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Criminal Justice

Vikram Amar*

When asked to talk for fifteen minutes about the criminal law and criminal procedure cases of the Roberts Court, I was a bit daunted because, of course, that is an umbrella that includes a lot of really meaty topics: Fourth Amendment search and seizure, Fifth Amendment compelled self-incrimination, death penalty jurisprudence, the revolution in sentencing—or should I say judicial fact-finding in sentencing—that we have had since 2000 and the *Apprendi v. New Jersey*¹ decision, and then of course the terribly significant, but perhaps undertaught, habeas corpus area of law. That is something that often falls through law school cracks but is a hugely important area of the Supreme Court's work and the nation's judicial caseload.

There is, I think, significant potential for change in the criminal law and criminal procedure areas with additions on the Court in the past few years. Even if we are to assume, which I think is plausible, that Chief Justice Roberts has instincts in this area that are not too far from those of his former boss and predecessor, Chief Justice Rehnquist, I think, as Joan Biskupic mentioned earlier,² that Justice Alito's replacement of Justice O'Connor has potentially large implications here. This is both because Justice O'Connor was sometimes a moderating force in some of these criminal law and criminal procedure areas, and also because Justice Alito brings a depth of knowledge and experience to the criminal law area that is rather unique to this Court. He was an Assistant United States Attorney and a United States Attorney for a long time, and so has a distinct voice and distinct credibility in some of these areas.³

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1. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2. See Joan Biskupic, *The Alito/O'Connor Switch*, 35 PEPP. L. REV. 495 (2008).

3. See Biographies of Current Members of the Supreme Court, <http://www.supremecourt.gov/about/biographiescurrent.pdf> (last visited Jan. 10, 2008). Justice Alito served as Assistant United

Certainly in the past two years, we have not observed a sea change. It is too short a time for that. Indeed, I am not even sure we can talk about trends yet. So instead, let me just note some seemingly significant developments and call them that.

In the death penalty area, this is a conservative court often divided five to four with Justice Kennedy siding about twice as often with the “movement” conservatives, as Jeffrey Rosen put them earlier,⁴ than with the other four Justices. If you look back at the last two Terms of the Court, there have been about a dozen five-to-four capital cases, and in eight of those, Justice Kennedy sided with the more conservative jurists to uphold the death sentence.⁵

A lot of these cases arrive at the Court in a habeas context. The key concept to really know about in that area, as an introduction to habeas, is that since 1996 and the congressional enactment of AEDPA⁶ (the acronym for the big statute that Congress passed in 1996 retooling habeas), a federal court can grant habeas relief only when the state court’s decision is “contrary to, or involved an unreasonable application of, clearly established” Supreme Court holdings.⁷

So it is the meaning of that phrase that does a lot of the work in capital and other criminal cases that get to the U.S. Supreme Court in the context of habeas, and the last two years have seen essentially a continuation of a trend that really goes back to the early twenty-first century, where the Court is giving that phrase an ever more narrow, and some would say crabbed, definition.

I think one example of this is the unanimous decision from the Court to reverse the Ninth Circuit—I am sorry to bring that up in front of some of the Ninth Circuit judges here today—in *Carey v. Musladin*.⁸ It was a case from Northern California, in San Jose, where a criminal defendant had objected to the fact that members of the victim’s family, the murder victim’s family, wore buttons depicting an image of the murder victim at trial, and the defendant claimed that this was prejudicial, and had that argument rejected

States Attorney for the District of New Jersey from 1977 to 1981, and served as the United States Attorney for the District of New Jersey from 1987-1990. *Id.*

4. See Jeffrey Rosen, *The Roberts Court and Executive Power*, 35 PEPP. L. REV. 503 (2008).

5. See *Fry v. Piller*, 127 S. Ct. 2321 (2007); *Uttecht v. Brown*, 127 S. Ct. 2218 (2007); *Schiro v. Landrigan*, 127 S. Ct. 1933 (2007); *Lawrence v. Florida*, 127 S. Ct. 1079 (2007); *Ayers v. Belmontes*, 127 S. Ct. 469 (2006); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Kansas v. Marsh*, 548 U.S. 163 (2006); and *Brown v. Sanders*, 546 U.S. 212 (2006).

6. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.).

7. 28 U.S.C. § 2254(d)(1).

