981) (holding that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile).

<sup>124</sup> *Thomas*, 532 U.S. at 776.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

Florida Supreme Court held that the search of the car did not fit within the rule articulated in *Belton* because Thomas was not in the car when he was stopped by the police.<sup>129</sup> The Florida court reasoned that to extend the rule in *Belton* to the search of Thomas's car could conflict with the search incident doctrine as defined by *Chimel v. California*.<sup>130</sup> The case was remanded and the *Chimel* issue was left to be addressed by the trial court.<sup>131</sup> Thus, there was no final order or judgment giving jurisdiction to the Supreme Court.<sup>132</sup> Currently, the *Belton* rule does not extend to someone who is not in the car when it is stopped. Under *Belton*, if a person is stopped while in the car the police can search the entire passenger compartment and any containers in the car.<sup>133</sup> Consequently, the question raised in *Thomas* remains open for address in the future.

The Court's Fourth Amendment jurisprudence has left many people scratching their heads about the general message to be derived from it. But one thing is becoming clear: the home, as distinguished from cars and persons in public, is very important and will remain strongly protected. After considering *Atwater* together with the car cases, however, I told my students to sell their cars and go naked in the streets.

---

<sup>129</sup> *Thomas*, 532 U.S. at 776 (citing the decision below that held that the bright-line rule articulated in *Belton* "is limited to situations where the law enforcement officer initiates contact with the defendant while the defendant remains in the car.") (citations omitted).

<sup>130</sup> *Id.*; *Chimel v. California*, 395 U.S. 752, 768 (1969) (holding that there was no constitutional justification, in the absence of a search warrant, for the police to extend a search beyond an area within which the defendant might have obtained a weapon or something that could have been used as evidence against him when the arrest occurred in the defendant's home).

<sup>131</sup> *Thomas*, 532 U.S. at 776.

<sup>132</sup> *Id.* at 777.

<sup>133</sup> *Id.*

## II. OTHER SUPREME COURT CONSTITUTIONAL DECISIONS IN THE CRIMINAL LAW AREA

### *Texas v. Cobb*

The Supreme Court decided an important case regarding the extent of the right to counsel under the Sixth Amendment.<sup>134</sup> The case was *Texas v. Cobb*,<sup>135</sup> which raised issues as to what crimes the Sixth Amendment right to counsel attaches.<sup>136</sup> Keep in mind that we are discussing the Sixth Amendment right to counsel and not the Fifth Amendment<sup>137</sup> right to counsel under *Miranda v. Arizona*.<sup>138</sup> Mr. Cobb confessed to the burglary of a neighbor's home.<sup>139</sup> He was subsequently indicted for that crime, and counsel was appointed.<sup>140</sup> When Cobb confessed, he told the police that he did not know anything about what happened to the mother and her infant who lived on the premises.<sup>141</sup> Fifteen months later, Cobb's father informed the police that his son told him he had killed both of them.<sup>142</sup> Cobb, who was free on bond in the burglary case, was arrested, and the police obtained a

---

<sup>134</sup> U.S. CONST. amend VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

<sup>135</sup> *Texas v. Cobb*, 532 U.S. 162 (2001).

<sup>136</sup> *Id.* at 167 (holding that the Sixth Amendment right to counsel is offense specific and does not attach until a prosecution is commenced. Relying on its decision in *McNeil*, the Court reiterated its prior holding that statements by a defendant regarding offenses of which he was not previously charged, were "admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses.").

<sup>137</sup> U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself . . . ."

<sup>138</sup> 384 U.S. 436, 473-75 (1966) (holding that all arrestees must, among other things, be clearly informed of their right to counsel and any waiver of that right must be obtained knowingly and intelligently).

<sup>139</sup> *Cobb*, 532 U.S. at 165.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

*Miranda* waiver.<sup>143</sup> During questioning, Cobb admitted that he had stabbed the woman to death during the burglary, and that he had buried the baby alive with its mother.<sup>144</sup> Not a good set of facts from the defendant's perspective.

