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Supreme Court Decisions: The Press v. The Prosecution

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small to satisfy the sixth and fourteenth amendments' guarantee of a right to trial by jury, the remaining seven justices declined to base their decisions on incipient social science data. Mr. Justice White concurred in the judgment because he agreed that a jury of less than six persons would fail to represent the sense of the community and thus fail to achieve a fair cross-section of the community. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment but noted that Justice Blackmun's heavy reliance on numerology was unwarranted. Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, argued that while the sixth and fourteenth amendments mandate juries in criminal cases with more than five members, Ballew should not be subjected to a new trial since the Georgia law was "overbroad and therefore facially unconstitutional." *Id.*, at 246.

In conclusion, the Court felt that juries with six or more members represent a fair cross-section of the community, promote unbiased decision-making, and thus safeguard the constitutional guarantees of the sixth and fourteenth amendments.

In passing it should be mentioned that in Maryland, the Maryland Declaration of Rights[3] grants to the accused the right to juror unanimity in criminal trials. However, the defendant, with the court's consent and the prosecutor's consent, may waive unanimity.[4] Concomitantly, Maryland Rule 751 states that in criminal trials the parties may stipulate to a jury of less than twelve members. Although the Supreme Court has sanctioned less than unanimous verdicts with twelve member juries, the Court will eventually have to address the issue of unanimity for juries with less than twelve members.

—J. Michael Dougherty, Jr.

Photo by J.J.R.

[3]MD. DEC. OF RIGHTS art. 21.

[4]State v. McKay, 280 Md. 558, 375 A. 2d 228 (1977). *See*, 7 U. BALT. L. REV. 130 (1977).

The Press v. The Prosecution

Constitutional struggle between the government and the press is not a novel phenomenon. The interests of the two often conflict and as a result of a recent Supreme Court decision, the friction seems likely to continue. In *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978), the Justices were confronted with the question of whether the government, pursuant to a search warrant, may constitutionally seize evidence from a newspaper when the paper is not suspected of criminal activity.

The Supreme Court decided that a newspaper unsuspected of involvement in a crime cannot automatically and absolutely claim immunity from a search warrant for evidence related to that same crime. By a vote of 5-3, Justice Brennan not participating, the Court held that when a place to be searched is occupied by a person not then a suspect, a warrant to search for evidence reasonably believed to be present can be issued despite the absence of unusual circumstances. The essential element is the reasonable cause to believe that the objects to be sought are indeed present on the premises into which entry is made.

This decision affirmed *Stanford Daily v. Zurcher*, 550 F2d. 464 (9th Cir. 1977), which required the existence of probable cause to believe that the owner of the property to be searched would have disregarded the court order not to remove or destroy evidence as a basis for issuance of the search warrant. Both the Court of Appeals and the District Court, 353 F.Supp. 124 (N.D. Cal. 1972) emphasized the absence of suspected criminal involvement on the part of the newspaper reporter. In such a case, probable cause to think that evidence of a crime is located on the property is not alone sufficient to justify the issuance of a warrant; a threat concerning the removal or destruction of evidence must be clearly shown.

On Friday, April 9, 1971, a student demonstration was held at the Stanford University Hospital and culminated in the demonstrators' forcible occupation of the administrative offices. The police departments of the City of Palo Alto and Santa Clara County were called to remove the students. After several attempts were made to persuade the demonstrators to leave peacefully, the police broke through one of the barricades that had been erected by the protestors at both the east and west ends of the corridor adjacent to the administrative offices. As the police moved through the west end, the protestors emerged from the east end with sticks and attacked the police stationed there. All nine of the policemen were injured.

A photographer for the *Stanford Daily News* was also located at the east end of the corridor. On April 11, the *Stanford Daily* carried a story about the demonstration, complete with pictures and a byline of a *Daily* staff member. On April 12, the District Attorney for Santa Clara County secured a warrant for the immediate search of the *Daily* offices for negatives, film and pictures of the April 9th event. The District Attorney claimed that he had justifiable, reasonable and probable cause to believe that he could locate evidence relevant to the identity of the individuals who attacked the Hospital's administrative offices. The search included the photo lab, filing cabinets, desks and waste paper baskets but excluded locked drawers and rooms. Notes were read and photos were found but nothing was removed.

The *Stanford Daily News* argued that the actions nevertheless threatened its ability to gather, analyze, and disseminate news. Specifically, the *Daily* alleged that the search

would now impede publication, deplete confidential sources, discourage reporters from preserving written recollections, chill news dissemination and result in press self-censorship. If records could easily be seized, fewer people would cooperate with the press, less information would be sought and therefore, less would be printed.

