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# United States Supreme Court: 1999 Term

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## UNITED STATES SUPREME COURT: 1999 TERM

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This article summarizes many of the criminal law decisions decided by the United States Supreme Court during the last term.

### SEARCH & SEIZURE

#### Search Incident to Traffic Citation

In Knowles v. Iowa, 119 S.Ct. 484 (1998), a policeman stopped Knowles for speeding and issued a citation rather than arresting him. The officer then conducted a full search of the car without either Knowles' consent or probable cause, finding marijuana and a "pot pipe." Because he had not been arrested, Knowles argued that the search could not be sustained under the "search incident to arrest" exception. The issue was whether a full search of an automobile pursuant to issuance of a citation for speeding, as authorized by an Iowa statute, violated the Fourth Amendment. The Supreme Court reversed, holding that the search was unconstitutional. In the Court's view, there are "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. ... But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case." The Court remarked that the "threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest," which involves extended exposure in taking a suspect into custody and transporting him to the police station. In contrast, a routine traffic stop is a relatively brief encounter and is more analogous to a *Terry* stop than to a formal arrest. The second justification — the need to discover and preserve evidence — also did not apply. Once Knowles was issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

The Court also stressed that the officer is not without means to protect his or her safety:

> [O]fficers have other, independent bases to search for weapons and protect themselves from danger. For example, they may order out of a vehicle both the driver, and any passengers; perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous; conduct a "*Terry* patdown" of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon; and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest (citations omitted).

#### Automobile Exception

In Maryland v. Dyson, 19 S.Ct. 2013 (1999), the defendant was convicted of conspiracy to possess cocaine with intent to distribute. A deputy received a tip from a reliable source that the defendant had bought drugs and would be returning to Maryland in a red Toyota, license number DDY. When the police spotted the car with the defendant, a known drug dealer, they stopped him and searched the car. They did not have a warrant. Twenty-three grams of cocaine were found.

On review, the Supreme Court was asked to determine whether the Fourth Amendment's "automobile exception" has a separate exigency requirement in cases in which there is sufficient time to acquire a search warrant. In a per curiam opinion, the Court answered in the negative:

> The Fourth Amendment generally requires police to secure a warrant before conducting a search. As we recognized nearly 75 years ago in *Carroll v. United States*, ... there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in *United States v. Ross*, ... when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that

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would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added.) In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania v. Labron*, ... (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more" (citations omitted).

**Automobile Exception: Search of Purse**

In Wyoming v. Houghton, 119 S.Ct. 1297 (1999), a Highway Patrol officer stopped a vehicle for a routine traffic stop, at which point the officer noticed a hypodermic syringe in the driver's shirt pocket. When the officer asked the driver why he had the syringe, the driver replied ("with refreshing candor") that he used it for drugs. The officer then searched the car and its contents, including a passenger's purse. When the officer found drugs and drug paraphernalia, he arrested the passenger, Houghton.

The Supreme Court upheld the search, ruling that a police officer with probable cause may search the inside of the car and any containers in the car that are capable of concealing the object of the search. Furthermore, "a package may be searched, whether or not its owner is present as a passenger or otherwise." The Court set forth a two step process to determine if there is a Fourth Amendment violation. The first step is determining "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." If that inquiry provides no answer, the Court must "evaluate the search or seizure under traditional standards of reasonableness." Historically, the permissible scope of a warrantless car search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." The Court concluded:

> In sum, neither *Ross* [456 U.S. 798 (1982)] itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers — like customs officials in the Founding era — to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband in the car.

Moreover, drivers may secret drugs in a passenger's purse or other container to avoid detection.

Justice Breyer, concurring, agreed that an officer with probable cause may search a car and its contents, but not the people in the car A purse that is attached to a person may possibly be protected. In this case, the purse was separated from the owner; therefore, he agreed with the majority that it may be searched. Justice Stevens, with whom Justice Souter and Justice Ginsburg joined, dissented: The search of a person's purse or briefcase is a serious intrusion on privacy and should require specific, individual probable cause.

**Warrantless Seizure of Forfeitable Property**

In Florida v. White, 119 S.Ct. 1555 (1999), police officers on three occasions observed White using his car as a means to transport cocaine. Months later the police arrested him on unrelated charges. The arresting officers, without a warrant, seized his automobile in accordance with the provisions of the Florida Contraband Forfeiture Act. Cocaine was found in the car, and White was charged with possession of a controlled substance.