8. 127 S. Ct. 649 (2006), *rev'g* *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005).

by the state courts.⁹ The Ninth Circuit embraced that argument,¹⁰ and it was reversed nine-to-nothing by the Supreme Court.¹¹

Although these cases generated many opinions, they tended as a group to define the concept of “clearly established federal law, as determined by the Supreme Court” rather narrowly.¹² For example, Justice Thomas wrote that, although there are cases out there that talk about the problems that arise when we have coercive influences in the trial courtroom, usually those coercive influences come from state-sponsored activities as opposed to privately initiated conduct, as was true in this case, because the family members were not, of course, state actors.¹³

Justice Kennedy seemed to eschew this public-private distinction, but nonetheless couldn’t find enough authority in Supreme Court case law to really condemn what happened in this case, which itself was a little bit murky on the facts in the record.¹⁴ So he too disagreed with the Ninth Circuit that the state courts had necessarily botched application of Supreme Court precedent.¹⁵

Of course, I think it’s accurate to say that the Justices tend to be a little bit skeptical about Ninth Circuit rulings, especially in the habeas context. I don’t think this attitude is particularly fair to the Ninth Circuit, so some others here today might say something about that as well.

Let me just make one other note about recent habeas cases and especially habeas capital cases. Last Term, October Term 2006, the Supreme Court reversed the Fifth Circuit repeatedly in capital habeas cases,¹⁶ sending a message that although it might not agree completely with the way the Ninth Circuit decides some of its cases, neither does it see the Fifth Circuit as the paradigm appellate court. Whatever AEDPA means, the correct approach to applying it lies somewhere in between San Francisco and New Orleans.

Let me mention three Fourth Amendment search and seizure cases that are kind of significant. Two of them are authored by Justice Souter, who is a

9. *Musladin*, 427 F.3d at 654-55.

10. *Id.* at 661.

11. *Carey*, 127 S. Ct. at 654 (majority opinion).

12. *Id.* at 655 (Stevens, J., concurring).

13. *See id.* at 653-54.

14. *See id.* at 656-57 (Kennedy, J., concurring).

15. *Id.*

16. *See Abdul-Kabir v. Quarterman*, 217 S. Ct. 1654 (2007), *rev'g* *Cole v. Dretke*, 418 F.3d 494 (5th Cir. 2005); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007), *rev'g* *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006); *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), *rev'g* *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006).

bit of a bellweather in the Fourth Amendment. If you go back to the late 1990s, he is often in the majority in Fourth Amendment cases and often asked to write Fourth Amendment opinions. The two that he authored here came out in favor of the Fourth Amendment claimant.

The first is *Georgia v. Randolph*,¹⁷ which involved the question of when police can enter a premises because there has been consent, when this consent obviated a need for a warrant or some other compliance with the Fourth Amendment.¹⁸ Justice Souter wrote for the Court, holding that when one spouse invites the police in, in this case an estranged wife, and the husband is protesting, saying, “No, I don’t want you to come in,” that does not count as valid consent.¹⁹

There had been cases earlier where the Court had held that police do not need the consent of all the persons who have control over the premises, that the consent of any one of them is enough; but none of those cases involved a conflict between the people who controlled the premises.²⁰

And in the context of conflict, the Supreme Court said most people would not feel welcome or invited to go into an apartment or a home where one of the occupants was resisting entry.²¹ In some ways, the case really turned on that kind of question of social meaning—how would we feel if we were invited by somebody into an apartment, but the spouse of the person who invited us in is telling us not to come in? The majority said we probably would not feel very comfortable doing it.²²

Interestingly, one of the dissents in that case, authored by Chief Justice Roberts, kind of criticized the result from the left, if you will. This was a drug case. Drugs were uncovered when the estranged wife allowed the police to come in. But what if, instead, asked Chief Justice Roberts, it had been a domestic violence case? What if the husband said, “No, I don’t want you to come in,” and the wife said, “Yes, I do” in that setting? Should the police be disabled from entering?²³

And I think it is maybe a good thing that Chief Justice Roberts and Justice Scalia were thinking about that issue, but I actually do not think there is much to their criticism, because if a wife is saying, “I’m being abused, come in,” police do not need consent. That is an exigent circumstance. They do not need a warrant. That is probable cause. If they reasonably believe that there is a crime going on, that someone is being hurt, that, in

17. 547 U.S. 103 (2006).

18. *Id.* at 106.

19. *Id.* at 122-23.

20. *See id.* at 120-21; *see also* U.S. v. Matlock, 415 U.S. 164, 170 (1973).

21. *Randolph*, 547 U.S. at 113, 121.