Cobb moved to suppress the confession on the grounds that it was obtained in violation of his Sixth Amendment right to counsel.<sup>145</sup> The problem with the questioning was that Cobb had already been indicted on the burglary, and, as the Supreme Court held in *McNeil v. Wisconsin*,<sup>146</sup> the Sixth Amendment right to counsel is offense specific.<sup>147</sup> Cobb contended that burglary was the offense the police were questioning him about, and the offense to which his right to counsel attached.<sup>148</sup> And, he argued, the right to counsel attached also for questions about the people who were present during the burglary.<sup>149</sup>

The Supreme Court, in a five to four decision, reiterated that the Sixth Amendment right to counsel is offense specific, but that it does not necessarily extend to offenses factually related to those that have been actually charged.<sup>150</sup> In arriving at its decision, the Court had to side-step the case of *Michigan v. Jackson*,<sup>151</sup> in which the Court held, with Justice Rehnquist dissenting, that once a person is formally charged, the Sixth Amendment applies.<sup>152</sup> In other words, *Jackson* held, once the individual charged has requested counsel at his arraignment, a waiver of counsel cannot thereafter be obtained unless the defendant initiates conversation with the police.<sup>153</sup>

In *Cobb* the State of Texas asked the Supreme Court to overrule *Jackson*.<sup>154</sup> The Court refused to do so,<sup>155</sup> and instead it

---

<sup>143</sup> *Id.*

<sup>144</sup> *Cobb*, 532 U.S. at 166.

<sup>145</sup> *Id.*

<sup>146</sup> 501 U.S. 171 (1991).

<sup>147</sup> *Cobb*, 532 U.S. at 167.

<sup>148</sup> *Id.* at 166.

<sup>149</sup> *Id.* at 171-72.

<sup>150</sup> *Id.* at 173.

<sup>151</sup> 475 U.S. 625 (1986).

<sup>152</sup> *Id.* at 632.

<sup>153</sup> *Id.* at 636.

<sup>154</sup> *Cobb*, 532 U.S. at 166.

used the test from the double jeopardy cases, namely the *Blockburger* test.<sup>156</sup> In *Blockburger v. United States*,<sup>157</sup> the Court held that offenses are not the same if each requires proof of a fact that the other does not.<sup>158</sup> Proof of burglary and proof of capital murder are quite distinct, and require proof of different facts. Therefore, under *Blockburger*, and pursuant to the scope of the Double Jeopardy Clause of the Fifth Amendment,<sup>159</sup> the Court held it is not double jeopardy to be convicted of burglary and then later convicted of murder, since murder and burglary do not rely on the same set of facts for conviction.<sup>160</sup> The Court said that the same is true with respect to the Sixth Amendment right to counsel.<sup>161</sup> The dissent regarded the *Blockburger* test as horrendous.<sup>162</sup> It said that for years, scholars have been harshly criticizing the *Blockburger* test, so why make life worse by now adding it to the Sixth Amendment? Well, as Justice Rehnquist

---

<sup>155</sup> See *id.* at 174 (Kennedy, J., concurring) (“the Court has reached its conclusion without the necessity to reaffirm or give approval to the decision in *Michigan v. Jackson* . . . .”) (citations omitted).

<sup>156</sup> *Id.* at 172-73 (referring to the rule of law articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), particularly, 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”).

<sup>157</sup> 284 U.S. at 299.

<sup>158</sup> *Id.* at 304.

<sup>159</sup> U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .”

<sup>160</sup> *Cobb*, 532 U.S. at 174.

<sup>161</sup> *Id.* at 173 (“We see no constitutional difference between the meaning of the term “offense” in the contexts of double jeopardy and of the right to counsel.”)

<sup>162</sup> *Id.* at 184-85 (Breyer, J., dissenting, “the simple sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. The test has emerged as a tool in an area of our jurisprudence that the Chief Justice has described as ‘a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator. Some will apply the test successfully; some will not. Legal challenges are inevitable. The result . . . will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton’s Serbonian Bog . . . where armies whole have sunk’”).

said in *Jackson*, questioning people is very important.<sup>163</sup> The result is a cutting back on the right to counsel.