White raised the following issue: Whether the Fourth Amendment requires the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband? The Court said, "No." With probable cause, the police do not need a warrant to seize a car on public property. "Recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*. . . . This need is equally weighty when the automobile, as opposed to its contents, is the contraband that the police seek to secure." The Court went on to note: "Here, because the police seized respondent's vehicle from a public area — respondent's employer's parking lot — the warrantless seizure also did not involve any invasion of respondent's privacy. Based on the relevant history and our prior precedent, we therefore conclude that the Fourth Amendment did not require a warrant to seize respondent's automobile in these circumstances."

The dissent argued that since there is nothing illegal about owning a car, a warrant should be needed to search the car. A warrantless search may intrude on the rights of innocent people, and there is no safety risk or fear of loss evidence if the police wait to obtain a properly issued warrant in this context..

**Standing**

In Minnesota v. Carter, 119 S.Ct. 469 (1998), a police officer looked in an apartment window through a gap in a closed blind and observed Carter and Johns bagging cocaine. The defendants were not overnight guest; they were there only for their illegal business activity. The issue before the Court was whether they had an expectation of privacy protected by the Fourth Amendment. Without such an expectation, they did not have standing to challenge the constitutionality of the search. The Court found that the "defendants, who were in another person's apartment for a short time... [not overnight guests]... had no legitimate expectations of privacy in the apartment, and, thus, any search which may have occurred did not violate their Fourth Amendment rights."

The Court had previously held in Minnesota v. Olson, 495 U.S. 91 (1990), that an overnight guest in a house had standing. Citing *Olson* and other cases, the Court concluded: "Thus an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." The Court cited a number of factors as supporting its conclusions: (1) the purely commercial nature of the transaction engaged in, (2) the relatively short period of time on the premises, and (3) the lack of any previous connection between the defendants and the householder.

The Court declined to address another issue, leaving it for another day: "Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a 'search.'"

Justice Scalia, with whom Justice Thomas joined, concurred: "Respondents here were not searched in "their . . .

house" under any interpretation of the phrase that bears the remotest relationship to the well understood meaning of the Fourth Amendment." Therefore, they are not protected by the Fourth Amendment.

Justice Ginsberg, with whom Justice Stevens and Justice Souter joined, dissented: Whether or not a guest is staying the night is irrelevant to expectations of privacy. Nor does "the fact that they were partners in crime ... alter the analysis." A private residence is a place where one should be able to reasonably expect "privacy free of governmental intrusion."

**Media Presence at Search**

In Wilson v. Layne, 119 S.Ct. 1692 (1999), law enforcement officers entered petitioners' home at around 6:45 a.m. in an attempt to execute a warrant to arrest their son. Although the warrant did not mention a media ride-along, the officers invited a reporter and a photographer to enter the home. The media members were not helping the officers execute the arrest. The suspect was not home, and the search was never reported by the media. Petitioners subsequently brought a civil rights action.

The issue raised was whether the officers' actions in bringing members of the media to observe and record the execution of the arrest warrant violated petitioners' Fourth Amendment rights. The Court ruled that a media ride-along violates the Fourth Amendment. However, since the state of the law was not clearly established at the time of this search, the officers were entitled to the defense of qualified immunity.

In the Court's view, "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." The Court elaborated:

> Here, of course, the officers had such a warrant, and they were undoubtedly entitled to enter the Wilson home in order to execute the arrest warrant for Dominic Wilson. But it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them. In *Horton v. California*, [496 U.S. 128, 140 (1990)], we held "if the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." While this does not mean that every police action while inside a home must be explicitly authorized by the text of the warrant, see *Michigan v. Summers*, [452 U.S. 692, 705 (1981)] (Fourth Amendment allows temporary detainer of homeowner while police search the home pursuant to warrant), the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion, see *Arizona v. Hicks*, [480 U.S. 321, 325 (1987)]. See also *Maryland v. Garrison*, [480 U.S. 79, 87 (1987)] ("The purposes justifying a police search strictly limit the permissible extent of the search"). Certainly the presence of reporters inside the home was not related to the objectives of the authorized intrusion. Respondents concede that the reporters did not engage in the execution of the warrant, and did not assist the police in their task. The reporters therefore were not present for any reason related to the justification for police entry into the home — the apprehension of Dominic Wilson.