Essentually, the *Daily* contended that the warrant stifled its freedom of expression and the stringent standards of the fourteenth amendment should be applied with scrupulous exactitude when materials protected by the first amendment are involved. The *Daily* sought declaratory and injunctive relief under Title 42 U.S.C. §1983. The *Daily* successfully contended at the District Court level that the police conducting the search, the Police Chief, the District Attorney, his Deputy and the judge issuing the warrant violated the *Daily's* constitutional rights under the first, fourth and fourteenth amendments.

The fourth amendment applied to the states through the fourteenth amendment, provides that "[T]he 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." In order to insure the reasonableness of the search and seizure and the validity of the warrant, the standard of probable cause is a reasonable belief that a) a crime has been committed and b) that relevant evidence connected with the crime may be found on the premises into which entry is sought. This "relevant evidence" includes the fruits or instrumentalities of crime or property constituting evidence of the crime itself. However, the fourth amendment does not expressly state anything about the exclusion of warrants to search the premises of third parties nor does it require the existence of probable cause to believe that a third party be implicated in the crime.

In *Zurcher,* the Supreme court chose not to read these requirements into the fourth amendment and decided that the law protects against general intrusions and requires that the search be reasonable, specific in purpose, based upon probable cause and approved by a neutral magistrate. Such a neutral magistrate can protect against searches unreasonable in scope.

The Supreme Court felt that no justification existed for further encroachment upon the prosecutorial process. The Justices reached this conclusion after balancing the interest in protecting first amendment freedoms against the interest of ensuring the successful prosecution of the guilty defendants. This balancing process exemplifies a struggle that initially started between the Crown and the press and which constituted the impetus for the eventual enactment of the fourth amendment. In the instant case, the Court supported the government's interest in enforcing the criminal laws and recovering evidence.

The *Daily* argued that this interest is offset in certain circumstances. Most importantly, the *Daily* contended that in a situation where the basic probable cause is not met, additional requirements such as the initial use of a subpoena should be imposed.

The Court, however, answered this contention by emphasizing that a delay in responding to a subpoena *duces tecum* could result in the disappearance of evidence. During the investigatory stage and prior to an indictment, the prosecution cannot be sure that a third party is innocent or is not aligned with the defendant. Only a warrant can expedite the successful prosecution of a guilty party by providing access to evidence instrumental to a conviction. At the same time, only the higher stringent standard for evaluating the validity of a warrant was viewed by the Court as a better protection against an unjustifiable invasion of privacy. The *Daily* believed that the better protection is afforded by requiring a subpoena proceeding involving notice and a hearing.

In his concurring opinion, Judge Powell joined with the court in denying any relief to the *Daily* and condemned Justice Stewart's view that in the case of a newspaper, the search without a warrant is unreasonable if a subpoena may be obtained as a substitute procedure. Justice Powell felt that if the framers of the fourth amendment had intended to create a special exception for the press, they would have done so.

Justices Stewart and Marshall, dissenting, felt that the search conducted in the case definitely infringed upon the *Daily's* first amendment right. Although they agreed with the majority that the validity of the search had nothing to do with the subject of the search as a suspect, they nevertheless argued that such a search significantly disrupted the newspaper's operation.

Stewart and Marshall state that a subpoena would give a newspaper time to locate the requested material. Assuming the newspaper is not implicated in the crime and there are no exigent circumstances, the Justices argued that the newspaper should be given the opportunity to respond before a search warrant is issued. Once a search has been conducted, the invasion of constitutional liberties has occured and it is too late to challenge the basis for issuance of the warrant.

In addition, Stewart and Marshall recognized the dangers in compelling disclosure of confidential news sources. Informants have been essential to the gathering of information and ultimate dissemination of news of public interest. Warrants could force reporters to reveal the identity of these sources even though they may be unrelated to the evidence sought. Future sources of important—but secret information, fearful of having their identity revealed, may be reluctant to confide in the press.

In a separate dissenting opinion, Justice Stevens discussed another dimension of the case. He emphasized the private nature of the evidence sought and questioned the sufficiency of the reasonable belief standard when the police make an unannounced search of property belonging to a non-suspect. Since the warrant clause of the fourth amendment was not framed to protect private papers and at the same time does not define probable cause, Stevens stressed the need to distinguish between evidence of a personal nature and instruments of a crime. He recognized that there should be probable cause that the defendant committed a crime and that the defendant is likely to destroy any evidence related to it. If a lower probable cause standard is employed and personal matters are seized, reputations could be injured and privacy invaded. Only the subpoena process affords a *prior* opportunity to challenge the search and therefore, to prevent access to private materials.

However, the majority did not agree that a subpoena procedure should be required where an unannounced search is conducted on the property of a newspaper not suspected of committing a crime. A warrant is not barred in such a case and a special exemption from searches and seizures for the press was rejected.