*Glover v. United States*

The next case is *Glover v. United States*,<sup>164</sup> which involved an ineffective assistance of counsel claim. At Glover's sentencing, a probation officer recommended that the defendant's federal labor racketeering, money laundering, and tax evasion convictions be grouped together under Federal Sentencing Guideline 3D1.2,<sup>165</sup> which allows for a grouping of counts if they are substantially similar.<sup>166</sup> The government objected to the grouping and the trial judge agreed.<sup>167</sup> As a result, Glover's offense level was increased two levels and he received an additional six to twenty-one months on his sentence.<sup>168</sup> His attorney did not say anything.<sup>169</sup> There was no objection made at trial, at sentencing, or on appeal.<sup>170</sup> Glover subsequently filed a *pro se* motion under 28 U.S.C. § 2255<sup>171</sup> to correct his sentence, arguing that his lawyer was asleep at the wheel.<sup>172</sup> The district court in Detroit said that the two-level increase under the sentencing guidelines was not significant enough to amount to

---

<sup>163</sup> *Jackson*, 475 U.S. at 638 (Rehnquist, J., dissenting).

<sup>164</sup> 531 U.S. 198 (2001).

<sup>165</sup> U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 *Groups of Closely Related Conduct* (2000), providing in pertinent part, "All counts involving substantially the same harm shall be grouped together in a single group."

<sup>166</sup> *Glover*, 531 U.S. at 200.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 201.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Glover*, 531 U.S. at 201 (citing 28 U.S.C. § 2255 (1994 & Supp. III 1997) which states in pertinent part that a prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence).

<sup>172</sup> *Glover*, 531 U.S. at 201.



'prejudice' under the rule laid down in *Strickland v. Washington*.<sup>173</sup> The Seventh Circuit agreed, and said that even if Glover's counsel was ineffective, the increase in sentence was insignificant.<sup>174</sup> This flippancy by the lower courts was unbelievable to me; the judges do not serve the sentences, the defendants do. In this case, the judge was essentially telling a defendant that six to twenty-one months in prison is not a big deal.<sup>175</sup>

The question for the Supreme Court was: Was it a big deal? If six to twenty-one months is not significant, then what time frame would be significant enough so that the ineffective assistance of counsel rule would apply. The Court refused to go down that path and said: "Authority does not suggest that a minimal amount of time in prison cannot constitute prejudice."<sup>176</sup> The Court held that prejudice resulted because Glover's attorney failed to argue the point, and thus the Seventh Circuit had not applied the *Strickland* test properly when it rendered its judgment regarding the amount of the increase involved in the sentencing.<sup>177</sup>

### ***Rogers v. Tennessee***

The next case is *Rogers v. Tennessee*<sup>178</sup> which, in my opinion, ranks along with *Atwater*, as an unfortunate decision. *Rogers* involved the retroactive abolition judicially of the Tennessee common law rule known as the "year and a day rule."<sup>179</sup> The year and a day rule provided that for a defendant to be charged with murder, the victim had to die because of the

---

<sup>173</sup> *Id.* at 202; *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (A defendant must show both that his counsel's performance was deficient, and that the deficiency prejudiced his defense).

<sup>174</sup> *Glover*, 531 U.S. at 202.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 203.

<sup>177</sup> *Id.* at 204.

<sup>178</sup> 532 U.S. 451 (2001).

<sup>179</sup> *Id.* at 453.

defendant's act within a year and a day of that act.<sup>180</sup> The defendant, Mr. Rogers, stabbed Mr. Bowdery, however Bowdery did not die until fifteen months later.<sup>181</sup> Rogers was convicted of murder, despite the year and a day rule and the fact that Bowdery died beyond a year and a day.<sup>182</sup>

The Tennessee Supreme Court rejected the lower court's determination that Tennessee's codified homicide statute had abolished the rule.<sup>183</sup> However, the Tennessee Supreme Court reasoned that since the rule has been abolished in most jurisdictions, and the reasons for recognizing such a rule no longer exists, the rule is abolished as to Mr. Rogers' case.<sup>184</sup> What happened to the *Ex Post Facto* Clause?<sup>185</sup> The court made something a homicide that on the day the crime was committed was not a homicide under Tennessee law.