Similarly, in Hanlon v. Berger, 119 S.Ct. 1706 (1999), in executing a search warrant on petitioners ranch, the police brought along a media crew from CNN. Again, the Court found a violation of the Fourth Amendment.

**Seizure of Property**

In City of West Covina v. Perkins, 119 S.Ct. 678 (1999), local police officers seized property in a home pursuant to a valid search warrant. The property belonged to Perkins, the home owner, and his family. However, the search warrant was issued because Marcus Marsh, a former boarder in the Perkins' home, was a suspect. The officers left a "Search Warrant: Notice of Service" and an itemized list of the property seized. When Perkins was unable to retrieve his belongings, he filed suit on due process grounds. The issue presented was whether the Constitution required a State or its local entities to give detailed and specific instructions to owners who seek return of property lawfully seized but no longer needed for a police investigation or criminal prosecution. The Court ruled in favor of the city: "When the police seize property for a criminal investigation, ... due process does not require them to provide the owner with notice of state law remedies." In the Court's view,

> [a] primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful. It follows that when law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return. Individualized notice that the officers have taken the property is necessary in a case such as the one before us because the property owner would have no other reasonable means of ascertaining who was responsible for his loss. No similar rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law. Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him.

The Court cited Federal Criminal Rule 41(d) as an example. All that is required is "a copy of the warrant and a receipt for the property taken. . . . The Rule makes no provision for notifying property owners of the procedures for seeking return of their property."

## FIFTH AMENDMENT

In Mitchell v. U.S., 119 S.Ct. 1307 (1999), the defendant pleaded guilty to conspiring to distribute cocaine and of distributing cocaine within 1,000 feet of a school or playground. At the sentencing hearing, Mitchell claimed her Fifth Amendment privilege against self-incrimination and therefore remained silent. The case raised two issues: (1) whether a guilty plea waives the privilege in the sentencing phase of the case, and (2) whether, in determining facts about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence.

The Supreme Court ruled for the defendant on both issues, holding that a guilty plea does not waive the privilege at sentencing, and a sentencing court may not draw an adverse inference from defendant's failure to testify. The Court first discussed the "waiver" rule as it applies at trial:

> It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and

then invoke the privilege against self-incrimination when questioned about the details. See *Rogers v. United States,* [340 U.S. 367, 373 (1951)]. The privilege is waived for the matters to which the witness testifies, and the scope of the "waiver is determined by the scope of relevant cross examination," *Brown v. United States,* [ 356 U.S. 148, 154-15 (1958)]. "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry," *id. at 155.* Nice questions will arise, of course, about the extent of the initial testimony and whether the ensuing questions are comprehended within its scope, but for now it suffices to note the general rule.

The justifications for the rule of waiver in the testimonial context are evident: A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry.

The Court then distinguished guilty pleas. "There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. Unlike the defendant taking the stand, who cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters he has himself put in dispute, . . . the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense. Rather, the defendant takes those matters out of dispute, often by making a joint statement with the prosecution or confirming the prosecution's version of the facts. Under these circumstances, there is little danger that the court will be misled by selective disclosure. In this respect a guilty plea is more like an offer to stipulate than a decision to take the stand." In a later passage, the Court noted: "A waiver of a right to trial with its attendant privileges is not a waiver of the privileges which exist beyond the confines of the trial."

Moreover, the Court observed that a guilty plea does not automatically extinguish any further risk of criminal prosecution. "Where a sentence has yet to be imposed, . . . however, this Court has already rejected the proposition that 'incrimination is complete once guilt has been adjudicated,' *Estelle v. Smith*, [451 U.S. 454, 462 (1981)], and we reject it again today." In addition, "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony."

The Court further remarked:

> [I]t appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important. Our rule is applicable whether or not the sentencing hearing is deemed a proceeding separate from the Rule 11 hearing, an issue we need not resolve.

Finally, the Court examined the "negative inference" rule. The normal rule is that no negative inference from the defendant's failure to testify is permitted. *Griffin v. California*, 380 U.S. 609, 614 (1965). The Court explained:

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it.