22. *See id.*

23. *Id.* at 129 (Roberts, C.J., dissenting).

itself, in the Fourth Amendment doctrine, would justify the police to intervene.²⁴

Another Fourth Amendment case, this one from the most recent Term, in which Justice Souter wrote again upholding the Fourth Amendment claim, came from here in California. It was called *Brendlin v. California*.²⁵ In this case, police pulled a car over for what they admitted later was an invalid reason.²⁶ So it is an admittedly invalid stop. But then after the stop was made, the cop recognized the passenger of the car as someone for whom there was an outstanding arrest warrant.²⁷

It was in rural California, and I think there was a little bit more local police familiarity with various individuals in the community than in big cities. The police officer knew that this was one of Brendlin brothers, and that there was an arrest warrant out for one of them. So the passenger was arrested, searched incident to that arrest, with the result being that drugs and drug equipment were uncovered.²⁸

The question was whether that evidence could be introduced against him. He said that his Fourth Amendment rights were violated when the car was wrongfully pulled over, because at that moment he was seized, and the seizure was not reasonable within the meaning of the Fourth Amendment.²⁹

And the California Supreme Court, somewhat surprisingly, ruled that when cops pull over a car, they seize the car and they seize the driver, but they don't seize the passenger.³⁰ That passenger somehow is free to go, but the stop is directed towards the car, and thus, the person who is controlling the car, the driver. But the stop is not directed towards the other persons.³¹ The unanimous Supreme Court rejected that.³²

I think, again, largely, the case boiled down to a question of social meaning. If you were a passenger in a car, and the car gets pulled over by the cops, would you feel comfortable opening the passenger door and just waltzing out and finishing your journey on foot?

24. Sherry F. Colb, *No Bickering Over Consent: The Supreme Court Correctly Decides a Search and Seizure Case*, FINDLAW'S WRIT, Apr. 5, 2006, available at <http://writ.news.findlaw.com/colb/20060405.html>.

25. *Brendlin v. California*, 127 S. Ct. 2400 (2007).

26. *Id.* at 2406.

27. *Id.* at 2404.

28. *Id.*

29. *Id.*

30. *People v. Brendlin*, 136 P.3d 845, 855 (Cal. 2006).

31. *Id.*

32. *Brendlin*, 127 S. Ct. at 2408-10.

After I read the California Supreme Court opinion, even before the Court granted certiorari, I asked twenty or thirty people, lawyers and non-lawyers alike, and nobody said that he would feel comfortable doing that. And there are at least a couple good reasons for that.

First, of course, the police can tell everybody to stay put if they want to. They have the right to control the situation for their own safety. Knowing that the police can control the situation really makes you less likely to get out of the car, less likely to feel free to get out of the car, because you do not want to escalate the situation. You do not want to create tension where none exists.

And then, second, and relatedly, I think under some recent Supreme Court cases, particularly *Illinois v. Wardlow*,³³ if someone opened the door and started walking out, that might give rise to probable cause of wrongdoing right there. What are the odds that the person is so close to his destination and he is exiting just because he does not want to incur the waste of time associated with traffic stops, as opposed to some other reason? The Court had a little trouble there concluding no passenger would feel free to leave the car.³⁴

The third Fourth Amendment case came out the other way. This was a five-to-four decision, the Term before last, in *Hudson v. Michigan*,³⁵ and this is a sleeper case. As a matter of common law and as the Fourth Amendment dictates, police have to execute a reasonable search in a reasonable manner.³⁶ This includes a requirement that they knock and announce themselves and wait for a brief interval before entering.³⁷ Now, if there is a reason to believe that their safety could be in jeopardy or that evidence could be rapidly destroyed, they do not have to do that. But in an ordinary run of cases, they have to knock and give a little bit of time.³⁸ The police did not do that here.³⁹

There are questions about how much time is enough, but the Supreme Court did not have to resolve any of those in *Hudson v. Michigan*, because everyone, including the state, agreed that the Fourth Amendment was violated because the police did not wait a reasonable period of time.⁴⁰ Thus, there was an admitted Fourth Amendment violation.⁴¹

33. *Illinois v. Wardlow*, 528 U.S. 199 (2000).

34. *Brendlin*, 127 S. Ct. at 2406-07.

35. *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

36. *See id.* at 2162.

37. *Id.*

38. *See id.* at 2162-63.

39. *Id.* at 2163.

40. *Id.*

41. *Id.*

The question is, should the evidence uncovered in the subsequent search and entry be suppressed? The Supreme Court said in a five-to-four opinion, authored by Justice Scalia, that the exclusionary rule does not apply here even though there is a Fourth Amendment violation.⁴² He said two very important things that could have significant ramifications going forward.