The Supreme Court, in a five to four decision, with Justice O'Connor writing for the Court, held that the Tennessee Supreme Court's retroactive application of the decision abolishing the year and a day rule was correct, since the *Ex Post Facto* Clause only applies to legislative acts and not to the common law.

---

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 454 (the victim had survived the initial attack, but had lost higher brain function and fell into a coma for a prolonged period).

<sup>182</sup> *Id.* (The Tennessee Court of Criminal Appeals held that "Tennessee's Criminal Sentencing Reform Act of 1989 . . . which abolished all common law defenses in criminal actions in Tennessee, had abolished the [year and a day] rule.").

<sup>183</sup> *Rogers*, 532 U.S. at 455.

<sup>184</sup> *Id.*

<sup>185</sup> U.S. CONST. art. I § 10, cl.1. The *Ex Post Facto* Clause provides in pertinent part that "No State Shall . . . pass . . . ex post facto law[s]." There are four types of laws to which the *Ex Post Facto* Clause extends: (1) every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was, when committed; (3) every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and (4) every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Calder v. Bull*, 3 Dallas 386, 390 (1798) (seriatim opinion of Chase, J.).

<sup>186</sup> However, to so hold the Court had to distinguish *Bouie v. City of Columbia*,<sup>187</sup> which seemed on all fours.

In *Bouie*, the Supreme Court reversed a decision of the South Carolina Supreme Court that had retroactively applied a criminal trespassing statute to civil rights demonstrators.<sup>188</sup> The statute made it a crime to enter upon the property of another after having notice that the owner forbade it.<sup>189</sup> The South Carolina Supreme Court had extended the statute to cover the sit-in demonstrators who had not been told by the owner of the premises that they were unwelcome before they entered, but who had remained on the premises after receiving notice to leave.<sup>190</sup> That change in the construction of the statute, according to the *Bouie* decision, was a violation of the Due Process Clause.<sup>191</sup> The Court said, "If a state legislature is barred by the *Ex Post Facto* Clause from passing a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result with judicial construction."<sup>192</sup>

In *Rogers*, however, Justice O'Connor labored mightily to distinguish *Bouie*.<sup>193</sup> First, she said that the language specifically relied on by *Rogers* was dicta,<sup>194</sup> and second, she said that the case is not the same as *Bouie*, because abrogating the year and a day rule here was not "unexpected and indefensible," the criterion laid out in *Bouie*.<sup>195</sup> She said that it could be expected because of advances in medical science, other states have abandoned it, and because Tennessee's own courts had mentioned abandoning the rule three times in dicta.<sup>196</sup> At the same time, she

---

<sup>186</sup> *Rogers*, 532 U.S. at 466-67.

<sup>187</sup> 378 U.S. 347 (1964).

<sup>188</sup> *Id.* at 349.

<sup>189</sup> *Id.* at 349 n.1.

<sup>190</sup> *Id.* at 350.

<sup>191</sup> *Id.*

<sup>192</sup> *Bouie*, 378 U.S. at 353-54.

<sup>193</sup> *Rogers*, 532 U.S. at 458-59.

<sup>194</sup> *Id.* at 459 (reasoning that since *Bouie* had been decided on Due Process grounds, any language regarding the *Ex Post Facto* Clause was unnecessary to the Court's decision in that case).

<sup>195</sup> *Id.* at 462.

<sup>196</sup> *Id.* at 463-64.

said that the Court does not mean to say that a defendant in State A is on notice for what all other states are doing: only what his own state is doing.<sup>197</sup>

I cannot improve upon what Justice Scalia said in his dissent:

Today's opinion produces,...a curious constitution that only a judge could love. One in which (by virtue of the Ex Post Facto Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that.<sup>198</sup>

Justice Scalia then went on to explain what the Court had gotten wrong; "the fair warning to which *Bouie* and subsequent cases referred was not 'fair warning that the law might be changed,' but fair warning of what constituted the crime at the time of the offense."<sup>199</sup>

### *Seling v. Young*

In another *Ex Post Facto*/Double Jeopardy case, *Seling v. Young*, the Court held that a sex offender, who had already served out his prison term, could be subjected to civil commitment under Washington State's sex predator act.<sup>200</sup> The State of Washington's sex predator act, like many sex predator acts, such as the one upheld in *Kansas v. Hendricks*,<sup>201</sup> authorizes civil commitment of "sexually violent predators;" persons suffering from mental diseases which makes them more likely to commit sex crimes and sexual violence.<sup>202</sup> Right after Mr.