Justice Scalia, with whom the Chief Justice, Justice O'Connor, and Justice Thomas joined, dissented: A defendant can use her Fifth Amendment privilege to abstain from testifying; however, this does not mean that the defendant is protected from the sentencer drawing inferences from her silence. The prohibition on the use of defendant's silence as demeanor evidence is not found in the text or history of the Fifth Amendment. "Conduct which forms a basis for inference is evidence. Silence is often the evidence of the most persuasive character."

## RIGHT OF CONFRONTATION

In Lilly v. Virginia, 119 S.Ct. 1887 (1999), the defendant was convicted of capital murder and sentenced to death. Three men broke into a home and stole nine bottles of liquor, three loaded guns, and a safe. They also robbed a small country store, abducting and then killing DeFilippis. After robbing two more stores, they were found by the police and questioned. Lilly did not mention the murder to the police, but the other two men said that Lilly was the group leader and that he had killed DeFilippis. At trial, Lilly's brother, one of the accomplices, invoked his Fifth Amendment right, but a tape recording and written transcripts of his statements to the police were admitted into evidence.

On review, the Supreme Court was required to decide whether the accused's Sixth Amendment right of confrontation had been violated. The Court reversed. In addressing the issue, the Court adhered to the general framework summarized in Ohio v. Roberts, 448 U.S. 56 (1980): A hearsay statement is admissible only when (1) the statement falls within a "firmly rooted" hearsay exception or (2) it contains "particularized guarantees of trustworthiness."

The Court then observed: "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."

Moreover, there was no particularized guarantee of trustworthiness: "It is abundantly clear that neither the words that Mark spoke nor the setting in which he was questioned provides any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting. Mark was in custody for his involvement in, and knowledge of, serious crimes and made his statements under the supervision of governmental authorities. He was primarily re-

sponding to the officers' leading questions, which were asked without any contemporaneous cross-examination by adverse parties. Thus, Mark had a natural motive to attempt to exculpate himself as much as possible."

## VOID-FOR-VAGUENESS DOCTRINE

In Chicago v. Morales, 119 S.Ct. 1849 (1999), the defendants moved to dismiss charges based on the city's gang loitering ordinance, which prohibited "criminal street gang members" from "loitering" with one another or with other persons in any public place. During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. The Court found the ordinance unconstitutional.

In the Court's view, "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." See also Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966)("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ."); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). In the majority's view, the ordinance failed on both counts.

Justice Breyer, concurring, wrote that the ordinance had the potential of penalizing many innocent people. "To grant to a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a 'minor,' 'limitation upon the free state of nature."

The dissent noted that the ordinance did not outlaw loitering; it only authorized the police to order people to disperse. When this dispersal order was not obeyed, and only then was the conduct unlawful. Further, the majority was incorrect in their belief that the ordinance punished the mindless act of loitering. The ordinance actually only punished the willful act of ignoring a police order to disperse, as such there is a mens rea requirement. Because there is no constitutional right to stay in one place, "it is up to the citizens of Chicago — not us — to decide whether the trade-off," the possibility of some inconvenience for innocent people versus safer streets for all, was worthwhile. "So long as constitutionally guaranteed rights are not affected, and so long as the proscription has a rational basis, all sorts of perfectly harmless activity by millions of perfectly innocent people can be forbidden."

## GUILTY PLEAS

In Peguero v. United States, 119 S.Ct. 961 (1999), the defendant pleaded guilty and was sentenced to 274 months imprisonment for cocaine distribution. The trial court, however, failed to inform him of his right to appeal the sentence. Nevertheless, Peguero was in fact aware of this right. The issue was whether the trial court's failure to advise the defendant of the right to appeal his sentence entitled him to collateral relief. The Supreme Court ruled against the defendant: "[A] district court's failure to advise the defendant of his right to appeal does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission."

