THE DIRTY DOZEN:
THE TWELVE WORST BURGER - REHNQUIST COURT DECISIONS IN THE FIELD OF CRIMINAL PROCEDURE

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Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.

Introduction

Criminal defense attorneys are familiar with the fact that beginning in 1969 (when Warren Burger was appointed Chief Justice by Richard Nixon) the United States Supreme Court has been steadily taking a narrower and narrower view of the rights secured individuals against governmental action. The Supreme Court's trend in favor of restricting individual rights has continued, perhaps worsened, under William Rehnquist, appointed Chief Justice by Ronald Reagan in 1986. (Rehnquist originally was appointed to the Court as an associate justice by Richard Nixon in 1972.) The Supreme Court's decisions concerning the rights of criminal defendants are the most exemplary of the Court's swing to the right. The Court's decisions in the field of criminal procedure have been so pro-government, in fact, that scholars now discuss with great concern what they call "the criminal procedure counterrevolution" or "the new Rehnquisition" in the Supreme Court.

Unfortunately, however, the general public is generally unaware of these disturbing developments, which, of course, have undermined the traditional healthy balance in our country between the individual and the state by exalting the powers of government. Since it is the obligation of the criminal defense bar to help educate the public about the imperiling of their constitutional rights, it might be helpful to pick out and summarize some of the most obviously unfortunate decisions of the Burger-Rehnquist Court in the area of criminal procedure so that anyone can understand what the Court is doing.

The following 12 cases have been selected and summarized by me as the dozen worst Burger-Rehnquist Court decisions involving criminal procedure rights. You may disagree with my selection. You may think other Burger-Rehnquist Court decisions to be even worse than the ones I have selected. But whatever our disagreement, all of us who are criminal defense attorneys ought to make sure that the public is correctly informed and fully informed of the recent Supreme Court decisions that make a mockery of our nation's commitment to the rights of its citizens.

1. *United States v. White*, 401 U. S. 745 (1971) (on several occasions a government informer with a concealed radio transmitter engaged in conversations with the defendant in a restaurant, in the defendant's home, in the informer's home, and in the informer's car; a number of conversations in the informer's home were not only electronically over by an agent stationed outside the house, but also by another agent concealed in the kitchen closet; at no time did the agents obtain a court order or warrant; held, evidence obtained thereby was seized in accordance with the 4th amendment and was admissible, despite the lack of warrant or probable cause; the plurality opinion rests on assumptions about what "criminals" anticipate when they contemplate

their criminal activities; for purposes of the 4th amendment, the risk that a person in whom one confides may be a secret government agent surreptitiously recording or transmitting (or both) the conversation is deemed by the Court to be no different from the traditional risk that the person confided in may spill the beans, and hence no warrant is required in any of these situations) (White, J.) (4-1-4)

2. *Stone v. Powell*, 428 U. S. 564 (1976) (reinterpreting federal habeas corpus statute so that federal habeas corpus relief may no longer be granted on grounds unconstitutionally seized evidence was introduced at the petitioner's state criminal trial; const-benefit analysis applied; notorious footnote 31 implies that postconviction relief for violations of constitutional rights should be limited to the innocent) (Powell, J.) (6-3)

3. *Dalia v. United States*, 441 U. S. 238 (1979) (4th amendment held not to prohibit, per se, covert entries to install legal electronic bugging equipment; covert entries deemed to be implicitly authorized by electronic surveillance statute; no violation of 4th amendment where FBI agents with court order authorizing electronic interception but no explicit court approval for covert entry to install the interception equipment, nonetheless pried open window of defendant's office at midnight and spent 3 hours inside installing the equipment) (Powell, J.) (5-3); compare *Smith v. Maryland*, 442 U. S. 735 (1979) (without warrant and without probable cause police may, without violating 4th amendment, install on an individual's phone line and use a pen register device which records all numbers dialed from an individual's phone; no "search" has occurred; the 4th amendment does not protect an expectation of privacy here) (Powell, J.) (5-4)

4. *Bell v. Wolfish*, 441 U. S. 520 (1979) (court declines to acknowledge propriety of using writ of habeas corpus to attack conditions of pretrial confinement; neither strip searches nor body cavity inspections of pretrial detainee after contact visits with insiders were unconstitutional under due process clause; nor were "publisher-only" rule, the prohibition on receipt of packages, or the room-search rule; "[a]dmittedly, this practice [body cavity inspections] gives us the most pause;" in evaluating the constitutionality of conditions or restrictions of pretrial confinement, the proper inquiry is not whether the conditions are justified by compelling necessities of jail administration, but whether those conditions amount to punishment; an example would be "loading a detainee with chains and shackles and throwing him into a dungeon ...;" "[t]he presumption of innocence ... has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun") (Rehnquist, J.) (6-3)

Note: In *Block v. Rutherford*, 468 U. S. 576 (1984), Bell v. Wolfish was construed to uphold the constitutionality of a blanket policy prohibiting contact visits for pretrial detainees at the Los Angeles County Jail with a capacity for 5,000 inmates (Burger, C. J.) (6-3); see also Hudson v. Palmer, 468 U. S. 517 (1984) (prisoner in his cell enjoys no 4th amendment protections) (Burger, C. J.) (5-4)