---

<sup>197</sup> *Id.* at 464.

<sup>198</sup> *Rogers*, 532 U.S. at 468 (Scalia, J., dissenting).

<sup>199</sup> *Id.* at 470 (Scalia, J., dissenting) (paraphrasing majority opinion at 532 U.S. at 462-3).

<sup>200</sup> *Seling v. Young*, 531 U.S. 250, 263 (2001).

<sup>201</sup> 521 U.S. 346 (1997).

<sup>202</sup> *Seling*, 531 U.S. at 253.

Young was released from prison, he was confined pursuant to the civil statute.<sup>203</sup> After an unsuccessful challenge in the Washington state courts, Young sought a writ of *habeas corpus* in the federal courts.<sup>204</sup>

However, while Young's *habeas* was pending, the Supreme Court decided *Hendricks*, and had upheld the constitutionality of the Kansas statute in that case as non-punitive and not in violation of the Double Jeopardy and *Ex Post Facto* Clauses.<sup>205</sup> The Ninth Circuit remanded the case to the district court for reconsideration in light of *Hendricks*, and to let Mr. Young come in to show that in his situation he is really in prison again.<sup>206</sup> He presented evidence that he was not getting anything: no essential services, no psychiatrist; it was just like prison.<sup>207</sup> The Ninth Circuit affirmed the district court's ruling that the law did not violate Young's substantive due process rights or his procedural due process or equal protection rights. However, it determined that the statute, although a civil statute, as applied to Young, was punitive, and therefore it violated the Double Jeopardy and *Ex Post Facto* Clauses.<sup>208</sup>

The only issue before the Supreme Court was whether Young could raise an "as-applied" challenge to this statute.<sup>209</sup> The Court held that because the statute is a civil statute on its face, it cannot be punitive, thus Young was precluded from challenging the statute under the Double Jeopardy Clause, even as it applied to him.<sup>210</sup>

---

<sup>203</sup> *Id.* at 255.

<sup>204</sup> *Id.* at 258.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Seling*, 531 U.S. at 259.

<sup>208</sup> *Id.* at 260.

<sup>209</sup> *Id.* at 262.

<sup>210</sup> *Id.* at 262-63.

*Ohio v. Reiner*

Of the remaining two cases, one, *Ohio v. Reiner*, is a *per curiam* decision.<sup>211</sup> *Reiner* raised the issue of the scope of the Fifth Amendment privilege against self-incrimination, and the Court is quite straightforward with its analysis. Here, a man was charged with involuntary manslaughter for the death of his two-month-old son.<sup>212</sup> His expert testified at trial that the son, who died from “shaken baby syndrome,” could have been injured by someone else several hours before he stopped breathing.<sup>213</sup> At that time, a babysitter was taking care of the child during the day. The defense theory was that she had caused the child’s injuries.<sup>214</sup> The babysitter informed the court that she intended to assert her Fifth Amendment privilege at trial.<sup>215</sup> The prosecutor then requested that she be immunized, and the judge granted her immunity.<sup>216</sup> She testified before the jury that she was immunized and that she had nothing to do with the child’s death.<sup>217</sup> The jury found the defendant guilty, and, of course, he was very upset because the jury knew that the babysitter had been immunized, which suggested to them that the prosecution had already determined that she was not involved.<sup>218</sup> That obviously did not help to advance the defense’s theory that someone else did it.

The Supreme Court of Ohio reversed the conviction due to prejudice to the defendant, holding that if someone says she is innocent, then she is not entitled to assert the Fifth Amendment privilege against self-incrimination.<sup>219</sup> The Supreme Court, however, said that was an incorrect reading of the federal precedents because the privilege is about protecting innocent

---

<sup>211</sup> *Ohio v. Reiner*, 532 U.S. 17 (2001).