The Court began its analysis by underscoring the importance of advising the defendant of the right to appeal: "The requirement that the district court inform a defendant of his right to appeal serves important functions." First, as soon as sentence is imposed, the defendant will often be taken into custody and transported elsewhere, making it difficult for him to maintain contact with his attorney. The relationship between the defendant and the attorney may also be strained after sentencing, due to a defendant's disappointment over the outcome. Moreover, the attorney concentrating on other matters may fail to inform the defendant of the right to appeal. Second, if the defendant is advised of the right by the judge who imposes sentence, the defendant will realize that the appeal may be taken as of right and without affront to the trial judge, who may later rule upon a motion to modify or reduce the sentence. Third, advising the defendant of his right at sentencing also provides him with an opportunity to announce his intention to appeal and request the court clerk to file the notice of appeal, well before the 10-day filing period runs. See Fed. Crim. R.32(c)(5) ("If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant."); Fed. App. R. 4(b) (establishing 10-day period for filing appeal, which may be extended for 30 days by district court for "excusable neglect").

The Court concluded: "These considerations underscore the importance of the advice which comes from the court itself. Trial judges must be meticulous and precise in following each of the requirements of Rule 32 in every case. It is undisputed, then, that the court's failure to give the required advice was error." However, a violation of Rule 32(a)(2) is subject to harmless error review. The Court ruled that because the "petitioner was aware of his right to appeal, the purpose of the Rule had been served and petitioner was not entitled to relief."

## DUTY TO DISCLOSE EVIDENCE

In Strickler v. Greene, 119 S.Ct. 1936 (1999), the victim was abducted from a shopping center, robbed, and murdered. At trial an eyewitness, Stoltzfus, gave detailed testimony about the crimes and the defendant's role as one of the perpetrators. Information about the witness's earlier statements was not disclosed to the defense, thereby raising a *Brady* issue. The question before the Court was whether the defendant would have been convicted of capital murder and received the death sentence if Stoltzfus had not testified, or if Stoltzfus had been impeached. Court ruled against the accused.

The Court pointed out that there "are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." In this case, the Court found that the suppressed evidence was exculpatory. The materials consisted of notes taken by a detective during interviews with an eyewitness and letters written by the witness to the detective. "They cast serious doubt on [the witness's] confident assertion of her 'exceptionally good memory.'" The Court held, however, that the accused had not established prejudice.

The dissent viewed the facts differently: "The withheld documents would have shown, . . . that many of the details Stoltzfus confidently mentioned on the stand (such as Strickler's appearance, [the victim's] appearance, the hour

of the day when the episode occurred, and her daughter's alleged notation of the license plate number of [the victim's] car) had apparently escaped her memory in the initial interview with the police." Because confident eyewitness testimony is often a very significant factor in jurors' deliberations, "[o]ne cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility of that story."

Nevertheless, the majority did include a significant comment concerning the relationship between *Brady* and a prosecutor's "open file policy": "We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."

## JURY TRIALS

In Richardson v. United States, 119 S.Ct. 1707 (1999), the accused was charged with engaging in a "continuing criminal enterprise." A jury convicted him, under the statute, for leading a gang that distributed heroin, crack cocaine, and powder cocaine over a period of years stretching from 1984 to 1991. At trial, the judge "instructed the jurors that they must unanimously agree that the defendant committed at least three federal narcotics offenses, but did not have to agree as to the particular offenses."

The issue before the Court was whether the statute's phrase "series of violations" referred to one element, or whether those words created several elements. The issue was important because "[c]alling a particular kind of fact an 'element' carries certain legal consequences. . . . The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (Citing Johnson v. Louisiana, 406 U.S. 356, 369-371 (1972) (Powell, J., concurring); Andres v. United States, 333 U.S. 740, 748 (1948); Fed. Crim. R. 31).

The Court used the following example to illustrate the issue: "Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement — a disagreement about means — would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force." This case, however, was different because the Government's interpretation would impose "punishment on a defendant for the underlying crimes without any factfinder having found that the defendant committed those crimes. If there are federal statutes reflecting a different practice or tradition, the Government has not called them to our attention, which suggests that any such statute would represent a lesser known exception to ordinary practice." The Court ruled that the jury must unanimously agree not only that the defendant committed some "continuing series of violations" but also that he committed each of the individual "violations" necessary to make up that "continuing series."

The dissent argued that the majority's "unnecessary atomization of the continuing series element disrupts Congress' careful concentration on the ongoing enterprise and replaces it with a concentration on perhaps three violations picked out of the continuing series." The intent of the statute is specifically to punish drug kingpins, such as the defendant.