5. *Moran v. Burbine*, 475 U. S. 412 (1986) (defendant, in custody in a police station, was advised of his Miranda v. Arizona, 384 U. S.436 (1966), rights and interrogated incommunicado and then confessed to murder; prior to the interrogation and while defendant was in custody, an attorney retained by defendant's sister telephoned the police station, stated that she would act as defendant counsel if he was questioned, and was informed that defendant would not be questioned again until the next day; however, the defendant was in fact interrogated later the same day; at no time prior to or during the interrogation session did police tell him of the telephone call earlier that day from the attorney; despite this police misconduct and deception, the confession was not inadmissible under the 5th amendment self-incrimination clause, as construed in Miranda, or under the due process clause of the 14th amendment which prohibits involuntary confessions; "we have never read the Constitution to require police to supply a suspect with a flow information to help him calibrate his self interest in deciding whether to speak or stand by his rights"(!)) (O'Connor, J.) (6-3)

6. *Lockhart v. McCree*, 476 U. S. 162 (1986) (even assuming that "death-qualifying" juries--that is, excluding for cause at the guilt phase prospective jurors whose opposition to capital punishment would prevent or substantially impair the performance of their duties at the sentencing phase of a capital trial--in fact produces somewhat more conviction-prone juries, the use of death-qualifying procedures in state capital criminal trials does not violate the Federal Constitution) (Rehnquist, J.) (5-4)

Note: In *Buchanan v. Kentucky*, 483 U. S. 402 (1987), it was held that under Lockhart v. McCree there was no violation of the Federal Constitution where the defendant, against whom the death penalty was not sought, was nonetheless tried by a death-qualified jury at his joint trial at which the death penalty was sought against his co-defendant. (Blackmun, J.) (6-3)

7. *Darden v. Wainwright*, 477 U. S. 168 (1986) (murder conviction and death sentence affirmed, despite inflammatory and prejudicial prosecutorial misconduct in form of prosecutor's closing arguments at end of guilt-innocence stage of the trial; the prosecutor engaged in a tirade against supposedly overly lenient prison officials; he more than once referred to the defendant as "an animal;" and he more than once expressed the wish that defendant had been shot in the face or head; he expressed his personal belief in defendant's guilt; and he made still other prejudicial remarks reflecting his emotional reaction to the case; but due process is not violated "solely because the prosecutor's remarks are undesirable or even universally condemned (!);" [t]he weight of the evidence against [the defendant] was heavy;" and the trial was not fundamentally unfair) (Powell, J.) (5-4)

8. *Bowers v. Hardwick*, 478 U. S. 186 (1986) (Georgia sodomy statute, criminalizing consensual sexual acts between adults (even married adults) in private, and making these acts punishable as a felony with a possible 20-year sentence of imprisonment does not violate Federal Constitution (!)) (White, J.) (5-4)

Note: *Bowers v. Hardwick* was overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

9. *Maryland v. Garrison*, 480 U. S. 79 (1987) (Baltimore, Maryland narcotics police obtained a search warrant to search for marijuana the third floor apartment of one McWebb in a multiple occupancy building; unknown to the six officers executing the warrant, there were actually two apartments on the third floor--McWebb's and Garrison's; while searching Garrison's apartment thinking it was McWebb's the officers found drugs which were then seized and used to convict Garrison of a drug offense in a Maryland state court; the evidence was admissible and the conviction is reinstated; no violation of the 4th amendment occurred when police searched Garrison's apartment pursuant to a search warrant for McWebb's apartment, since the police were laboring under a reasonable mistake) (Stevens, J.) (6-3)

10. *McCleskey v. Kemp*, 481 U. S. 279 (1987) (Georgia murder conviction and death sentence upheld; study indicating that death penalty in Georgia was imposed more often on black defendants and killers of white victims failed to establish that any of decision makers acted with discriminatory purpose in violation of equal protection clause; study at most indicated a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial bias affecting Georgia's capital-sentencing process, and thus did not establish violation of 8th amendment) (Powell, J.) (5-4)

11. *United States v. Salerno*, 481 U. S. 739 (1987) (upholding the constitutionality of preventive detention provisions of Bail Reform Act of 1984; due process is not violated because preventive detention of criminal suspects is "regulatory" rather than "penal"; and "[w]e have repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest;" an individual's right to personal liberty may be "subordinated to the greater needs of society;" nor does preventive detention of criminal suspects found to be dangerous to the community offend the Excessive Bail Clause of the 8th amendment, and any language to the contrary in *Stack v. Boyle*, 342 U. S. 1 (1951) is "dicta") (Rehnquist, C. J.) (6-3)

12. *Griffin v. Wisconsin*, 483 U. S. 868 (1987) (defendant was convicted of a felony and placed on probation; as a condition of probation he had to submit to the rules of the state department of social services which administers probation in Wisconsin; these rules permit probation officers to search a probationer's home without a warrant, provided the officer has reasonable grounds to believe contraband is present, and they also prohibit probationers from having firearms without advance approval; after receiving a tip from the police department that a gun was at defendant's residence, a probation officer accompanied by three plainclothes policemen went to defendant's apartment without a warrant and searched it and found a handgun, as a result of which defendant was charged with felony possession of a firearm, convicted, and sentenced to two years in prison; no warrant and no probable cause were required here, and no violation of the 4th amendment occurred; probation has "special needs;" a probation officer is not a policeman "who normally conducts searches against the ordinary citizen;" the probation officer, "while assuredly charged with protecting the public, is also supposed to have in mind the welfare of the

probationer" who is in fact referred to in the regulations as the "client;" "the probation regime would also be disrupted by a requirement of probable cause;" "we deal with a situation ... that is not, or at least not entirely, adversarial" (!)) (Scalia, J.) (5-4)