—Charles Chester

A Suit of Armor

On March 28, 1978 the Supreme Court reinforced the common law principle of judicial immunity from civil suit. In a 5-3 decision the Court in *Stump v. Sparkman,* 98 S.Ct. 1099 (1978), concluded that an Indiana Circuit Court judge who authorized the sterilization of a fifteen year old girl in an *ex parte* proceeding, was immune from civil suit under 42 U.S.C.§1983.

The circumstances preceding the application of the doctrine are shocking. In 1975 Linda and Leo Sparkman sought medical advice as to why they could not conceive a child. At this point Linda Spitler Sparkman first learned that she had been sterilized at the age of fifteen. Her mother, Ora Spitler McFarlin, had petitioned the Circuit Court of DeKalb County, Indiana to order the sterilization of her daughter. Mrs. McFarlin had alleged that without her knowledge and consent, her daughter, Linda, dated and stayed overnight with various young men. Mrs. McFarlin directed her attorney, Warren G. Sunday, to prepare an affidavit which stated that "Linda was 'somewhat retarded' although she attended public schools and had been passed along with other children in her age level." *Sparkman v. McFarlin* 552 F.2d 172, 173 (7th Cir. 1977). The petition and affidavit were presented to Judge Stump of the Circuit Court who issued the requested order without appointing a guardian *ad litem* to represent Linda's interests, without holding an evidentiary hearing, without providing Linda with notice of the petition, and without even filing the order in the DeKalb County Circuit Court. The only "notice" Linda received during this period of time was that she was to enter the hospital for an appendectomy.

Linda and Leo Sparkman brought an action seeking damages pursuant to 42 U.S.C. §§1983, 1985 (3) contending that the actions of the defendants, Ora E. McFarlin, Warren G. Sunday, Esq., Dr. John Hines, and Judge Harold Stump, violated her constitutional rights by sterilizing her or causing her to be sterilized. Pendent state claims were attached for assault and battery and medical malpractice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood. The District Court, in granting the defendants' motions to dismiss, held that no federal action would lie against any of the defendants because Judge Stump, the only state agent, was absolutely immune from suit pursuant to the doctrine of judicial immunity. *Sparkman v. McFarlin,* Civil No. F 75-129 (N.D. Ind. May 13, 1976). "Whether or not Judge Stump's approval of the petition may in retrospect appear to have been premised on an erroneous view of the law, Judge Stump surely had jurisdiction to consider the petition and act thereon." 98 S.Ct. at 1104.

On appeal, the Seventh Circuit Court of Appeals reversed the judgment of the Circuit Court and held that Judge Stump failed to act within his jurisdiction when he approved the petition to have Linda Spitler sterilized. The Court reasoned that although IND. CODE 33-4-4-3 confers original jurisdiction in all cases of law and equity, it does not cloak a Circuit Court judge with blanket immunity. The Court found that there was no statutory basis for Judge Stump's approval of the petition. In addition, Judge Stump was acting unlawfully even if he was creating an innovative legal remedy to meet changing social conditions, an argument made in support of the broad discretion exerciseable by a judge. A judge may not use his judicial power "to order extreme irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate." 552 F.2d at 176.

Of significance is the fact that the Court of Appeals found the actions taken to be an illegitimate exercise of judicial common law power due to failure to comply with elementary principles of procedural due process. 552 F.2d at 176.

The Supreme Court reversed the decision of the Court of Appeals and found that Judge Stump was immune from liability for damages even if his approval of the petition for sterilization was in error. The concepts of jurisdiction and the judicial act requirements were found to be determinative of the extent of the doctrine of judicial immunity. The Court noted that the Seventh Circuit Court of Appeals misconstrued the doctrine. Because Judge Stump had performed a judicial act that was not in clear absence of all jurisdiction, he was thus entitled to judicial immunity. 98 S.Ct.at 1106.

The Supreme court examined the statutory authority vested in an Indiana Circuit Court Judge pursuant to IND. CODE 33-4-4-3 (1976), which states:

> Said Court shall have exclusive jurisdiction in all cases at law and in equity whatsoever and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon other justices of the peace. . .

Formerly, Indiana Circuit Court judges had the authority to authorize sterilization but only upon institutionalized persons. Ch. 227, §1, 1951 Indiana Act 649; Chap. 244, §§1-3, 1937 Indiana Acts 1164; Chap. 312, §§2-6, 1931 Indiana Acts 116; Chap. 241, §§1-6, 1927 Indiana Acts 713 (repealed 1974). The Supreme Court did not consider it significant that the authority to sterilize had been repealed. What was significant, however,