## FAILURE TO INSTRUCT: HARMLESS ERROR

In Neder v. United States, 119 S.Ct. 1827 (1999), the defendant was convicted of various false statements, fraud, conspiracy, and racketeering offenses. The Supreme Court affirmed in part, reversed in part, and remanded. The contested issue was whether the trial judge's omission of an element of the charge in the jury instructions can be harmless error. The Court ruled in the affirmative.

In prior cases, the Court had held that most constitutional errors can be harmless: "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 579 (1986). The Court, however, has found that some errors are "structural" and thus subject to automatic reversal. This limited category includes the following errors: (1) Johnson v. United States, 520 U.S. 461, 468 (1997) (complete denial of counsel); (2) Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); (3) Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); (4) McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); (5) Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); (6) Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction)).

The error in *Neder* — a jury instruction that omits an element of the offense — differed from these constitutional violations. Those cases involve errors that "infect the entire trial process." Brecht v. Abrahamson, 507 U.S. 619, 630 (1993). They "necessarily render a trial fundamentally unfair." *Rose*, 478 U.S. at 577. In other words, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." Id. at 577-78.

In contrast, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. "[T]he omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."

The dissent wrote: "[D]epriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of every element of the crime charged—can never be harmless." The question that the majority's opinion raises is "why, if denying the right to conviction by jury is structural error, taking one of the elements of the crime away from the jury should be treated differently from taking all of them away—since failure to prove one, no less than failure to prove all, utterly prevents conviction." According to the dissent, "The right to render the verdict in criminal prosecutions belongs exclusively to the jury; reviewing it belongs to the appellate court."

## DEATH PENALTY

In Jones v. United States, 119 S.Ct. 2090 (1999), the defendant was convicted of kidnapping with death resulting and was sentenced to death. The defendant kidnaped Private McBride at gunpoint and sexually assaulted her. He beat her with a tire iron in the head. When her body was later found, "the medical examiners observed that large pieces of her skull had been driven into her cranial cavity or were missing." At the sentencing hearing the jury recommended unanimously that the defendant be sentenced to death. The district court agreed and sentenced him to death.

The case raised the issue of whether the defendant was entitled to an instruction as to the consequences of jury deadlock. The Court ruled that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." Previously, the Court had ruled that a jury cannot be "affirmatively misled regarding its role in the sentencing process." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). However, the jury in this case had not been affirmatively misled by the trial court's refusal to give the accused's proposed instruction. The proposed instruction had no bearing on the jury's role in the sentencing process; it focused on what happens in the event that the jury is unable to fulfill its role — when deliberations break down and the jury is unable to produce a unanimous sentence recommendation.

The district court never told the jury that it would give the defendant a lighter sentence in the event that the jury could not agree. In fact, the court said that it would impose a sentence "authorized by the law," which meant life without leave or death. Further, even though the verdict forms may have been confusing when looked at independently, in light of the entire jury instruction, there should not have been any confusion. "Moreover, even assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. . . . Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights."

The Court also addressed a void-for-vagueness argument. "Ensuring that a sentence of death is not so infected with bias or caprice is our 'controlling objective when we examine eligibility and selection factors for vagueness.'" Tuilaepa v. California, 512 U.S. 967, 973 (1994). This review, however, is "quite deferential." As long as an aggravating factor has a core meaning that criminal juries should be able to understand, it passes constitutional muster. "Assessed under this deferential standard, the factors challenged here surely are not vague."

In the dissent's view, "accurate sentencing information is an indispensable prerequisite to a [jury's] determination of whether a defendant shall live or die." The sentencing information in this case seemed to include a nonexistent option, namely, that the trial court could impose some type of lesser sentence. Therefore, the case should be remanded for a new sentencing hearing.

## VENUE

In United States v. Rodriguez-Moreno, 119 S.Ct. 1239 (1999), a drug distributor hired a small group including the defendant to find a specific drug dealer and to hold the middleman captive. The group kidnaped the middleman and forced him to travel with them from Texas to New Jersey to New York to Maryland. While in Maryland, the defendant came into possession of a gun and held it to the kidnaped victim's head. He did not shoot, and the victim later escaped. The Court granted certiorari to determine whether venue in a prosecution for using or carrying a firearm during and in relation to any crime of violence, 18 U.S.C. § 924(c)(1), is proper in any district where the crime of violence was committed, even if the firearm was used or carried only in a single district.