First he said, in effect, that the exclusionary rule is really strong medicine. It is chemotherapy. We are doing harm even as we are trying to do good, so it is reserved for very narrow circumstances where we are sure the virtues of the rule exceed its drawbacks.⁴³ In this case, that high test is not satisfied, in part because there are civil remedies available to a victim of a knock-and-announce violation, and so you do not need the suppression of the evidence to deter the police.⁴⁴

Second, and more important, he observed that the knock-and-announce violation did not really affect whether the police had a right to get at that evidence.⁴⁵ In other words, the police could have gotten the same evidence had they knocked and announced, so they shouldn't be any worse off than they would have if they had done things the right way.⁴⁶ That is, the violation did not factually or proximately cause the evidence to be obtained.⁴⁷ The police did not profit from it in that respect.⁴⁸

That second rationale, that there was no "but for" or proximate causation, is the potentially broad rationale. Why? Because you can imagine *Hudson* being invoked in a situation where the police do not even have a warrant. They had a warrant in *Hudson*, but suppose they do not have a warrant, but could get one. Can they then later argue that, "Look, if we had done things the right way, we still would have gotten the evidence, so we shouldn't be disadvantaged by the fortuitous fact that we didn't do it the right way?" That is a very broad approach to the inevitable discovery idea, but it is one that is suggested by the opinion there.

There was one other exclusionary rule case now that I will mention. It was *Sanchez-Llamas v. Oregon*,⁴⁹ and the Court there again expressed a reluctance to apply the exclusionary rule. In that case, we have an international convention that required that when a person is arrested, if he is

42. *See id.* at 2159, 2168.

43. *Id.* at 2168.

44. *Id.* at 2166-67, 2175.

45. *See id.* at 2164.

46. *See id.*

47. *See id.*

48. *See id.* at 2164, 2177.

49. *Id.* at 2669.

not a U.S. citizen, he be allowed to inform the consulate of his country.⁵⁰ That requirement was not complied with here.⁵¹ The question was whether or not that made the evidence subsequently obtained excludable.

The Supreme Court held that, since the violation was one of only a statute or a treaty, and not one of the Constitution itself, the exclusionary rule has no application.⁵² So again, we are reading the exclusionary rule narrowly. And later on, in the fifth segment of this marathon day, we might mention a case on the current Term's docket that involves the exclusionary rule as well.⁵³

Let me just finally mention one other big area, and that is the sentencing revolution. Since *Apprendi*⁵⁴ seven years ago, the Supreme Court has insisted on the following: Every fact that is found in a criminal trial that can have the effect of bumping up a defendant's sentence into a higher sentencing range than would otherwise be allowed—other than the fact of a prior conviction—must be found by a jury rather than a judge and proven beyond a reasonable doubt.⁵⁵

The Supreme Court applied that in *Apprendi*. It extended that to the state of Washington's state statutes in *Blakely*.⁵⁶ It invalidated the federal sentencing guidelines in *Booker*,⁵⁷ holding that the guidelines cannot operate in a mandatory way because of this constraint.⁵⁸

And then this past Term in *Cunningham v. California*,⁵⁹ the Supreme Court struck down California's criminal sentencing regime.⁶⁰ In California, a judge could sentence a defendant to either six, twelve, or sixteen years, and could pick between those three set points. But the statute created a presumption in favor of the midpoint, twelve years, unless the judge found an aggravating circumstance that would authorize elevation to the high term of sixteen years.⁶¹ The Supreme Court said that is judicial fact-finding that increases the potential sentence and is impermissible.⁶²

50. *Id.* at 2674-75.

51. *Id.* at 2676-77.

52. *Id.* at 2679-82.

53. *Moore v. Virginia*, 636 S.E.2d 395 (Va. 2006), *cert. granted*, 128 S. Ct. 28 (2007).

54. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

55. *Id.* at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

56. *Blakely v. Washington*, 542 U.S. 296 (2004).

57. *United States v. Booker*, 543 U.S. 220 (2005).

58. *Id.* at 235, 244, 258.

59. *Cunningham v. California*, 127 S. Ct. 856 (2007).

60. *Id.* at 870-71.

61. *Id.* at 860.

62. *Id.* at 871.

The thought I will leave you with is that Justice Alito wrote a very, very comprehensive dissent in *Cunningham*, in which he really challenged the majority to explain what its underlying theory in this line of cases is.⁶³ And I think it is fair to say even supporters of the *Apprendi* doctrine do not really have a completely clear sense of what we are trying to accomplish. It is a bit ironic. The doctrine is actually pretty clear. The test is straightforward and predictable, but it is doctrine without a firmly-laid analytic foundation. It is doctrine without a link to any fully articulated underlying values. And Alito's dissent points that out.⁶⁴ So in the next year or two, I think you will see a lot more discussion of what the *Apprendi* line is really trying to do.

63. *Cunningham*, 127 S. Ct. at 873-81 (Alito, J., dissenting).

64. *See id.* at 879-81.