<sup>212</sup> *Id.* at 18.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Reiner*, 532 U.S. at 18.

<sup>217</sup> *Id.* at 18-19.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 19.

people, and if there is any chance that a person could be asked a question that in any way could endanger him or her, then the privilege applies.<sup>220</sup> I think the case is worth talking about because the Court has not spoken very often about how judges go about measuring the privilege. It is a broad decision that gives a wide swath of protection to the assertion of the privilege and lawyers should be aware of it.

### *Shafer v. South Carolina*

The last case, *Shafer v. South Carolina*,<sup>221</sup> is important because it involves the death penalty. To understand *Shafer*, it is important to understand *Simmons v. South Carolina*,<sup>222</sup> which is the background to the *Shafer* case. In 1994, the Court held in *Simmons* that when the future dangerousness of a capital defendant is put in issue, and the only available sentencing alternative to the death penalty is life imprisonment without the possibility of parole, due process requires that the jury be informed of the defendant's ineligibility for parole.<sup>223</sup>

In *Shafer*, under South Carolina law as revised, capital jurors face two questions during the sentencing phase.<sup>224</sup> They are first asked whether the state proved one of the aggravating factors to justify imposition of the death penalty. If the jury does not unanimously agree that the state proved a factor necessary to justify imposition of the death penalty, then it cannot recommend the death penalty as a sentence and a sentence is then imposed by the judge.<sup>225</sup> In that case the judge has a choice of; (1) life imprisonment, or (2) a mandatory minimum thirty-year prison term.<sup>226</sup> If the jury does agree that the state has proved the

---

<sup>220</sup> *Id.* at 20-21 (citing *Grunewald v. United States*, 353 U.S. 391, 421-422 (1957)).

<sup>221</sup> 532 U.S. 36 (2001).

<sup>222</sup> 512 U.S. 154 (1994).

<sup>223</sup> *Id.* at 156.

<sup>224</sup> *Shafer*, 532 U.S. at 40.

<sup>225</sup> *Id.* at 40-41.

<sup>226</sup> *Id.*

necessary aggravating factors, then it must recommend either the death penalty or life imprisonment.<sup>227</sup> The sentencing alternative of thirty-years to life is not an option for the jury.<sup>228</sup>

Schafer's attorney argued that since the jury had found the aggravating factors, the defendant was entitled to a charge as to his ineligibility of parole pursuant to *Simmons*.<sup>229</sup> However, the judge refused to charge the jury as to parole ineligibility,<sup>230</sup> and the South Carolina Supreme Court upheld the refusal on the ground that a sentence of thirty-years to life existed as a third alternative sentence in the new statutory scheme.<sup>231</sup>

I think any first-year law student reading that statute would easily see that the thirty-years to life sentence could only be imposed by the judge, not the jury. Therefore, in this case, just as in *Simmons*, the jury had before it only two options; life or death. But the jury was not allowed to be told that "life" means life without the possibility of parole. During deliberations, the jury asked the judge whether a person serving a life sentence could become eligible for parole.<sup>232</sup> He told them parole was not for them to consider.<sup>233</sup> What was wrong with the judge? What is wrong with the Supreme Court of South Carolina? The answer rests with Justice Ginsburg's observation that "South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status."<sup>234</sup> I say that if that is the way South Carolina judges read statutes, then they have to go back to law school.

So these, in my opinion, are the Court's most interesting decisions this term in the constitutional criminal law area. For the future, I believe that the events of 9/11 will prove very important in many ways. It will be interesting to see what the Court will do with such issues as checkpoints, racial profiling and

---

<sup>227</sup> *Id.* at 41.

<sup>228</sup> *Id.* at 50.

<sup>229</sup> *Shafer*, 532 U.S. at 41.

<sup>230</sup> *Id.* at 42.

<sup>231</sup> *Id.* at 46.

<sup>232</sup> *Id.* at 44.

<sup>233</sup> *Id.* at 46.

<sup>234</sup> *Shafer*, 532 U.S. at 48.



2001

*FOURTH AMENDMENT RULINGS*

105

technological developments when these issues come before it in various contexts that touch on post 9/11 concerns.

**[This page intentionally left blank.]**