Article III of the Constitution requires that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. In addition, the Sixth Amendment requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Finally, Federal Criminal Rule 18 provides that "prosecution shall be had in a district in which the offense was committed."

The Supreme Court had previously ruled that the "*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Cabrales, 524 U.S. 1, 6-7 (1998) (quoting United States v. Anderson, 328 U.S. 699, 703 (1946)). In applying this test, a court must identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts. See *Cabrales*, 524 U.S. at 6-7; Travis v. United States, 364 U.S. 631, 635-637 (1961); United States v. Cores, 356 U.S. 405, 408-409 (1958).

The Court rejected the argument that the crime was a "point-in-time" offense that is committed only in the place where the kidnaping and the use of a gun coincide. Rejecting this view, several circuits had determined that kidnaping is a "unitary" crime. The Supreme Court agreed: "A kidnaping, once begun, does not end until the victim is free. It does not make sense, then, to speak of it in discrete geographic fragments." See also United States v. Lombardo, 241 U.S. 73 (1916) ("where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done."); Hyde v. United States, 225 U.S. 347, 356-367 (1912) (venue proper against defendant in district where co-conspirator carried out overt acts even though there was no evidence that the defendant had ever entered that district or that the conspiracy was formed there).

The Court held that Congress had provided that continuing offenses can be tried "in any district on which such offense was begun, continued, or completed," 18 U.S.C. § 3237(a). Even though respondent only used the gun in Maryland, he did it "during and in relation to" the continuous crime of kidnaping, which occurred in Texas, New York, New Jersey, and Maryland.

## CARJACKING

In Holloway v. United States, 119 S.Ct. 966 (1999), the petitioner was found guilty on three counts of carjacking, and several related offenses. In each of the carjacking incidents, petitioner's accomplice approached the driver with a gun. The accomplice would threaten the driver that he would shoot if the keys were not handed over. The accomplice testified that he hoped to never use the gun, but would if he had to. The only actual violence was one punch, caused by a victim's hesitation in giving-up his car. The issue was whether the phrase "with the intent to cause

death or serious bodily harm" required the prosecution to prove that the defendant had an unconditional intent to kill or harm in all events, or whether it merely required proof of an intent to kill or harm, if necessary, to effect a carjacking.

When the actual text does not specify, the meaning of a statute depends on the context. The intent may be "conditional" or "unconditional." The purpose of the statute was to penalize those who steal cars. It did not seem reasonable to think Congress amended the statute so that it "would no longer prohibit the very crime it was enacted to address except in those unusual circumstances when carjackers also intended to commit another crime — murder or a serious assault."

Justice Scalia dissented. According to traditional English, "intent" usually meant something one wants and expects to happen; not something one does not want or expect to happen. Further, there is no basis for finding that there is a different meaning of "intent" in criminal law. "Conditional intent is no more embraced by the unmodified word 'intent' than a sea lion is embraced by the unmodified word 'lion.'" Justice Thomas also dissented: Without a stronger precedent for criminal statutes including "conditional intent" as a recognized part of the unmodified term "intent," it should not be presumed that Congress meant to include both "conditional and unconditional intent" in the statute's meaning of intent.

In Jones v. United States, 119 S.Ct. 1215 (1999), Jones and two other men robbed two victims. One of Jones's accomplices struck one victim on the head and in his ear, causing serious bodily damage. Jones forced the other victim out the victim's car and drove away in the stolen vehicle. The police followed and the chase ended when Jones crashed. Jones was told that he faced a maximum of 15-years, defined by the carjacking statute. However, after being found guilty by the jury, the court imposed a 25-year sentence on the carjacking charge because one victim suffered serious bodily injury. Jones argued that the 25-year sentence for serious bodily injury was invalid because serious bodily injury is a separate element, "which had been neither pleaded in the indictment nor proven before the jury."

The issue on appeal was whether the federal carjacking statute, defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict. The Supreme Court held that the provision that established higher penalties for serious bodily injury or death set forth additional elements of the offense, not mere sentencing considerations. The Court reasoned: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court will choose to avoid the constitutional questions. The Court looked to the textual structure of the statute and other similar statutes, "on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." From this the majority concluded that § 2911(2) and § 2911(3) were distinct offenses. Further, the Court should not diminish "the jury's significance by removing control over" factual determinations.